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[*continued on next page*]

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- The official judgment number is inserted immediately beneath the case name;
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For the avoidance of doubt, these changes do not apply to reports of judgments delivered before 11 January 2001 or to the citation of such cases in other reports.

CITATION

These reports are cited thus:

[2005] 3 All ER

REFERENCES

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The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (2004 reissue) para 9 refers to paragraph 9 on page 11 of the 2004 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 14 *Halsbury's Statutes* (4th edn) (2003 reissue) 734 refers to page 734 of volume 14 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 269 refers to page 269 of the 2001 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

Halsbury's Statutory Instruments

The reference 14 *Halsbury's Statutory Instruments* (2004 issue) 201 refers to page 201 of the 2004 issue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

Cases reported in volume 3

	Page
A v Secretary of State for the Home Dept [HL]	169
Adam (on the application of), R v Secretary of State for the Home Dept [CA]	29
Administrators of Balasubramanium's Estate, Hertsmere Primary Care Trust v [Ch D]	274
Albania (Government of the Republic of) v Bleta [QBD]	351
Alstom Combined Cycles Ltd, Henry Boot Construction Ltd v [CA]	932
Amendment to the Consolidated Criminal Practice Direction (Case management) [CA]	91
Amendment to the Consolidated Criminal Practice Direction (Jury service) [CA]	89
Aon Trust Corp Ltd v KPMG (a firm) [Ch D]	587
Arkin v Borchard Lines Ltd [CA]	613
A-G v Scotcher [HL]	1
A-G for Jersey v Holley [PC]	371
A-G's Ref (No 2 of 2003) [CA]	149
Ayliffe v DPP [DC]	330
Baker & Davies plc v Leslie Wilks Associates (a firm) [QBD]	603
Baldock v Webster [CA]	655
Barclays Bank plc, Customs and Excise Comrs v [CA]	852
Barker v Saint-Gobain Pipelines plc [CA]	661
Barking and Dagenham London BC, University of East London Higher Education Corp v [Ch D]	398
Barking and Dagenham London BC (No 2), University of East London Higher Education Corp v [Ch D]	416
Bleta, Government of the Republic of Albania v [QBD]	351
BMB Builders Merchants Ltd, HSS Hire Services Group plc v [CA]	486
Bobezes, Secretary of State for Work and Pensions v [CA]	497
Borchard Lines Ltd, Arkin v [CA]	613
BRB (Residuary) Ltd, Uphill v [CA]	264
Brunel University, Webster v [CA]	812
Campbell v Hamlet [PC]	1116
Cardiff Local Health Board, R (on the application of Keating) v [CA]	1000
Care Standards Tribunal, R (on the application of Moore) v [CA]	428
Chamberlin Solicitors, Emokpae v [CA]	812
Cohen, Unidare plc v [Ch D]	730
Collins, DPP v [QBD]	326
Customs and Excise Comrs v Barclays Bank plc [CA]	852
Deutsche Morgan Grenfell Group plc v IRC and the A-G [CA]	1025
Dicker, Scammell v [CA]	838
DPP, Ayliffe v [DC]	330
DPP v Collins [QBD]	326
DPP, Percy v [DC]	330
DPP, Swain v [DC]	330
Emokpae v Chamberlin Solicitors [CA]	812
Englewood Properties Ltd v Patel [Ch D]	307
Fox, Sieff v [Ch D]	693
Germany (Government of) v Kleinschmidt [DC]	759
Goodyear, R v [CA]	117
Guardian Newspapers Ltd, Re [Ch D]	155
H (on the application of), R v Secretary of State for Health [CA]	468
Hajigeorgiou, Vasiliou v [CA]	17
Hamlet, Campbell v [PC]	1116
Hanson Concrete Products Ltd, Morgan Est (Scotland) Ltd v [CA]	135
Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [CA]	932
Hertsmere Primary Care Trust v Administrators of Balasubramanium's Estate [Ch D]	274
Hill v Transport for London [Ch D]	677
Holley, A-G for Jersey v [PC]	371
HSS Hire Services Group plc v BMB Builders Merchants Ltd [CA]	486
Huang v Secretary of State for the Home Dept [CA]	435
Hyperion Records Ltd, Sawkins v [CA]	636
Igen Ltd, Wong v [CA]	812
Impregilo SpA, Lesotho Highlands Development Authority v [HL]	789
IRC and the A-G, Deutsche Morgan Grenfell Group plc v [CA]	1025
J (a child) (return to foreign jurisdiction: convention rights), Re [HL]	291
Keating (on the application of), R v Cardiff Local Health Board [CA]	1000
Kilnoore Ltd (in liq), Re [Ch D]	730
Kleinschmidt, Government of Germany v [DC]	759
KPMG (a firm), Aon Trust Corp Ltd v [Ch D]	587
Leeds City Council v Price [CA]	573
Leslie Wilks Associates (a firm), Baker & Davies plc v [QBD]	603
Lesotho Highlands Development Authority v Impregilo SpA [HL]	789
Limbuela (on the application of), R v Secretary of State for the Home Dept [CA]	29
Mark v Mark [HL]	912
May, R v [CA]	523
McGlinn v Waltham Contractors Ltd [QBD]	1126

Page

Metropolitan Police Comr, R (on the application of W) v [DC] .. 749
Metropolitan Police Comr, Ward v [HL] . .1013
Mitsui & Co Ltd v Nexen Petroleum UK Ltd [Ch D] 511
Moore (on the application of), R v Care Standards Tribunal [CA] 428
Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd [CA] 135
Mushtaq, R v [HL] 885
Napier (on the application of), R v Secretary of State for the Home Dept [QBD] 76
Nexen Petroleum UK Ltd, Mitsui & Co Ltd v [Ch D] 511
Oxford City Council, Oxfordshire CC v [CA] 961
Oxfordshire CC v Oxford City Council [CA] .. 961
Patel, Englewood Properties Ltd v [Ch D] .. 307
Percy v DPP [DC] 330
Price, Leeds City Council v [CA] 573
R v Goodyear [CA] 117
R v May [CA] 523
R v Mushtaq [HL] 885
R v Z [HL] 95
R (on the application of Adam) v Secretary of State for the Home Dept [CA] 29
R (on the application of H) v Secretary of State for Health [CA] .. 468
R (on the application of Keating) v Cardiff Local Health Board [CA] 1000
R (on the application of Limbuela) v Secretary of State for the Home Dept [CA] 29
R (on the application of Moore) v Care Standards Tribunal [CA] 428
R (on the application of Napier) v Secretary of State for the Home Dept [QBD] 76
R (on the application of Tesema) v Secretary of State for the Home Dept [CA] 29
R (on the application of W) v Metropolitan Police Commissioner [DC] 749
Robertsons (London) Ltd, Wilson v [Ch D] .. 873
Saint-Gobain Pipelines plc, Barker v [CA] .. 661
Sawkins v Hyperion Records Ltd [CA] .. 636
Scammell v Dicker [CA] 838
Scotcher, A-G v [HL] 1
Secretary of State for Health, R (on the application of H) v [CA] .. 468
Secretary of State for the Home Dept, A v [HL] 169
Secretary of State for the Home Dept, Huang v [CA] 435

Page

Secretary of State for the Home Dept, R (on the application of Adam) v [CA] .. 29
Secretary of State for the Home Dept, R (on the application of Limbuela) v [CA] 29
Secretary of State for the Home Dept, R (on the application of Napier) v [QBD] 76
Secretary of State for the Home Dept, R (on the application of Tesema) v [CA] 29
Secretary of State for the Home Dept, X v [HL] 169
Secretary of State for Work and Pensions v Bobezes [CA] 497
Sieff v Fox [Ch D] 693
SK (an adult) (forced marriage: appropriate relief), Re [Fam D] 421
Swain v DPP [DC] 330
Technology and Construction Court: Statement by the Lord Chief Justice of England and Wales [QBD] 289
Tesema (on the application of), R v Secretary of State for the Home Dept [CA] 29
Transport for London, Hill v [Ch D] 677
Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc [CA].. 775
Uddin (a child) (serious injury: standard of proof), Re [CA] 550
Unidare plc v Cohen [Ch D] 730
University of East London Higher Education Corp v Barking and Dagenham London BC [Ch D] 398
University of East London Higher Education Corp v Barking and Dagenham London BC (No 2) [Ch D] .. 416
Uphill v BRB (Residuary) Ltd [CA] 264
Vasiliou v Hajigeorgiou [CA] 17
W (on the application of), R v Metropolitan Police Comr [DC] 749
Waltham Contractors Ltd, McGlinn v [QBD] 1126
Ward v Metropolitan Police Comr [HL] .. 1013
Webster, Baldock v [CA] 655
Webster v Brunel University [CA] 812
Western Power Distribution (South West) plc, Trustees of Stokes Pension Fund v [CA] 775
Wilson v Robertsons (London) Ltd [Ch D] .. 873
Wong v Igen Ltd [CA] 812
X v Secretary of State for the Home Dept [HL] 169
Z (local authority: duty), Re [Fam D] 280
Z, R v [HL] 95

Digest of cases reported in volume 3

APPEAL – Reopening of appeal – Application to reopen final appeal – Circumstances in which court will reopen an appeal

Re Uddin (a child) (serious injury: standard of proof) .. .. **CA** **550**

ARBITRATION – Award – Contract stipulating currency of account and applicable law – Arbitral tribunal making award in currency other than that provided by contract – Tribunal making ordering pre-award interest under procedural law of arbitration – Whether excess of power

Lesotho Highlands Development Authority v Impregilo SpA . .. .. **HL** **789**

BANK – Duty of care – Freezing order – Claimant serving on bank freezing orders prohibiting disposals from clients' accounts – Clients transferring money from accounts after claimant serving orders on bank – Whether bank owing duty of care to claimant to prevent payment of money from accounts

Customs and Excise Comrs v Barclays Bank plc .. .. **CA** **852**

BUILDING CONTRACT – Certificate – Cause of action – Whether claim to have sum included in final certificate in respect of work or events for which sum should have been included in interim certificate fresh cause of action

Henry Boot Construction Ltd v Alstom Combined Cycles Ltd .. .. **CA** **932**

COMMONS – Registration – Town or village green – Land on which significant number of inhabitants of locality had indulged in lawful sports or pastimes as of right for not less than 20 years and 'continue to do so' – Whether registration of such land in itself conferring rights on inhabitants – Whether such a green falling within legislation rendering it an offence to interfere with enjoyment of town or village greens – Whether lawful sports and pastimes having to continue to date of registration

Oxfordshire CC v Oxford City Council .. .. **CA** **961**

COMPANY – Shares – Voting power – Statutory provision treating person as having control of company if 'entitled to exercise' third or more of voting 'power' – Whether bare trustee of shares entitled to exercise voting power

Re Kilnoore Ltd (in liq) .. .. **Lewison J** **730**

CONSUMER CREDIT – Agreement – Pawnbroking agreements – Redemption period – Antedated agreements – Whether antedated agreements with redemption period running from antedated dates enforceable

Wilson v Robertsons (London) Ltd .. .. **Laddie J** **873**

——Agreement – Pawnbroking agreements – Total amount of credit – Total charge for credit – Item entering into total charge for credit not to be treated as credit – Whether agreement with document fee treated as part of total amount of credit enforceable

Wilson v Robertsons (London) Ltd .. .. **Laddie J** **873**

CONTEMPT OF COURT – Criminal contempt – Disclosure of secrets of jury room – Whether defence for juror to show bona fide aim of preventing miscarriage of justice – Whether statute to be so interpreted so as to make it compatible with right to freedom of expression – Effect of warnings against disclosure given to juror

A-G v Scotcher .. .. **HL** **1**

CONTRIBUTION – Claimant building contractor subcontracting to defendant consulting engineer – Claimant agreeing with employer to remedy faults at no expense to employer and instructing contractors to carry out remedial works – Deed of settlement signed with employer on completion of works – Claimant seeking contribution from defendant – Whether for purposes of statute 'payment' having to be money payment – Whether time running for limitation purposes from date of agreement or date of settlement deed

Baker & Davies plc v Leslie Wilks Associates (a firm) **Judge Richard Havery QC** **603**

COPYRIGHT – Musical work – Originality – Existing composition – Whether copyright subsisting in modern performing editions of out-of-copyright music

Sawkins v Hyperion Records Ltd .. .. **CA** **636**

COSTS – Order for costs – Discretion – Payment into court – Effect of offer to settle without payment in

Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc .. .. **CA** **775**

——Order for costs – Jurisdiction – Pre-action protocol – Defendant incurring costs at pre-action protocol stage in responding to claims not pursued by claimant in subsequent

McGlinn v Waltham Contractors Ltd .. .. .. **Judge Peter Coulson QC** **1126**

——Order for costs – Professional funder part-financing claimant's litigation under contingent fee agreement – Claimant's litigation unsuccessful – Whether professional funder liable for costs

Arkin v Borchard Lines Ltd .. .. **CA** **613**

COURT OF APPEAL – Practice – Second appeals from county court or High Court – Appeals raising important point of principle or practice – Some other compelling reason

Uphill v BRB (Residuary) Ltd .. .. **CA** **264**

CRIMINAL EVIDENCE – Admissions and confessions – Judge ruling that evidence of confession not obtained by oppression or other improper means – Whether summing up should include direction jury to disregard confession if they conclude that confession might have been obtained by oppression or other improper means

R v Mushtaq .. .. **HL** **885**

CRIMINAL LAW – Murder – Provocation – Self control of reasonable man – Whether accused's alcoholism eligible for consideration by jury in determining whether reasonable person having characteristics of accused would have lost control

Attorney General for Jersey v Holley .. .. **PC** **371**

——Proscribed organisation – Proscribed organisations listed or operating under same name as organisation listed – 'Irish Republican Army' listed – Whether person belonging or professing to belong to 'Real Irish Republican Army' belonging or professing to belong to proscribed organisation

R v Z .. .. **HL** **95**

——Public electronic communications network – Message or other matter – Sending grossly offensive message or other matter – Test for determining whether grossly offensive

DPP v Collins .. .. **Sedley LJ** **326**

——Trial – Plea – Advance indication of sentence by trial judge – Guidance

R v Goodyear .. .. **CA** **117**

CRIMINAL LAW (CONT'D) – Trespass – Aggravated trespass – Defence – Disrupting lawful activity – Protestors disrupting activities at military bases – Whether disrupting lawful activity

Ayliffe v DPP .. .. **DC 330**

DAMAGES – Apportionment – Claimant developing mesothelioma after being exposed to asbestos dust by successive employers in breach of duty and by self-employment – Whether liability for damages to be apportioned

Barker v Saint-Gobain Pipelines plc .. .. **CA 661**

DISCLOSURE AND INSPECTION OF DOCUMENTS – Defendant for purposes of disclosure only – No reasonable cause of action against party from whom disclosure sought – Whether availability of pre-action disclosure ground for refusing exercise of jurisdiction to order disclosure from third parties

Mitsui & Co Ltd v Nexen Petroleum UK Ltd .. .. **Lightman J 511**

DIVORCE – Jurisdiction – Habitual residence – Unlawful residence – Whether person whose residence unlawful capable of being habitually resident

Mark v Mark .. .. **HL 912**

DOMICILE – Acquisition of domicile of choice – Unlawful residence – Whether person whose residence unlawful capable of acquiring domicile of choice

Mark v Mark .. .. **HL 912**

EMPLOYMENT – Disability – Discrimination – Complaint of discrimination – Burden of proof

Wong v Igen Ltd (Equal Opportunities Commission intervening) .. .. **CA 812**

——Sex discrimination – Complaint of discrimination – Burden of proof

Wong v Igen Ltd (Equal Opportunities Commission intervening) .. .. **CA 812**

EUROPEAN COMMUNITY – Income support dependent child allowance – Member of same household – Child not treated as member of same household where child continuously absent for period of more than four weeks – Portuguese national residing in United Kingdom as migrant worker – Child spending periods of time exceeding four weeks with grandparent in Portugal – Allowance refused – Whether discrimination on grounds of nationality – Nature of proof required to establish discrimination

Secretary of State for Work and Pensions v Bobezes .. .. **CA 497**

EXTRADITION – Extradition request and certificate – Service – Time of service – Responsibility for service

Government of Germany v Kleinschmidt .. .. **DC 759**

——Hearing – Case where person has been convicted – Person not convicted in his presence – Person deliberately absenting himself from his trial – Right to fair trial – Meaning of 'deliberately absented himself from his trial'

Government of the Republic of Albania v Bleta .. .. **Pill LJ 351**

FAMILY PROCEEDINGS – Orders in family proceedings – Specific issue order – Child welfare – Father applying for return of child to foreign jurisdiction – Different legal concepts of child welfare – Approach of court

Re J (a child) (return to foreign jurisdiction: convention rights) .. .. **HL 291**

HIGH COURT – Jurisdiction – Inherent jurisdiction – Circumstances leading to suspicion where forced marriage abroad of adult British citizen might be in contemplation – Whether jurisdiction to grant appropriate relief

Re SK (an adult) (forced marriage: appropriate relief) .. .. .. **Singer J** **421**

IMMIGRATION – Appeal – Detention pending deportation – Statutory power to detain non-nationals suspected of terrorism – Whether power constituting lawful derogation from right to liberty

A v Secretary of State for the Home Dept .. .. **HL** **169**

——Asylum seeker – Failure to claim asylum as soon as reasonably practicable disentitling destitute asylum seeker from support – Whether inhuman or degrading treatment

R (on the application of Limbuela) v Secretary of State for the Home Dept **CA** **29**

——Immigrant claiming on facts removal amounting to unlawful interference with right to respect for private and family life – Whether adjudicator's assessment of proportionality limited to review of Secretary of State's decision to refuse leave – Whether adjudicator to decide for himself whether removal proportionate or not

Huang v Secretary of State for the Home Dept .. .. **CA** **435**

JUDGE – Judge in fact – Recorder eligible for authorisation to act as High Court judge but not so authorised – Recorder adjudicating on High Court action believing action to be in County Court – Whether recorder acting as de facto High Court judge

Baldock v Webster .. .. **CA** **655**

LIMITATION OF ACTION – Land – Adverse possession – Accrual of cause of action – Whether intervention of Crown's ownership defeating claim

Hill v Transport for London .. .. **Rimer J** **677**

LOCAL AUTHORITY – Gipsies occupying local authority land without licence or consent – Local authority seeking possession order – Whether breach of right to respect for private and family life

Leeds City Council v Price .. .. **CA** **573**

——Statutory duty – Vulnerable adult seeking assisted suicide abroad – Husband proposing to make necessary arrangements and to accompany her – Whether duty lying on local authority to seek injunctive relief against husband – Whether court would act of its own motion

Re Z (local authority: duty) .. .. **Hedley J** **280**

MEDICAL TREATMENT – Human fertilisation – Keeping embryos – 'Person responsible' securing proper arrangements made for keeping embryos – Whether 'person responsible' person keeping embryos

A-G's Ref (No 2 of 2003) .. .. **CA** **149**

MENTAL HEALTH – Admission of patient to hospital – Admission for assessment – Right to liberty and security – Patient admitted for assessment – Patient not competent to avail herself of statutory provision allowing for application for discharge – Whether breach of right to liberty and security

R (on the application of H) v Secretary of State for Health .. .. .. **CA** **468**

——Mental disorder – Person believed to be suffering from mental disorder – Warrant to remove person to place of safety specifying named professionals to accompany constable – Named professionals not accompanying constable on execution of warrant – Whether execution lawful

Ward v Metropolitan Police Comr .. .. **HL** **1013**

MENTAL HEALTH (CONT'D) – Patient admitted for assessment – Statutory period for detention for assessment – Hospital applying for court order relating to nearest relative before end of statutory period – Effect of application extending statutory period until application finally disposed of – Whether breach of right to liberty and security

R (on the application of H) v Secretary of State for Health .. .. .. **CA** **468**

MISTAKE – Mistake of law – Money paid under mistake of law – Restitution – Whether payments of advance corporation tax made under mistake of law – Whether English law recognising claim in restitution to recover taxes paid under mistake of law

Deutsche Morgan Grenfell Group plc v IRC and the Attorney General .. **CA** **1025**

NATIONAL HEALTH SERVICE – Health authority – Facilities for prevention of illness, care of persons suffering from illness and after-care of persons who have suffered from illness – Meaning of 'facilities'

R (on the application of Keating) v Cardiff Local Health Board .. .. **CA** **1000**

NEGLIGENCE – Causation – Employee developing mesothelioma after being exposed to asbestos dust by successive employers in breach of duty and by self-employment – Whether exposure during self-employment precluding employee from recovering damages from employers

Barker v Saint-Gobain Pipelines plc .. .. **CA** **661**

PENSION – Pension scheme – Company pension scheme – Minimum funding requirement – Minimum funding requirement applicable to schemes other than money purchase schemes – Whether scheme money purchase scheme

Aon Trust Corp Ltd v KPMG (a firm) .. .. **Sir Andrew Morritt V-C** **587**

POLICE – Powers – Anti-social behaviour – Power to remove person under 16 from dispersal area to his place of residence – Whether power to remove coercive

R (on the application of W) v Metropolitan Police Commissioner .. .. **DC** **749**

PRACTICE – Application to search for, inspect and copy documents – Application to inspect and copy documents in court record – Case having ended – Whether court capable of giving permission

Re Guardian Newspapers Ltd .. .. **Park J** **155**

——Compromise of action – Consent order – Uncertainty – Whether consent order could be void for uncertainty

Scammell v Dicker .. .. **CA** **838**

——Criminal proceedings – Consolidation of existing practice directions, practice statements and practice notes – Amendment – Case management

Amendment to the Consolidated Criminal Practice Direction (Case management) .. .. **CA** **91**

——Criminal proceedings – Consolidation of existing practice directions, practice statements and practice notes – Amendment – Excusal from jury service

Amendment to the Consolidated Criminal Practice Direction (Jury service) **CA** **89**

——Evidence – Expert evidence – Disclosure to other parties – Order made during case management conference giving permission to each party to instruct expert in named field – Whether imposing condition as to disclosure curtailing right to legal professional privilege

Vasiliou v Hajigeorgiou .. .. **CA** **17**

PRACTICE (CONT'D) – Offer to settle – Defendants notifying claimants of existence of error in Pt 36 offer but failing to disclose its nature – Whether claimants entitled to rely on Pt 36 offer

Hertsmere Primary Care Trust Administrators of Balasubramanium's Estate .. .. **Lightman J** **274**

——Parties – Substitution – Substitution after expiry of limitation period – Party named in claim form in mistake for new party – Correct approach

Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd .. .. .. **CA** **135**

——Payment into court – Costs – Trial judge determining liability issue in favour of claimant – Disclosure to judge that payment in by defendants but not its amount – Judge awarding claimant its costs on issue of liability – Whether possible to disclose actual amount of payment in to judge

HSS Hire Services Group plc v BMB Builders Merchants Ltd .. .. .. **CA** **486**

——Technology and Construction Court – Case management – Interim arrangements

Technology and Construction Court: Statement by the Lord Chief Justice of England and Wales .. .. .. **Lord Woolf CJ** **289**

PRISON – Discipline – Prisoner charged with disciplinary offence – Prisoner refused legal representation for hearing – Prisoner found guilty – Secretary of State remitting penalty – Secretary of State refusing to quash finding of guilt – Whether breach of right to fair trial

R (on the application of Napier) v Secretary of State for the Home Dept .. .. **Goldring J** **78**

PRIVILEGE – Public interest immunity – Production contrary to public interest – Sentencing – Confiscation order – Judge ruling in favour of Crown on public interest immunity in relation to certain material – Judge subsequently making confiscation order – Whether special counsel required to be appointed

R v May .. .. **CA** **523**

RACE RELATIONS – Discrimination – Employment – Complaint of discrimination – Burden of proof

Wong v Igen Ltd (Equal Opportunities Commission intervening) .. .. **CA** **812**

RESTRICTIVE COVENANT AFFECTING LAND – Declaration whether covenant affecting land unenforceable – Costs of High Court application – Incidence of costs – Pre-CPR rule of practice – Whether consistent with CPR

University of East London Higher Education Corp v Barking and Dagenham London BC (No 2) .. .. **Lightman J** **416**

——Extinguishment – Local authority owning benefited land as housing authority and burdened land as education authority – Whether unity of seisin extinguishing covenant

University of East London Higher Education Corp v Barking and Dagenham London BC .. .. **Lightman J** **398**

SALE OF LAND – Vendor – Fiduciary duty to purchaser – Vendor as trustee for purchaser – Whether scope of fiduciary duty extending beyond land the subject of sale

Englewood Properties Ltd v Patel .. .. **Lawrence Collins J** **307**

SENTENCE – Confiscation order – Proceeds of crime – Person benefiting from offence if he obtained property – Companies obtaining property fraudulently – Companies jointly controlled by offenders – Whether each offender obtaining benefit of whole of property obtained

R v May .. .. **CA 523**

SOCIAL SERVICES – Registered care homes – Owners of care homes seeking deregistration – Tribunal refusing deregistration on basis homes 'establishments' – Meaning of 'establishment' – Whether homes establishments where occupants assured tenants

R (on the application of Moore) v Care Standards Tribunal .. .. .. **CA 428**

TRINIDAD AND TOBAGO – Legal profession – Attorney at Law – Professional misconduct – Disciplinary proceedings – Standard of proof

Campbell v Hamlet .. .. **PC 1116**

TRUST AND TRUSTEE – Powers of trustee – Rule of equity requiring trustee to take into account all relevant considerations and not take into account any irrelevant considerations when exercising power – Scope of rule

Sieff v Fox .. .. **Lloyd LJ 693**

House of Lords petitions

This list, which covers the period 15 June 2005 to 28 July 2005, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

Government of the Republic of Albania v Bleta [2005] 3 All ER 351. Leave to appeal refused 11 July 2005 (Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell).

R (on the application of G) v Immigration Appeal Tribunal, R (on the application of M) v Immigration Appeal Tribunal [2005] 2 All ER 165. Leave to appeal refused 28 July 2005 (Lord Nicholls of Birkenhead, Lord Hope of Craighead and Baroness Hale of Richmond).

R (on the application of Nunn) v First Secretary of State [2005] 2 All ER 987. Leave to appeal refused 20 June 2005 (Lord Bingham of Cornhill, Lord Steyn and Lord Rodger of Earlsferry).

Ridgeway Motors (Isleworth) Ltd v ALTS Ltd [2005] 2 All ER 304. Leave to appeal refused 30 June 2005 (Lord Hoffmann, Lord Walker of Gestingthorpe and Baroness Hale of Richmond).

Attorney General v Scotcher

[2005] UKHL 36

HOUSE OF LORDS

LORD STEYN, LORD HUTTON, LORD RODGER OF EARLSFERRY, BARONESS HALE OF RICHMOND AND LORD CARSWELL

6, 7 APRIL, 19 MAY 2005

Contempt of court – Criminal contempt – Disclosure of secrets of jury room – Whether defence for juror to show having bona fide aim of preventing miscarriage of justice – Whether statute to be interpreted as including such a defence so as to make it compatible with convention right to freedom of expression – Effect of warnings against disclosure given to juror – Contempt of Court Act 1981, s 8(1) – Human Rights Act 1998, s 3, Sch 1, Pt I, art 10.

In January 2000, the defendant was summoned for jury service. On the first day, like all other potential jurors, he was given a booklet which contained warnings about only talking about the case in the jury room when all the jury was present and that he was not to talk about the case outside the jury room, or tell anyone details of the jury's deliberations. He was also shown a video which said that it was a contempt of court, which might be punishable by imprisonment, to disclose the opinions of jurors or the way they voted in their deliberations. The defendant was balloted to serve as a juror in a trial in which the two defendants were brothers. The jury convicted both defendants by a majority. The day after the end of the trial the appellant wrote to the defendants' mother informing her of the discussions that had taken place in the jury room, which he felt would show that the verdict was unsafe. He wrote that he was aware that he was in contempt of court in writing the letter and asked her not to show the letter to the police, the judge or prosecuting counsel. The mother sought advice from her solicitor who brought it to the attention of the Court of Appeal. The court in turn contacted the police who then referred the matter to the Attorney General. Proceedings for contempt were instituted against the defendant in the terms of s 8(1)[a] of the Contempt of Court Act 1981. The Divisional Court ruled that it was not a defence for a juror to show that he had disclosed the jury's deliberations with the bona fide aim of preventing a miscarriage of justice. Thereafter, the

a Section 8(1) is set out at [3], below

appellant accepted that he had committed a contempt and was sentenced. On appeal issues arose (i) as to the present state of the law on disclosures by members of the jury; (ii) whether in the particular circumstances of the case, by virtue of s 3[b] of the Human Rights Act 1998, s 8(1) had to be interpreted as including a defence where the juror had a bona fide aim of preventing a miscarriage of justice, so as to make it compatible with the right to freedom of expression in art 10[c] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act); and (iii) the effect of the warnings given to potential jurors.

Held – (1) A juror who disclosed to the court, whether directly or indirectly, what was said or done during the jury's deliberations with the intention of prompting an investigation was not, without more in contempt of court in the terms of s 8(1). However, writing to a third party with the intention that the matter should be raised by lawyers presenting an appeal to the Court of Appeal was not sufficient to exclude the juror from the scope of s 8(1). It followed that, in the instant case, if the appellant had written his letter to the Crown Court or to the Court of Appeal, he would not have been in contempt of court in terms of s 8(1). Nor if he had spoken or written to the jury bailiff or to the clerk of the court. Similarly, if he had sent a sealed letter containing his complaint to the defendant's solicitors or counsel or even to a citizens' advice bureau or similar organisation, and had asked them to forward it unopened to the appropriate court authorities, any disclosures in the letter would have been disclosures to the court and so outside the terms of s 8(1). The appellant, however, had done something very different. He had disclosed the jury's deliberations to a third party who had no authority to receive disclosures on behalf of the court and who might, or might not, pass the contents of the letter on to the court. Moreover, the appellant had no control over what the recipient of his letter did with it. By his action the appellant created all the risks to the confidentiality of the jurors' deliberations which s 8(1) was designed to prevent. In those circumstances s 8(1) applied to him and he was accordingly in contempt of court (see [1], [2], [25]–[28], [32]–[34], below); *R v Mirza* [2004] 1 All ER 925 applied.

(2) Although the juror's right to freedom of expression under art 10(1) was engaged, it was subject to a restriction which was prescribed by law and necessary in a democratic society for preventing the disclosure of information received in confidence. Accordingly s 3 of the 1998 Act was of no avail. The rule governing the secrecy of jury deliberations was a crucial and legitimate feature of English trial law. Therefore, in so far as s 8(1) served to reinforce that rule by making it an offence for a juror to disclose the information which received in confidence from his fellow jurors, the objective was sufficiently important to justify limiting the juror's freedom of expression in that way; (see [1], [2], [29], [32]–[34], below); *Gregory v UK* (1997) 25 EHRR 577 considered.

(3) The terms of the warnings given to jurors could not affect the interpretation of the statute or the juror's guilt, one way or the other, at most they might be relevant to mitigation. In any event, the terms of the warnings were irrelevant in the instant case, since the appellxant had showed that he was not restrained by

b Section 3, so far as material, provides: '(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights ...'

c Article 10 is set out at [14], below

being warned that he would be in contempt of court if he disclosed the jury's deliberations to anyone. He deliberately chose to write to the mother even though he was well aware that in doing so he was in contempt of court. Accordingly the appeal would be dismissed (see [1], [2], [31]–[34], below).

Notes

For contempt of court by jurors see 9(1) *Halsbury's Laws* (4th edn) paras 407 and 434.

For the Contempt of Court Act 1981, s 8(1), see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 198.

For the Human Rights Act 1998, s 3, and Sch 1, Pt I, art 10, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 679, 707.

Cases referred to in opinions

A-G v Associated Newspapers Ltd [1994] 1 All ER 556, [1994] 2 AC 238, [1994] 2 WLR 277, HL.

A-G v New Statesman and Nation Publishing Co Ltd [1980] 1 All ER 644, [1981] QB 1, [1980] 2 WLR 246, DC.

De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.

Gregory v UK (1998) 25 EHRR 577, [1997] ECHR 22299/93, ECt HR.

R v Connor, R v Mirza [2004] UKHL 2, [2004] 1 All ER 925, [2004] 1 AC 1118, [2004] 2 WLR 201.

R v Smith [2005] UKHL 12, [2005] 2 All ER 29, [2005] 1 WLR 704.

R v Young (Stephen) [1995] QB 324, [1995] 2 WLR 430, CA.

Scottish Criminal Cases Review Commission, Petitioners 2001 SLT 1198, HC Just.

Cases referred to in list of authorities

Amuur v France (1996) 22 EHRR 533, [1996] ECHR 19776/92, ECt HR.

Boston v WS Bagshaw & Sons [1967] 2 All ER 87n, [1966] 1 WLR 1135n, CA.

Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.

Ellis v Deheer [1922] 2 KB 113, [1922] All ER Rep 451, CA.

Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557, [2004] 3 WLR 113.

Greenough v Gaskell (1833) 1 My & K 98, 39 ER 618, [1824–34] All ER Rep 767, LC.

Le Compte v Belgium (1982) 4 EHRR 1, [1981] ECHR 6878/75, ECt HR.

Leander v Sweden (1987) 9 EHRR 433, [1987] ECHR 9248/81, ECt HR.

Pan v R, Sawyer v R [2001] 5 LRC 311, [2001] 2 SCR 344, Can SC.

R (on the application of Mullen) v Secretary of State for the Home Dept [2004] UKHL 18, [2004] 3 All ER 65, [2005] 1 AC 1, [2004] 2 WLR 1140.

R (on the application of Wilkinson) v IRC [2003] EWCA Civ 814, [2003] 3 All ER 719, [2003] 1 WLR 2683; *affd* [2005] UKHL 30, [2005] 1 WLR 1718.

R v Brandon (1969) 53 Cr App R 466, CA.

R v Derby Magistrates' Court, ex p B [1995] 4 All ER 526, [1996] AC 487, [1995] 3 WLR 681, HL.

R v G [1996] 3 SCR 362, Can SC.

R v Hood [1968] 2 All ER 56, [1968] 1 WLR 773, CA.

R v McCluskey (1994) 98 Cr App R 216, CA.

R v Millward [1999] 1 Cr App R 61, CA.
R v Papadopoulos [1979] 1 NZLR 621, Wellington CA.
R v Roads [1967] 2 All ER 84, [1967] 2 QB 108, [1967] 2 WLR 1014, CA.
R v Tawhiti [1994] 2 NZLR 696, Wellington CA.
R v Wooler (1817) 2 Stark 111, 105 ER 1280.
Ras Behari Lal v King Emperor (1933) 50 TLR 1, [1933] All ER Rep 723, PC.
Remli v France (1996) 22 EHRR 253, [1996] ECHR 16839/90, ECt HR.
Rojas v Berllaque (A-G for Gibraltar intervening) [2003] UKPC 76, [2004] 1 WLR 201.
Sander v UK (2000) 8 BHRC 279, ECt HR.
Solicitor General v Radio New Zealand Ltd [1994] 1 NZLR 48, Wellington HC.
Sunday Times v UK (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.
Tanner v US (1987) 483 US 107, US SC.
Three Rivers DC v Bank of England (No 6) [2004] UKHL 48, [2004] 3 WLR 1274.
Zana v Turkey (1997) 4 BHRC 241, ECt HR.

Appeal

The defendant, Keith Richard Scotcher, appealed with permission of the House of Lords Appeal Committee given on 2 December 2003 from the decision of the Divisional Court of the Queen's Bench Division (Scott Baker LJ and Pitchford J) on 16 May 2003 committing the defendant to prison for contempt of court. The facts are set out in the opinion of Lord Rodger of Earlsferry.

Keir Starmer QC and *Hugh Southey* (instructed by *Birnberg Peirce & Partners*) for the appellant.
Philip Havers QC and *Robin Tam* (instructed by the *Treasury Solicitor*) for the Attorney General.

LORD STEYN.

[1] My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Rodger of Earlsferry. I agree with it. I would also dismiss the appeal.

LORD HUTTON.

[2] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry. I agree with it and for the reasons which he gives I would also dismiss the appeal.

LORD RODGER OF EARLSFERRY.

[3] My Lords, this appeal concerns the interpretation and application of s 8(1) of the Contempt of Court Act 1981 (s 8(1)), which provides:

> 'Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.'

THE FACTS

[4] In January 2000 the appellant, Keith Scotcher, was summoned for jury service at Blackfriars Crown Court. On the first day, like all the other potential

jurors, Mr Scotcher was given a booklet entitled 'You and Your Jury Service', which he read. Just below the list of contents the booklet said this:

> '**Warnings** are in grey boxes.
> You will find them on pages 1, 2 and 10.
> Please read them carefully.'

Page 1 included this warning:

> '**Warning**'
> When you become a juror you must never discuss the case with anyone who is not a member of your jury. Talk about the case only in the jury room when all the jury are present.'

There was another warning on p 10:

> '**Warning**
> You must not talk about the case outside the jury room.
> You must not show or tell anyone details of:
> by you or any other juror during the jury's deliberations.
>
> •statements made •opinions given
>
> •arguments put forward •votes cast
>
> If you do, you will be in contempt of court and you may be sent to prison or have to pay a fine.'

[5] The jurors were also shown a video, part of which said:

> 'It is a contempt of court, which may be punishable by imprisonment, to get or disclose the opinions of jurors or the way they voted in their deliberations.'

It went on to say:

> 'Please remember that it is an offence punishable by imprisonment for anyone to disclose information about what is discussed in the jury room or the opinions of individual jury members about a case.'

There was a notice to the same effect in the jury room.

[6] The appellant was balloted to serve as a juror in a trial in which the two defendants were brothers. By the end of the trial on Friday 11 February, the jury had been reduced to eleven members. That afternoon the jury convicted both defendants by a majority of 10 votes to 1.

[7] The following day, the appellant wrote to the defendants' mother in these terms:

> 'Dear Mrs Anderson
> I was the one jury member who held out against the prosecution case at the trial of [A] and [B]. I would like you to seriously consider, as I'm sure you are already, talking to your counsels about appealing the convictions on the grounds of an unsafe conviction, miscarriage of justice, or whatever. [XXXX]

When we first went out the voting was close XXXX. Many changed their vote late on simply because they wanted to get out of the courtroom and go home. I was shocked at how readily some of them were ready to convict on a complete lack of evidence, and I tried to show them how the evidence there was, [A]'s jacket, [B]'s suit, the phone book could so easily have been "fitted" into "[D]'s" statement—given after these items were taken from your house. It was never explained why policeman took these items.

The police searched the house 3 days after the incident. How did they know what items to take? They didn't find any drugs or anything associated with drug dealing. But, they took these items which they thought would be "useful", as they were, when it came to concocting a "statement" from [E]. This statement was not written down nor recorded. We only had the policeman's "word"—evidence for it (all the jury thought he was "dodgy"). Then, lo and behold, [A] and [B] were said to be wearing those very clothes the police just happened to take! Phone numbers from the book were said to have been known by [D]/[E]. In the "statement" he got close, some numbers wrong, but in court he was further away on [B]'s number. He had plenty of time to try and memorise them anyway, but how could he ever make a successful call? Of course there were other things that decided me they should not be found guilty. [F]? said in her statement that the jacket was GREEN! The only other mention of green was in [A]'s statement when policeman mistakenly said it was green! Indicating she was shown the statement. As well as her belatedly saying she knew of [A] and [B], who [E] said he knew as [G] and [H]. (said before couldn't recognise etc).

I tried to show the jury that this was how people were fitted up, and that there was not enough evidence to convict anybody. I'm sorry I did not succeed and I wish you XX success in your further efforts.

Yours sincerely—ANON

XXXX

I was a shop steward XXXX for 18 years and know how people get framed for things.

Some more thoughts on the case

[E] was clearly lying about the phone call he made to [B]. He says he keeps the number [B's] in his head. But got it wrong in first statement, and even more wrong in witness box—so how could he make the call at all? DC (1) should have been asked if he is paranormal—knew what to take from [C] house before [E] statement. Why these items and not any others? Does it happen often in DC (1)'s cases, that he picks up the "right" evidence before he even knows about it? What was he looking for in the search? Some of the jury thought the judge wasn't just summing up the case but indicating he wanted them found guilty. Some of the jury said they were ready to believe they were guilty despite almost complete lack of evidence. The "leader" of this pack was XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX saying they are drug dealers, etc, and should be locked away. There was no proof of this. Only [E] said this.

I tried to argue strongly that our duty X was first to presume innocence until proven guilty. Despite the fact that I was prepared to go through all the "evidence" present and show how it was a false case, when I challenged

the others to prove the guilt case—none of them even tried! The just decide on prejudice and hearsay. (and wanting to get home for tea!). I hope these are grounds in law to show that the verdict was unsafe. Don't know if it can be shown that [the] judge mis-directed the jury.

good luck!

Its a terrible thing to say, but it now looks if it would have been better not to go before a jury. A judge could not have decided on the complete lack of evidence. This is hindsight of course. My opinion was that the judge should have directed us to find not guilty due to lack of evidence (and clearly false evidence).

Please do not show this letter to:—police/judge/pros counsel.'

At the beginning of the letter the writer explained: 'I've blocked out some words because apparently I'm "in contempt of court" for writing to you.' In the letter as reproduced above the words blocked out in this way have been marked by capital Xs and initials have been substituted for names.

[8] Mrs Anderson sought advice about the letter from her solicitor who brought it to the attention of the Court of Appeal. The court in turn contacted the police, who then interviewed 11 of the original 12 jurors, including the appellant. All of them denied writing the letter. Handwriting samples were taken from the jurors and a handwriting expert examined the letter. The expert discovered that one piece of obliterated writing was the appellant's email address, while two other pieces of obliterated writing said 'Keith S'. On comparing the letter with the handwriting samples, the expert concluded that the appellant had written it. The appellant was then arrested and interviewed under caution. Despite the evidence of the expert, the admitted similarity between his writing and that in the letter and the similarities between some of the contents of the letter and his own personal history as a trade union official, the appellant continued to deny being the author.

[9] The material assembled by the police was referred to the Attorney General for him to consider, in terms of s 8(3) of the 1981 Act, whether to give his consent to proceedings for contempt of court being instituted against the appellant in terms of s 8(1). On 25 March 2002 the appellant's solicitors wrote to the Attorney General admitting that he had written the letter but arguing that no proceedings should be taken against him. On 16 July 2002 the Attorney General informed the appellant that he had given his consent to proceedings being instituted.

[10] On 23 October 2002 the Divisional Court granted the Attorney General permission to apply for a committal order against the appellant. When the matter came before the court again on 8 May 2003, the court decided to hear argument on whether a defence was available to a juror who disclosed the deliberations of the jury if the juror was motivated by a desire to expose a miscarriage of justice.

[11] On 16 May 2003 the Divisional Court (Scott Baker LJ and Pitchford J) held that no such defence was available ([2003] EWHC 1380 (Admin), [2003] All ER (D) 221 (May), [2004] ACD 4). The appellant then accepted that he had committed a contempt of court in terms of s 8(1). The Divisional Court ordered that the appellant should serve a two-month prison sentence suspended for one year and should pay costs of £2,500. In passing sentence the court accepted that the appellant had a genuine belief that there had been a

miscarriage of justice, although he was probably someone who was blind and unreceptive to the views of others.

THE APPEAL

[12] The House gave leave to appeal on 2 December 2003. Subsequently the House gave judgment in *R v Connor, R v Mirza* [2004] UKHL 2, [2004] 1 All ER 925, [2004] 1 AC 1118. That decision corrected the previous interpretation of s 8(1), which the Divisional Court had applied in this case. As a result, the arguments for both sides before the House were different from those in the Divisional Court. Nevertheless, it remained common ground that, in terms of s 8(1), the appellant had revealed statements, opinions, arguments or votes of the members of the jury in the course of their deliberations. It was not disputed, either, that the mens rea for the offence was an intention to disclose and that the appellant had deliberately disclosed these aspects of the jury's deliberations to Mrs Anderson. So, unless some defence was available to the appellant in the circumstances of the case, he was guilty of contempt of court in terms of s 8(1).

[13] The suggestion was that a juror is not guilty of contempt if he discloses the jury's deliberations with the bona fide aim of preventing a miscarriage of justice. On its face, s 8(1) makes no provision for a defence of that kind and Mr Starmer QC did not suggest that there was anything in the statute itself which would permit that defence to be implied into s 8(1). He argued, however, that in the particular circumstances of this case, by virtue of s 3 of the Human Rights Act 1998, s 8(1) had to be interpreted as including such a defence so as to make it compatible with art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). If this could not be done, then the House should make a declaration of incompatibility under s 4 of the 1998 Act.

[14] Article 10 of the convention provides inter alia:

> '1. Everyone has the right to freedom of expression. This right shall include freedom to ... impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

At its broadest, Mr Starmer's submission was that the appellant was free to impart information about the jury's deliberations without interference by the Attorney General when his intention was to secure the defendants' art 6 convention right to a fair trial by a tribunal comprising an impartial jury. In fact, however, during the hearing Mr Starmer really confined his argument to the circumstances of this case.

[15] The appellant wrote the letter containing the disclosures about the jury's deliberations on 12 February 2000, more than seven months before the 1998 Act came into force on 2 October 2000. Nevertheless, Mr Havers appeared to accept that the Act, and in particular ss 3 and 4, applied to these

proceedings. In the absence of argument to the contrary, without deciding the point, I proceed on that basis.

[16] Prior to the decision of the House in *R v Connor*, the general assumption in the English courts was that the terms of s 8(1) were so broad as to apply to any court, whether the trial court or the Court of Appeal (Criminal Division), which might otherwise have wished to inquire into a matter relating to the jurors' deliberations. Section 8(1) in effect ruled out such inquiries by the courts. See, in particular, *R v Young (Stephen)* [1995] QB 324 at 330, [1995] 2 WLR 430 at 434 per Lord Taylor of Gosforth CJ. So a juror disclosing the jury's deliberations to the court would be in contempt under s 8(1). This understanding of the law presumably lay behind the blanket terms of the warnings in the leaflet for prospective jurors which the appellant was given and in the video which he saw. The House held, however, that if a trial judge were informed about any misconduct during the jury's deliberations but before they had returned their verdict, then s 8(1) did not prevent him from looking into the matter. Since jurors might well not appreciate that they could tell the judge about any misconduct of their fellow jurors, the House suggested that in future they should be given further guidance. This suggestion led Lord Woolf CJ to issue the *Practice Direction (Crown Court: Guidance to Jurors)* [2004] 1 WLR 665, which amended the consolidated criminal practice direction so as to provide inter alia:

> 'IV.42.6 Trial judges should ensure that the jury is alerted to the need to bring any concerns about fellow jurors to the attention of the judge at the time, and not to wait until the case is concluded. At the same time, it is undesirable to encourage inappropriate criticism of fellow jurors, or to threaten jurors with contempt of court.
>
> IV.42.7 Judges should therefore take the opportunity, when warning the jury of the importance of not discussing the case with anyone outside the jury, to add a further warning. It is for the trial judge to tailor the further warning to the case, and to the phraseology used in the usual warning. The effect of the further warning should be that it is the duty of jurors to bring to the judge's attention, promptly, any behaviour among the jurors or by others affecting the jurors, that causes concern. The point should be made that, unless that is done while the case is continuing, it may be impossible to put matters right.'

Subsequently, in *R v Smith* [2005] UKHL 12, [2005] 2 All ER 29, [2005] 1 WLR 704 the House looked further at what form the trial judge's inquiries might take when a matter was drawn to his attention during the trial.

[17] In reaching its decision in *R v Connor* the House held that s 8(1) does not apply to the trial court or to the Court of Appeal. Nevertheless, as the House also held, by virtue of a long-standing common law rule, after the jury have returned their verdict, evidence directed to matters intrinsic to the jurors' deliberations is inadmissible. Such evidence is excluded in order to protect the confidentiality of the jurors' deliberations and the finality of their verdict. So neither the trial court nor an appeal court would use their powers of investigation to obtain evidence of those deliberations which would be inadmissible. Where, however, the jury is alleged to have been affected by extraneous influences, eg contact with other persons who may have passed on information which should not have been before the jury, evidence of those

extraneous influences is admissible. The law is conveniently summarised in the speech of my noble and learned friend, Lord Carswell, in *R v Smith* [2005] 2 All ER 29 at [16].

THE APPELLANT'S BROAD SUBMISSION

[18] Starting from *R v Connor*, Mr Starmer submitted that if, before the verdict, the trial judge could inquire into allegations of misconduct in the jurors' deliberations, or the Court of Appeal could inquire into allegations of improper extrinsic influences even after the jury had returned their verdict, then in either event it must be lawful for a juror to disclose the deliberations of the jurors to the extent necessary to bring these matters to the attention of the trial judge or the appeal court. In practice the line between intrinsic and extrinsic factors relating to the jury's deliberations was not clear-cut: what appeared at first sight to be nothing more than the stubborn refusal of a juror to follow the judge's directions (and so a matter intrinsic to the jury's deliberations) might turn out on investigation to be due to bribery (an extraneous influence). So a juror could not be expected to know on which side of the line his disclosure would fall. It followed that, in proceedings for contempt of court under s 8(1), a defence must be open if the juror was motivated by a genuine desire to remedy a miscarriage of justice, irrespective of whether the complaint was of intrinsic or extrinsic misconduct.

[19] I would accept the substance of much, but not all, of that submission. A juror who complains to a court about misconduct which is intrinsic to the jury's deliberations is in effect tendering evidence which, on examination, turns out to be inadmissible. The mere fact that the evidence is inadmissible does not mean that there is anything improper or unlawful about the juror's action in bringing it to the attention of the court. On the contrary, the juror may well be acting from the very best of motives in an effort to avoid what he regards as a miscarriage of justice. Not surprisingly, therefore, there is nothing to suggest that, before the 1981 Act, his action would have been regarded as a contempt of court or as being otherwise unlawful.

THE ORIGINS OF SECTION 8(1)

[20] The circumstances which prompted the enactment of s 8(1) are well known and they were examined in some detail in the speech of Lord Lowry in *A-G v Associated Newspapers Ltd* [1994] 1 All ER 556, [1994] 2 AC 238. Following the acquittal of a prominent politician on a charge of conspiracy to murder, the New Statesman magazine published an article, based on an interview with one of the jurors, which gave an account of significant parts of the jury's deliberations. The Attorney General applied for an order for contempt of court against the New Statesman. In *A-G v New Statesman and Nation Publishing Co Ltd* [1980] 1 All ER 644, [1981] QB 1 the Divisional Court held that a juror's disclosure of the jury's deliberations was not a contempt of court unless it tended, or would tend, to imperil the finality of jury verdicts, or to affect adversely the attitude of future jurors and the quality of their deliberations. Since, the court held, the article in question would not have had that effect, the Attorney General's application was refused. Towards the end of his judgment Lord Widgery CJ said ([1980] 1 All ER 644 at 650, [1981] QB 1 at 11):

> 'The evidence before us shows that for a number of years the publication of jury room secrets has occurred on numerous occasions. To many of those

disclosures no exception could be taken because, from a study of them, it would not be possible to identify the persons concerned in the trials. In these cases, jury room secrets were revealed in the main for the laudable purpose of informing would-be jurors what to expect when summoned for jury service. Thus, it is not possible to contend that every case of post-trial activity of the kind with which we are concerned must necessarily amount to a contempt. Looking at this case as a whole, we have come to the conclusion that the article in the New Statesman does not justify the title of contempt of court. That does not mean that we would not wish to see restrictions on the publication of such an article, because we would. But our duty is to say what the law is today and to see whether today the activity in question is a contempt of court. We are unable to say that it is and we would therefore refuse the application.'

[21] Taking their cue from the wish expressed by the Divisional Court, the government introduced a clause into the Contempt of Court Bill, which was designed to make it a contempt of court to publish details of a jury's deliberations or to disclose them with a view to their being published, or with knowledge that they might be published, or to solicit their disclosure with intent to publish them or to cause or enable them to be published. As a result of pressure during the course of the passage of the Bill through Parliament, the original clause was considerably amended so as to produce the wider provision which is now to be found in s 8(1). The discussions in both Houses suggest—what the trilogy of verbs in s 8(1) also suggests—that the principal concern of Parliament was to prevent jurors from being harassed to reveal their deliberations. By contrast, the case of a juror spontaneously communicating his worries about the jury's deliberations to the court authorities does not feature in the debates as a cause for concern. There is accordingly nothing, either in the circumstances preceding its enactment or in the debates in Parliament, to suggest that s 8(1) was ever intended to apply to a juror who communicated to the court authorities his worries about misconduct during the jurors' deliberations.

THE REASONING IN *R V CONNOR*

[22] In *R v Connor* the House was concerned with two matters: first, the admissibility of allegations of misconduct made by a juror after the verdict and, secondly, the power of the trial court to investigate allegations of misconduct coming to light before the jury returned their verdict. In these circumstances the House did not need to consider the position of the juror making the complaint. Nevertheless, the reasoning of the House casts light on that question.

[23] Section 8(1) specifies types of conduct which constitute contempt of court. So, if that subsection applied to a court, it would mean that the court could itself be in contempt of court. This would be a very strange notion, as the High Court of Justiciary pointed out in *Scottish Criminal Cases Review Commission, Petitioners* 2001 SLT 1198 at 1202:

'... we have some difficulty in applying the idea of contempt of court to a situation where a court itself makes inquiries, not with the aim of bringing the court in question into contempt but with the very different aim of trying to ensure that justice does not miscarry. Moreover,

> Parliament has not qualified the appeal court's powers under s 104 of the [Criminal Procedure (Scotland) Act 1995] by reference to s 8 ... In these circumstances, since the point does not actually arise for determination, we need say no more than that we reserve our opinion both as to the effect of s 8 on the appeal court's powers under s 104 of the 1995 Act and as to whether, in any event, the court would ever use those powers to inquire into a jury's deliberations.'

In this passage the High Court referred to the provision containing the Scottish appeal court's powers of investigation. The equivalent English provision is s 23(1) of the Criminal Appeal Act 1968 under which the Court of Appeal can receive evidence relating to an alleged irregularity in a trial. When enacting s 8 of the 1981 Act, Parliament did not qualify that power in s 23(1).

[24] In *R v Connor* [2004] 1 All ER 925 at [57], it therefore seemed clear to Lord Slynn of Hadley—

> 'that in enacting s 8 of the Contempt of Court Act 1981 (primarily with the intention of preventing disclosure by and to the press) Parliament did not intend to fetter the power of a court to make investigation as to the conduct of a trial. Properly construed, s 8(1) does not apply to the court of trial or to the Court of Appeal hearing an appeal in that case. It cannot properly be read as categorising what the court does in the course of its investigation as a contempt of the court itself. What was said in *R v Young (Stephen)* [1995] QB 324 at 330, [1995] 2 WLR 430 at 434 should not be followed. The court is restricted in its inquiry into what happened in the jury's deliberations, not by s 8 of the 1981 Act but by the longstanding rule of the common law.'

My noble and learned friend, Lord Steyn, dissented from the decision of the majority to dismiss the appeals, since he considered that in the cases then before the House evidence of misconduct during the deliberations of the jury was admissible. But he agreed with the majority in holding that s 8 did not impinge on the powers of the Court of Appeal. Explaining why there was no need to resort to s 3 of the 1998 Act when interpreting s 8, Lord Steyn said (at [25]):

> 'The reason is simple: the notion that the Court of Appeal could be in contempt *of itself* if it exercised the jurisdiction to hear evidence about what happened in the jury room is an absurdity. Properly construed, on ordinary principles of construction, s 8 does not impinge on the jurisdiction of the Court of Appeal to receive evidence which it regards as relevant to the disposal of an appeal. I understand this to be an agreed position between counsel. But I would, in any event, rule accordingly. Section 8 is therefore not an impediment to a consideration of the appeals before the House on their legal merits. If it had been such an impediment, it would in my view have been an appropriate case for reading down the statute under s 3. Moreover, if the issue were to arise whether a juror who reported an irregularity during jury deliberations to the Court of Appeal would commit an offence by so doing, an appropriate reading down of the statute might become necessary.'

Lord Hobhouse of Woodborough was equally clear that s 8(1) did not apply to a court. He was also prepared to hold that it did not apply to a juror who brought misconduct to the attention of a court. He said (at [139]):

> 'But it must be added that the concept of a court being in contempt of itself cannot, on any view, be correct. Thus a communication by a juror to the court itself cannot without more, eg malice, dishonesty or improper motive, be a contempt of court; nor can be an inquiry addressed by the court or an authorised agent of the court to a person and a response to the court by that person to that inquiry.'

He said further (at [146]):

> 'The question of admissibility relates not to what the judge or judges see or read but what they take into account in making a substantive decision and what they treat as legitimate evidence for the parties to use in argument. Thus a jury note or letter will, save in exceptional circumstances, always be looked at by the trial judge and, if there is an appeal, by the Court of Appeal (the legal expression is de bene esse—ie for what it is worth); its existence and character will normally be disclosed to the parties' counsel and submissions as to its significance be invited and/or responded to.'

Lord Hope of Craighead's treatment of the point is entirely consistent with that construction. He explained that counsel had suggested two possible approaches, one being based on s 3 of the 1998 Act. He continued (at [92]):

> 'I would, for my part, hold that the ordinary rules of statutory construction provide a sufficient vehicle for giving a meaning to s 8(1) of the 1981 Act which will enable the court to do what is necessary in the interests of justice. Where allegations are made which suggest that a defendant is not receiving, or did not receive, the fair trial to which he was entitled under art 6(1) of the convention, they must be considered and investigated. Any investigation must, of course, be within the limits that are set by the common law. Evidence which is struck at by the common law rule will be inadmissible, and the court should not ask for or receive such evidence. But there is nothing in the statute that expressly inhibits or restricts the court in its performance of this task, and I do not think that an intention to do this can or should be read into it.'

Lord Hobhouse agreed with the reasons given by Lord Hope (at [147]). I agreed with both of them (at [149]).

[25] The decision of the House in *R v Connor* is accordingly authority for the proposition that s 8(1) of the 1981 Act does not apply to a court when it considers a juror's complaints about misconduct during the jury's deliberations, since a court cannot be in contempt of itself. By necessary implication, the complaint which the court may lawfully consider must itself be lawful. Therefore, as Lord Hobhouse held, a juror who discloses to the court what is said or done during the jury's deliberations with the intention of prompting an investigation is not, without more, eg malice, dishonesty or improper motive, in contempt of court in terms of s 8(1). The subsection no more applies to the juror than to the court. The background to the enactment of the provision is wholly consistent with that interpretation, which can be

reached on ordinary principles of statutory construction without resort to s 3 of the 1998 Act.

APPLYING THE LAW TO THIS CASE

[26] It is not disputed that the appellant genuinely believed that there had been a miscarriage of justice due to what he perceived to be failings on the part of his fellow jurors. Accordingly, if he had written his letter to the Crown Court or to the Court of Appeal, he would not have been in contempt of court in terms of s 8(1). During the hearing of the appeal before the House, Mr Havers accepted this. Mr Starmer sought to take the matter further, however, by arguing that, although the appellant had not written to the court directly, he had written to the defendants' mother with an intention that the matter should be raised by lawyers presenting an appeal to the Court of Appeal on their behalf. Even though he had chosen this indirect route, the appellant was intending to disclose the matter to the appeal court. This was, Mr Starmer submitted, sufficient to exclude him from the scope of s 8(1).

[27] Frequently, what can be done directly can also be done indirectly and to hold otherwise would be to promote form over substance. For example, if instead of writing to the trial judge or to the appeal court, the appellant had spoken or written to the jury bailiff or to the clerk of court, he would not have been in contempt. Similarly, if he had sent a sealed letter containing his complaint to the defendants' solicitors or counsel, or even to a citizens' advice bureau or similar organisation, and had asked them to forward it unopened to the appropriate court authorities, any disclosures in the letter would have been disclosures to the court and so outside the terms of s 8(1). There may be other such cases.

[28] What the appellant actually did was very different. By writing the letter to the defendants' mother he was not merely disclosing the jurors' deliberations to the court authorities by an indirect route; on the contrary, he was disclosing them to a third party who had no authority to receive disclosures on behalf of the court and who might, or might not, pass the contents of the letter on to the court. Indeed, the closing words of the letter, where the appellant urged Mrs Anderson not to show it to the police, to the judge or to prosecuting counsel, are scarcely consistent with an intention on the appellant's part that she should, in effect, act as a conduit between him and the court authorities. Moreover, the appellant had no control over what Mrs Anderson did with his letter. She could have passed it on to anyone, including the media. It does not lie in his mouth to argue that, unlike him, Mrs Anderson or anyone else would necessarily have been restrained by s 8(1). Fortunately, thanks to her good sense, all that happened was that the jurors were interviewed by the police and the appellant's—doubtless very one-sided—version of their deliberations was not given any wider circulation. By his action the appellant created all the risks to the confidentiality of the jurors' deliberations which s 8(1) was designed to prevent. In these circumstances s 8(1) applied to the appellant and he was accordingly—as he himself realised at the time—in contempt of court.

SECTION 3 OF THE 1998 ACT

[29] As I have already explained, it was not disputed that the appellant could, if appropriate, invoke ss 3 and 4 of the 1998 Act. In my view, however, neither section avails him in this case. The appellant's rights under art 10(1) were, of

course, engaged but in terms of art 10(2) the right to freedom of expression can be subject to a restriction which is prescribed by law and is necessary in a democratic society 'for preventing the disclosure of information received in confidence'. In *Gregory v UK* (1998) 25 EHRR 577 at 594 (para 44), the European Court acknowledged that the rule governing the secrecy of jury deliberations is a crucial and legitimate feature of English trial law. Therefore, in so far as s 8(1) serves to reinforce that rule by making it an offence for a juror to disclose the information which he receives in confidence from his fellow jurors, the objective is sufficiently important to justify limiting the juror's freedom of expression in this way. The provision is rationally connected to its aim and the means adopted are no more than is reasonably necessary, since the restriction does not apply to bona fide disclosures to the court authorities. The measure is accordingly 'reasonably justifiable in a democratic society': see *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684. Mr Starmer indeed accepted that, once the Practice Direction came into force, s 8(1) did not infringe a juror's art 10 rights, since he would know that he could draw his worries to the attention of the trial judge before the jury returned their verdict.

[30] He pointed out, however, that when the appellant served as a juror, the material shown to him suggested that the ban on disclosure was absolute—and that indeed was the position as generally understood following the earlier rulings of the Court of Appeal. Therefore, he argued, the appellant did not know, and could not have been expected to know, that he could contact the trial judge or the Court of Appeal. In those circumstances the law was not sufficiently clear and there was a disproportionate interference with the appellant's freedom of expression. Section 8(1) should therefore be interpreted as being subject to a defence that it did not apply to a juror who disclosed the jury's deliberations to a third party rather than to the court, if the juror was motivated by a desire to expose a miscarriage of justice and he did not contact the court authorities because he had been told that he could not disclose the deliberations to anyone.

[31] I would reject that argument. Section 3 of the 1998 Act comes into play only where it is needed in order to make a legislative provision compatible with a convention right. As Mr Starmer accepts, however, when properly interpreted according to domestic canons of construction, s 8(1) is compatible with art 10 of the convention. That being so, s 3 does not apply. In reality Mr Starmer is complaining about the warnings to jurors, which were based on a misinterpretation of s 8(1). But the terms of those warnings could not affect either the interpretation of the statute or the appellant's guilt, one way or the other. At most, they might have been relevant to mitigation. In fact, however, the warnings are irrelevant since, by writing the letter, the appellant showed that he was not restrained by being warned that he would be in contempt of court if he disclosed the jury's deliberations to anyone. That being so, the warnings would not have stopped him from contacting the court authorities, or consulting a lawyer about the matter, if he had wanted to. Instead, he deliberately chose to write to Mrs Anderson, even though—as the letter makes clear—he was well aware that in doing so he was in contempt of court.

[32] For these reasons I would dismiss the appeal.

BARONESS HALE OF RICHMOND.

[33] My Lords, for the reasons given in the opinion of my noble and learned friend Lord Rodger of Earlsferry, with which I agree, I too would dismiss this appeal. *a*

LORD CARSWELL.

[34] My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Rodger of Earlsferry. For the reasons which he has given I too would dismiss the appeal. *b*

Appeal dismissed.

Dilys Tausz Barrister.

Vasiliou v Hajigeorgiou

[2005] EWCA Civ 236

COURT OF APPEAL, CIVIL DIVISION

BROOKE, DYSON AND GAGE LJJ

24 FEBRUARY, 10 MARCH 2005

Practice – Evidence – Expert evidence – Disclosure to other parties – Order made during case management conference giving permission to each party to instruct expert in named field – Defendant instructing one expert then deciding to rely on a second expert – Judge deciding permission limited to first expert – Judge giving permission for defendant to rely on second expert provided report of first expert disclosed – Whether original order identifying first expert – Whether imposing condition as to disclosure curtailing right to legal professional privilege – CPR 35.4.

In a case management conference in the county court, the defendant identified W as an expert who would be able to address the issue of damages for breach of the defendant's covenant of quiet enjoyment in a lease of premises which were intended for use as a restaurant. The judge ordered that both parties had permission, if so advised, to instruct one expert each in the specialism of restaurant valuation and profitability and that the parties had to serve on each other any expert report. W prepared what was described as a draft interim report. Subsequently, it was decided that the defendant did not wish to rely on W as his expert witness, and N was instructed to prepare an expert's report. When the matter came before a second judge, it was held that the defendant needed permission to rely on N's report as the original order only gave the defendant permission to rely on the evidence of W and no other expert. He stated that there was mention of W in the evidence that led to the order. Thereafter, having held that permission was required, the judge decided he would give the defendant permission to rely on the evidence of N, but only on condition that the report of W was disclosed to the claimant. The defendant appealed with the permission of the judge. He first drew attention to the fact that CPR 35.4[a] provided that permission to call an expert or put in evidence an expert's report should be in relation to 'the expert named or the field identified' so that as the order had not named W, the judge should have held that it did not give the defendant permission only to instruct W. Second, even if that was wrong, the judge should not have made it a condition of granting permission for N to be called as a substitute expert that the defendant disclose W's report. He argued that the report of W was privileged and the privilege had not been waived by the defendant. Legal professional privilege was a fundamental right which could only be curtailed by Parliament. The effect of the judge's order was to give the defendant the choice of either surrendering his right to privilege in W's report or being prevented altogether from calling expert evidence at the assessment of damages in a case in which the defendant was facing a substantial claim for loss of profits. The claimant argued that once the defendant had instructed W he had implemented the order and, if the defendant wanted to instruct a second expert

a CPR 35.4 is set out at [13], below

by virtue of CPR 35.4, he needed permission of the court as the order did not envisage the instruction of a succession of experts.

Held - The terms of the order did not of themselves require the defendant to obtain the permission of the court to rely on the evidence of N. Despite the evidence given about W the order plainly and unequivocally identified the experts only by their field of expertise. Furthermore, even if it had been made explicitly clear that the defendant was asking for permission to rely on the evidence of W, it would not have been perverse to make an order simply giving permission to rely on one expert in the field of restaurant valuation and profitability. Accordingly, the terms of the order did not of themselves require the defendant to obtain permission of the court to rely on the evidence of N. As to the claimant's argument, the court did not have power to give permission for the instruction of experts. CPR 35.4 contained rules which governed the court's powers to restrict expert evidence. They did not refer to the 'instruction of experts'. They provided that no party might 'call' or 'put in evidence an expert's report' without the court's permission. Therefore, the words in the order 'permission, if so advised, to instruct one expert' should be construed as meaning 'permission, if so advised, to call and put in evidence a report from one expert'. It followed that the fact that W had been instructed did not of itself require the defendant to seek the permission of the court to instruct N. Accordingly, the appeal would be allowed (see [16]–[18], [20], below).

Per curiam. The court can control the conduct of litigation in general, and the giving of expert evidence in particular. Expert shopping is undesirable and, wherever possible, the court should use its powers to prevent it. It should be emphasised that, if a party needs the permission of the court to rely on expert witness A in place of expert witness B, the court has the power to give permission on condition that B's report is disclosed to the other party or parties, and that such a condition should usually be imposed. In imposing such a condition, the court is not abrogating or emasculating legal professional privilege; it is merely saying that, if a party seeks the court's permission to rely on a substitute expert, it will be required to waive privilege in the first expert's report as a condition of being permitted to do so. Furthermore, the condition of disclosure does not relate only to the first expert's final report, but also to a draft report containing the substance of his or her opinion (see [29]–[30], below).

Notes

For restrictions on expert evidence and disclosure of expert reports, see 17(1) *Halsbury's Laws* (4th edn reissue) paras 754 and 772.

Appeal

The defendant, Nicos Varnavas Hajigeorgiou, appealed, with permission of Judge Cowell, from his decision in the course of a case management conference in the Central London County Court on 18 October 2004, in an action brought by the claimant Vassos Michael Vasiliou for breach of the defendant's covenant of quiet enjoyment of premises intended to be used as a restaurant, whereby he ruled that an order made by Judge Levy QC, dated 21 July 2004 in relation to expert evidence, gave the defendant permission to rely on the evidence of Mr Trevor Watson, BSc, MBA, FRICS, and no other expert in restaurant valuation and profitability, so that the defendant required the court's permission

to rely on another expert in that field. The facts are set out in the judgment of the court.

Cases referred to in judgment

Beck v Ministry of Defence [2003] EWCA Civ 1043, [2003] All ER (D) 406 (Jun).

Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc [2001] EWCA Civ 414, [2001] RPC 913, [2001] All ER (D) 330 (Mar).

Jackson v Marley Davenport Ltd [2004] EWCA Civ 1225, [2004] 1 WLR 2926.

Lane v Willis, Lane v Beach (Executor of estate of George William Willis (decd)) [1972] All ER 430, [1972] 1 WLR 326, CA.

Ivan Clarke (instructed by *CP Christou*) for the appellant.

Vassos Michael Vasiliou appeared in person.

Cur adv vult

10 March 2005. The following judgment of the court was delivered.

DYSON LJ.

[1] This is an appeal from the decision of Judge Cowell who in the course of a case management conference at the Central London County Court gave certain directions in relation to expert evidence which the defendant seeks to challenge. The judge gave permission to appeal because he considered that his decision raises an issue of practice and procedure affecting legal professional privilege which is of some importance.

[2] The claimant started these proceedings on 1 August 2002. The details of the claim are immaterial for present purposes. Suffice it to say that the claimant seeks damages for breach of the defendant's covenant of quiet enjoyment in a lease of premises at Green Lanes, Palmers Green, London N13 which were intended to be used as a restaurant. On 7 April 2004, Judge Levy QC gave judgment in favour of the claimant on issues of liability and ordered an assessment of damages.

[3] A case management conference was fixed for 21 July. In anticipation of the hearing, Mr Christou (the defendant's solicitor) produced a witness statement in which he set out the defendant's proposed directions. At para 22, he identified a number of issues which, he contended, only an expert could address. These included the value of the restaurant and what profit the restaurant would have made if trading had not been restricted as a result of the defendant's breach of covenant. He continued:

> '23. I believe it is not in dispute that there is a tremendous lack of documentation on the part of the Claimant regarding the acquisition and refurbishment of the restaurant. In his evidence the Claimant stated that he had paid builders and contractors some £80,000.00 in cash and did not keep receipts and that in previous restaurants he had run again he was in the habit of not keeping receipts or having proper paperwork. The Claimant had no formal business plan and no formal financial arrangements. This makes it essential in my respectful opinion that these issues should be properly addressed by a restaurant valuation specialist who has given expert evidence on profitability cases.

24. The Defendant has identified an expert who [it] is anticipated will be able to deal with the above issues. The expert is Mr Trevor Watson, BSc, MBA, FRICS. A copy of Mr Watson's CV is exhibited hereto as CPC-10. Mr Watson has an impressive career history and the sample expert witness appointments specified in his CV cover, in my view, this precise situation including an expert appointment assessing the turnover of a fast food restaurant without formal accounting information.

25. Mr Watson's initial fee to provide the report will be £4,000 plus VAT. Thereafter fees are based upon an hourly rate of £250 per hour plus VAT. In view of the costs claimed by the Claimant so far, which approach £150,000 this is not viewed as a disproportionate expense. Nor can such a criticism be levied when taking into account the size of the Claimant's claimed losses as voluntarily quantified.

26. If the Claimant instructs an expert then it is likely that he would have to incur similar levels of expert's fees.

27. The Claimant's own position as to expert evidence is not clear. However the Defendant concedes that if the Claimant should wish in turn to rely upon similar expert evidence, then there could be no objection in that respect.

28. It was hoped that Mr Watson's report would be available by the beginning of July. As the Claimants have raised an issue as to whether there should be expert evidence on this point, the matter has been put on hold until the issue of leave is dealt with by this Honourable Court. If leave is granted the expert's report can be ready by the end of July 2004.'

[4] Mr Christou exhibited a detailed curriculum vitae of Mr Watson.

[5] The case management conference took place before Judge Levy on 21 July. It was common ground that each party should have permission to rely on an expert in the field of restaurant valuation and profitability, and we were told that there was little, if any, discussion about this before the judge. At the end of the hearing, counsel who appeared on each side prepared a draft order which they were satisfied accurately reflected what the judge had decided and/or the agreed directions which had been approved by the judge. The terms of the draft agreed by counsel were incorporated in the court order and included the following directions:

'3. Both parties do have permission, if so advised, to instruct one expert each in the specialism of restaurant valuation and profitability.

4. The Defendant do serve on the Claimant any expert's report pursuant to the permission granted under paragraph 3 of this order by 4pm on 4th October 2004.

5. The Claimant do serve on the Defendant any expert's report pursuant to the permission granted under paragraph 3 of this Order by 4pm on 31st October 2004.

6. The case be listed for a Pre Trial Review before His Honour Judge Levy QC on 19th November 2004, with a time estimate of half day.

7. The Trial of Assessment of Damages do take place on 13th December 2004 before His Honour Judge Levy QC with a time estimate of 5 days.'

[6] Difficulties were encountered in implementing these directions. They led Mr Fleming (litigation manager for the claimant's solicitors) to prepare a witness statement dated 28 September in which he described the problems. It is only

necessary to refer to what he said about the defendant's expert witness. He said that Mr Watson must have been appointed by the defendant as his expert, because some time after 30 July Mr Watson had attended the claimant's premises by appointment and had carried out an inspection. He went on to say that on 20 September, the defendant's solicitors wrote to the claimant's solicitors asking for access to be afforded to the claimant's premises the following day for inspection by 'a further expert, Mr Richard Negus, of Fleurets'. Correspondence ensued in which the claimant's solicitors asked why another expert had been appointed, but no explanation was forthcoming. Mr Fleming also said that on 27 September he had telephoned Mr Watson and told him that the defendant's solicitors wished to instruct another expert: Mr Watson expressed surprise, saying that he knew of no reason which prevented him from acting, and that indeed he had already prepared his evidence.

[7] This led Mr Fleming to submit at para 44 of his statement that (a) the defendant should not have permission to adduce the evidence of any further expert without an explanation, and (b) since Mr Watson's evidence was not privileged and may assist the court, disclosure of it should be ordered.

[8] Mr Christou responded in a witness statement of 11 October. He said that Mr Watson had been appointed and had inspected the premises. He had prepared what was described as a 'draft interim report'. Subsequently, it had been decided that the defendant did not wish to rely on Mr Watson as his expert witness, and Mr Negus was instructed to prepare an expert's report. Mr Negus was willing and able to prepare a report within the timescale prescribed by the order of 21 July. Mr Christou said that he was not at liberty to disclose why the decision had been taken to instruct Mr Negus. He said that, since the order had not limited permission to a named expert, the defendant was entitled to change experts without seeking the permission of the court. But if that was wrong, then he asked the court for permission to rely on the report of Mr Negus, and for an order that he be granted reasonable access to the premises so that he could make any necessary amendments to his report in accordance with his duty to the court.

[9] That was how matters stood when the case came before Judge Cowell on 18 October.

THE JUDGMENT

[10] First, the judge held that the defendant did need permission to rely on the report of Mr Negus. He decided that the order of 21 July gave the defendant permission to rely on the evidence of Mr Watson and no other expert in restaurant valuation and profitability, so that the defendant required the court's permission to rely on another expert in that field. At para 33 of the judgment, he said:

> 'There is no entitlement to call an expert in our law. There was mention of Mr Watson in the evidence that led to the order of 21 July 2004. It is true that the order does not name him, but it is not certain that the same order would have been made had not para 24 of the statement of Mr Christou extolled the virtues of Mr Watson. What was intended, even if not specified in the order, was that Mr Watson would, as indeed he did, inspect and report. It must always be borne in mind that county court orders are often hurriedly done, and often without any drafting or checking by the judge.'

[11] Secondly, having held that permission was required, he decided that he would give the defendant permission to rely on the evidence of Mr Negus, but

only on condition that the report of Mr Watson was disclosed to the claimant. In deciding to impose this condition, the judge relied heavily on the unreported decision of this court in *Beck v Ministry of Defence* [2003] EWCA Civ 1043, [2003] All ER (D) 406 (Jun) to which we shall refer later.

[12] On behalf of the defendant, Mr Clarke submits that the judge reached the wrong conclusion on both issues. First, the judge should have held that, properly construed, the order of 21 July gave permission to both parties to instruct an expert in restaurant valuation and profitability: it did not give the defendant permission only to instruct Mr Watson. Second, even if that is wrong, the judge should not have made it a condition of granting permission for Mr Negus to be called as a substitute expert that the defendant disclose Mr Watson's report.

CPR 35.4

[13] CPR 35.4 is headed 'Court's power to restrict expert evidence' and provides:

> '(1) No party may call an expert or put in evidence an expert's report without the court's permission.
>
> (2) When a party applies for permission under this rule he must identify—(a) the field in which he wishes to rely on expert evidence; and (b) where practicable the expert in that field on whose evidence he wishes to rely.
>
> (3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).
>
> (4) The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.'

THE FIRST ISSUE

[14] Mr Clarke's submission is quite simple. He draws attention to the fact that r 35.4(3) provides that permission to call an expert or put in evidence an expert's report shall be in relation to 'the expert named or the field identified'. In the present case, there can be no doubt that the order did not identify a named expert; it identified the field of expertise of the expert for whom permission was given. If the order had named Mr Watson, Mr Clarke concedes that the defendant would have had to apply to the court for permission to rely on Mr Negus. It cannot be argued that the order was not correctly drawn, nor was it so argued before the judge. The order followed the wording of the draft agreed between counsel and submitted to the associate after the conclusion of the case management conference.

[15] Mr Vasiliou (who was ably assisted in his submissions by Mr Fleming) contends that Judge Cowell was right to say that what was plainly intended by Judge Levy was to give the defendant permission to rely on the evidence of Mr Watson. He refers to *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc* [2001] EWCA Civ 414, [2001] RPC 913 in support of the proposition that it is possible under the slip rule to amend an order so as to give effect to the intention of the court. CPR 40.12(1) provides that '[t]he court may at any time correct an accidental slip or omission in a judgment or order'.

[16] The judge seems to have construed the order as giving the defendant permission to rely on the evidence of Mr Watson, but in our judgment the order plainly and unequivocally identifies the experts only by their field of expertise. Moreover, we cannot accept the submission that there was an accidental slip or

error here. The terms of the order were agreed by counsel. Despite the details given by Mr Christou about Mr Watson and his rates of charging, it is not surprising that the parties agreed, and the judge approved, an order giving the defendant permission to rely on an expert in Mr Watson's field of expertise, rather than on Mr Watson by name. An order giving the defendant permission to rely on an expert in Mr Watson's field would have served his purposes just as well. The significance of giving the details of Mr Watson's expertise could have been no more than evidence of the fact that there are experts in this field. The relevance of Mr Christou's evidence of charging rates was not only to indicate that Mr Watson's rates were reasonable and not disproportionate, but also to show that, if the claimant were to instruct an expert, his or her fees were also likely to be reasonable and proportionate.

[17] Even if it had been made explicitly clear that the defendant was asking for permission to rely on the evidence of Mr Watson, it would not have been perverse to make an order simply giving permission to rely on one expert in the field of restaurant valuation and profitability (ie the expertise of Mr Watson). The mere fact that such an order was made in that situation would not, of itself, suggest that the order was an accidental slip on the grounds that it did not give effect to the intention of the judge who made the order.

[18] We do not find it at all surprising that the order did not identify the name of the expert who could be relied on by the defendant in circumstances where he could not do the same in relation to the claimant. It would have been *possible* to make an order giving the defendant permission to call and rely on the report of Mr Watson, and giving the claimant permission to call and rely on the report of an unnamed expert in the field of restaurant valuation and profitability. But that would have been an unusual order to make. Judge Levy may well have taken the view that, if he could not restrict the claimant to a named expert, then it would not be right to restrict the defendant to a named expert. In these circumstances, we find it impossible to hold that the failure to name Mr Watson in the order of 21 July was an accidental slip.

[19] It follows that in disagreement with the judge, we consider that the terms of the order of 21 July did not of themselves require the defendant to obtain the permission of the court to rely on the evidence of Mr Negus. Moreover, as we have pointed out, the judge was told that the defendant would have been able to serve the report of Mr Negus within the time specified by the order of 21 July.

WERE THERE OTHER REASONS FOR NEEDING PERMISSION TO RELY ON MR NEGUS?

[20] Two other possible reasons for holding that the defendant needed permission to rely on Mr Negus were canvassed before us. First, Mr Fleming submitted that, once the defendant had instructed Mr Watson, he had implemented para 3 of the order of 21 July. The order had been carried into effect and, if the defendant wanted to instruct a second expert, he needed the permission of the court. The order did not envisage the instruction of a succession of experts. In our judgment, the court did not have power to give permission for the 'instruction' of experts. Rule 35.4 contains the rules which govern the court's power to restrict expert evidence. They do not refer to the 'instruction' of experts. They provide that no party may 'call' or 'put in evidence an expert's report' without the court's permission. It seems to us, therefore, that the words in the order 'permission, if so advised, to instruct one expert' should be construed as meaning 'permission, if so advised, to call and put in evidence a report from one expert'. If that is right, it must follow that the fact that

Mr Watson had been instructed did not of itself require the defendant to seek the permission of the court to instruct Mr Negus.

[21] Secondly, the question of permission arose in the context of a request for an inspection of the claimant's restaurant. The claimant did not in fact object to the appointment of Mr Negus on the grounds that Mr Negus wanted to inspect the restaurant, and that it was unreasonable to require the claimant to submit to a second inspection. Mr Fleming confirmed that this was not the basis of the objection. Moreover, as Mr Clarke pointed out, if the right to inspect had been denied to Mr Negus, this would not have prevented him from writing his report. If the court had indicated that it would give permission for Mr Negus to inspect the restaurant only on condition that the defendant disclosed Mr Watson's report, it is clear that the defendant would have instructed Mr Negus to write his report without the benefit of an inspection rather than disclose Mr Watson's report. In any event, we consider that to impose such a requirement as a condition of giving Mr Negus permission to inspect the premises would have been unreasonable and disproportionate. The circumstances here are a far cry from a personal injury case where a second expert wishes to conduct a second medical examination on the claimant, and issues such as those discussed in *Lane v Willis, Lane v Beach (Executor of estate of George William Willis (decd))* [1972] All ER 430, [1972] 1 WLR 326 arise. We shall say no more about the question of inspection. But, having referred to the possibility of the court imposing a condition on the grant of permission to rely on a second expert that the party seeking permission should disclose the report of the first expert, we shall now turn to the second issue. If our conclusion on the first issue is correct, then, strictly speaking, the second issue does not arise. But in case we are wrong on the first issue, and since the second issue was argued before us and (as the judge recognised) is of general importance, we shall deal with it.

THE SECOND ISSUE

[22] We shall approach this on the footing that the order of 21 July gave permission to the defendant to rely on the evidence of a named expert, Mr Watson, and that the defendant needed the permission of the court to rely on the evidence of Mr Negus in place of Mr Watson. As we have seen, the judge decided that he would give permission to the defendant to call Mr Negus and rely on his report on condition that the report of Mr Watson was disclosed to the claimant.

[23] Mr Clarke submits that this decision was wrong in principle. He argues as follows. The report of Mr Watson was privileged and the privilege had not been waived by the defendant. Legal professional privilege is a fundamental right which can only be curtailed by Parliament. The effect of the judge's order was to give the defendant the choice of either surrendering his right to privilege in Mr Watson's report (a report which, it may reasonably be inferred, was unfavourable to the defendant's case) or being prevented altogether from calling expert evidence at the assessment of damages in a case in which the defendant was facing a substantial claim for loss of profits. The practical effect of such an order was to compel the defendant to disclose Mr Watson's report and deprive him of his right to privilege in it. Mr Clarke submits that the case of *Beck v Ministry of Defence* [2003] EWCA Civ 1043 is distinguishable on its facts or was wrongly decided.

[24] In *Beck*'s case, the claim against the Ministry of Defence was for damages for psychiatric injury. The court gave permission to each party to call one

(unnamed) psychiatrist. The defendant's first psychiatrist examined the claimant and produced a report which the defendant considered to be unsatisfactory. For this and other reasons, the defendant lost confidence in the expert. They asked the claimant's solicitors for facilities for a further psychiatric examination by another expert. This request was refused.

[25] The defendant applied to the court for permission to change experts. No point seems to have been taken that the defendant did not need the permission of the court to change experts, because the court had not given permission by reference to named experts. The argument proceeded on the basis that the question was 'whether it can ever be appropriate to allow a party to substitute one expert for another without, at some stage at least, being required to disclose the first expert's report' (see the judgment of Simon Brown LJ at [2]). To that question, Simon Brown LJ gave this resounding answer:

> '[26] I do not say that there could never be a case where it would be appropriate to allow a defendant to instruct a fresh expert without being required at any stage to disclose an earlier expert's report. For my part, however, I find it difficult to imagine any circumstances in which that would be properly permissible and certainly, to my mind, no such circumstances exist here.
>
> [27] It seems to me that there clearly ought to be a condition attached to the order here permitting the defendants to instruct a fresh psychiatrist; namely that they should, on taking up such permission, forthwith disclose Dr Goodhead's report upon which they no longer seek to rely.'

Ward LJ said:

> '[30] Nevertheless, expert shopping is to be discouraged, and a check against possible abuse is to require disclosure of the abandoned report as a condition to try again. I agree, for the reasons given by Simon Brown LJ, that the appeal should be allowed to that limited extent.'

Lord Phillips of Worth Matravers MR said:

> '[31] A claimant who brings proceedings for personal injury, whether physical or psychiatric, must accept that he is likely to have to submit to a medical examination by an expert instructed by the defendant. A claimant can properly object, however, to being subjected to a second examination without good reason.
>
> [32] In this case the reason advanced for subjecting Mr Beck to a second examination is that the first expert instructed by the defendants has proved unsatisfactory. In my judgment a claimant can reasonably object to having to be examined again if this is, or may be, because the conclusions reached by the first expert have proved more favourable to him than the defendants had anticipated.
>
> [33] I do not consider that the court should order a second examination or stay proceedings pending a second examination by a new expert if this is a possibility. So to order would be to permit the possibility of expert shopping which is undesirable. In this case, on the evidence of the defendants' solicitor, it is not said that Mr Goodhead's conclusions are unfavourable to the defendants, but that the form or manner in which those conclusions have been expressed in the report that he has prepared are so unsatisfactory as to have resulted in a loss of confidence in him as an expert.

[34] I do not consider that a claimant should be required to take such an assertion on trust. Equally, I can accept that it may not be reasonable, and has been found not to be reasonable in this case, to expect defendants to advance specific criticisms of an expert's report at the time when the possibility remains that the defendants will be driven to rely upon that expert because the application to replace him has been refused.

[35] The answer in this case, and in any case where a situation similar arises, is that proposed by Simon Brown LJ that the permission to instruct a new expert should be on terms that the report of the previous expert be disclosed. Such a course should both prevent the practice of expert shopping, and provide a claimant in the position of Mr Beck with the reassurance that the process of the court is not being abused. In this way justice will be seen to be done.

[36] For those reasons I concur in the solution to this appeal proposed by Simon Brown LJ.'

[26] It is surprising that this important decision has not been reported. Mr Clarke says that it was wrongly decided. He submits that the court did not appreciate that the effect of its decision was to abrogate or at any rate emasculate privilege. Alternatively, he seeks to distinguish it from the present case on two grounds. First, in that case, the defendant was prepared to disclose the first report if it was granted permission to call the second expert. Second, the defendant put forward an explanation as to why it wished to instruct a second expert and the condition was imposed so that the claimant could see that the explanation was true.

[27] In our judgment, these factual differences are immaterial to the point of principle that was decided in *Beck*'s case which is encapsulated in para 26 of Simon Brown LJ's judgment (see [25], above) and are not a sufficient basis for distinguishing that case from the present. The court approached the issue that was before it on the footing that the defendant required permission in order to rely on a second expert. That is the basis on which we are approaching the second issue in the present case. The question of principle that was decided in *Beck*'s case was that the court has the power to give permission to a party to rely on a second (replacement) expert which it should usually exercise only on condition that the report of the first expert is disclosed. This decision is binding on us. We cannot accept that the decision is wrong or that it is conceivable that the court was unaware of the fact that reports prepared for the purposes of litigation are, until they are disclosed, protected by privilege.

[28] Clear support for this proposition is to be found in *Jackson v Marley Davenport Ltd* [2004] EWCA Civ 1225, [2004] 1 WLR 2926. The issue in that case was whether, if an expert makes an early report to his client before he makes the report which is later disclosed in the litigation, the law requires that the earlier report be disclosed. Longmore LJ said:

'[13] There can be no doubt that, if an expert makes a report for the purpose of a party's legal advisers being able to give legal advice to their client, or for discussion in a conference of a party's legal advisers, such a report is the subject matter of litigation privilege at the time it is made. It has come into existence for the purposes of litigation. It is common for drafts of expert reports to be circulated among a party's advisers before a final report is prepared for exchange with other side. Such initial reports are privileged.

a [14] I cannot believe that the Civil Procedure Rules were intended to override that privilege. CPR r 35.5 provides that expert evidence is to be given in a report unless the court directs otherwise. CPR r 35.10 then changed the previous law by providing in paragraph (3) that the expert's report must state the substance of all material (whether written or oral instructions) on the basis on which the report was written. By b paragraph (4) it is, moreover, expressly provided that these instructions shall not be privileged. But the reference in rule 35.10 to "the expert's report" is, and must be, a reference to the expert's intended evidence, not to earlier and privileged drafts of what may or may not in due course become the expert's evidence.'

c And Peter Gibson LJ said:

'[22] It could have been provided in the Civil Procedure Rules that the privilege attaching to documents coming into being with a view to litigation should not apply to any document prepared by an expert with a d view to producing a report. But that is not the way Part 35 is drafted. On the contrary, Part 35 makes clear how limited is the waiver of privilege when the expert report is put forward by a party with a view to reliance on it. The order providing for an expert's report does not itself waive privilege in any document. That only occurs once the party decides that the particular report on which he wishes to rely should be disclosed.'

e

[29] The principle established in *Beck*'s case is important. It is an example of the way in which the court will control the conduct of litigation in general, and the giving of expert evidence in particular. Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it. It needs to f be emphasised that, if a party needs the permission of the court to rely on expert witness A in place of expert witness B, the court has the power to give permission on condition that B's report is disclosed to the other party or parties, and that such a condition will usually be imposed. In imposing such a condition, the court is not abrogating or emasculating legal professional privilege; it is merely saying that, if a party seeks the court's permission to rely g on a substitute expert, it will be required to waive privilege in the first expert's report as a condition of being permitted to do so.

[30] A question that was not considered in *Beck*'s case is whether the condition of disclosure should relate only to the first expert's final report, or whether it should also relate to his or her earlier draft reports. In our view, it h should not only apply to the first expert's 'final' report, if by that is meant the report signed by the first expert as his or her report for disclosure. It should apply at least to the first expert's report(s) containing the substance of his or her opinion.

[31] In the present case, the first expert had produced a 'draft interim j report'. It is reasonable to infer from the defendant's wish to change experts and refusal to provide an explanation that the draft interim report contains the substance of the first expert's opinion on some or all of the remaining issues in the case. In these circumstances, we consider that the judge was entirely justified in deciding that, if the defendant needed the permission of the court to rely on the evidence of Mr Negus, it should be a condition that he disclose to the claimant Mr Watson's draft interim report.

CONCLUSION

[32] For the reasons given earlier, the defendant did not need the permission of the court to rely on the evidence of Mr Negus. But if he did need that permission, the judge was right to impose the condition that he imposed. But in view of our conclusion on the first issue, in our opinion this appeal should be allowed.

Appeal allowed.

Dilys Tausz Barrister.

R (on the application of Limbuela) v Secretary of State for the Home Department

R (on the application of Tesema) v Secretary of State for the Home Department

R (on the application of Adam) v Secretary of State for the Home Department

[2004] EWCA Civ 540

COURT OF APPEAL, CIVIL DIVISION
LAWS, CARNWATH AND JACOB LJJ
23, 24 MARCH, 21 MAY 2004

Immigration – Asylum seeker – Asylum support – Inhuman or degrading treatment – Failure to claim asylum as soon as reasonably practicable disentitling destitute asylum seeker from support – Whether inhuman or degrading treatment – Human Rights Act 1998, Sch 1, Pt I, art 3 – Nationality, Immigration and Asylum Act 2002, s 55(1), (5)(a).

In three separate cases the claimant asylum seekers had claimed to be destitute and the Secretary of State had refused them support under the relevant section of the Immigration and Asylum Act 1999, on the bases that they had not claimed asylum as soon as was reasonably practicable and support was therefore prohibited by s 55(1)[a] of the Nationality, Immigration and Asylum Act 2002, and they did not fall within s 55(5)(a) of the 2002 Act which empowered the Secretary of State, as an exception to the general prohibition on providing support, to exercise his powers to the extent necessary for the purpose of avoiding a breach of a person's convention rights as defined in the Human Rights Act 1998. The claimants each sought and was granted judicial review of the Secretary of State's decision, on the ground that his refusal breached art 3[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act), which provided, inter alia, that no one should be subjected to inhuman or degrading treatment, as their circumstances were such that a breach of art 3 was imminent. The Secretary of State appealed, requesting guidance from the Court of Appeal. At the time of the hearing of the conjoined appeals there were over 650 cases of the same kind before the Administrative Court. The housing charity, Shelter, appeared as intervener.

Held – The appeals would be dismissed (Laws LJ dissenting) for the following reasons.

(1) Per Carnwath LJ. Intense physical or mental suffering or humiliation of a degree sufficient to break moral or physical resistance would engage art 3 of the

a Section 55, so far as material, is set out at [4], below
b Article 3, so far as material, is set out at [5], below

convention but it was not necessary for an asylum seeker to show the actual onset of severe illness or suffering. If the evidence established clearly that charitable support in practice was not available, and that he had no other means of fending for himself, the presumption would be that severe suffering would imminently follow, and he would have done enough to show that he was verging on the necessary degree of severity. The scale of the potential problem meant that the instant cases could not be looked at in isolation. Once it was accepted that art 3 was potentially in play, it followed that the state had some responsibility in the matter. If the scale of the problem was such that the system was unable to cope then it was the responsibility of the state to take reasonable measures to ensure that it could cope. That was not inconsistent with s 55(5)(a) of the 2002 Act. On its face the section appeared to be directed to avoiding a breach in an individual case, but if the scale of the problem was such that individual breaches could only be avoided by more general action, such action could and had to be taken 'for the purpose' of avoiding the individual breaches. Although on the evidence before the court there was no reason to interfere with the judges' decisions in the instant individual cases, viewed as such, that approach was too narrow, given the circumstances. Assuming that none of the claimants in the instant cases, having the benefit of interim relief, was currently verging on art 3 suffering, it was to be anticipated, if the appeals were allowed, that they and up to 600 others would become dependent on charitable support. It was a practical certainty that many would not be able to find any charitable support or other lawful means of fending for themselves (see [88], [95], [97], [120]–[122], [136]–[139]); *R (on the application of Q) v Secretary of State for the Home Dept* [2003] 2 All ER 905 followed, *R (on the application of T) v Secretary of State for the Home Dept* [2004] HLR 254 considered.

(2) Per Jacob LJ. It was not appropriate to deal with the instant cases simply on the materials concerning the three claimants. The evidence showed that if a number in the order of 500 or more people were put on the streets, without money and with no entitlement to earn any, there was a near certainty that a substantial proportion would fall below the art 3 threshold. It followed that although it might not be possible to say of any particular individual that there was more than a very real risk that denial of food and shelter would take that individual across the art 3 threshold, it was possible to say that collectively the current policy of the Secretary of State would have that effect in the case of a substantial number of people. It followed that the current policy was unlawful as violating art 3, and that the treatment of the particular individuals who were the subject of the instant appeals in pursuit of that policy was also unlawful. Unless and until the time came when it could no longer be said that a substantial number of people would fall below the threshold, art 3 would prevent the state from standing by and letting them do so (see [140], [148]–[150], below); *R (on the application of Q) v Secretary of State for the Home Dept* [2003] 2 All ER 905 and *R (on the application of T) v Secretary of State for the Home Dept* [2004] HLR 254 distinguished.

Notes

For late claim for asylum: refusal of support, see Supp to 4(2) *Halsbury's Laws* (4th edn) (2002 reissue), para 247A, and for the prohibition of torture; inhuman and degrading treatment or punishment, see 8(2) *Halsbury's Laws* (4th edn reissue) para 124.

For the Human Rights Act 1998, Sch 1, Pt I, art 3, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 705.

For the Nationality, Immigration and Asylum Act 2002, s 55, see 31 *Halsbury's Statutes* (4th edn) (2003 reissue) 485.

Cases referred to in judgments

A v UK (1998) 5 BHRC 137, ECt HR.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

D v UK (1997) 2 BHRC 273, ECt HR.

E v Secretary of State for the Home Dept, R v Secretary of State for the Home Dept [2004] EWCA Civ 49, [2004] QB 1044, [2004] 2 WLR 1351.

Keenan v UK (2001) 10 BHRC 319, ECt HR.

N v Secretary of State for the Home Dept (Terrence Higgins Trust intervening) [2003] EWCA Civ 1369, [2004] 1 WLR 1182; *affd* [2005] UKHL 31, [2005] All ER (D) 55 (May).

O'Rourke v UK App No 39022/97) (26 June 2001, unreported), ECt HR.

Osman v UK (1998) 5 BHRC 293, ECt HR.

Pretty v UK (2002) 12 BHRC 149, ECt HR.

R v DPP, ex p Kebeline, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.

R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.

R v Secretary of State for the Home Dept, ex p Turgut [2001] 1 All ER 719, CA.

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.

R (on the application of Kumetah) v Secretary of State for the Home Dept [2003] EWHC 3170 (Admin).

R (on the application of Pretty) v DPP [2001] UKHL 61, [2002] 1 All ER 1, [2002] 1 AC 800, [2001] 3 WLR 1598

R (on the application of Q) v Secretary of State for the Home Dept [2003] EWCA Civ 364, [2003] 2 All ER 905, [2004] QB 36, [2003] 3 WLR 365; *affg* [2003] EWHC 195 (Admin), [2003] All ER (D) 251 (Feb).

R (on the application of Q) v Secretary of State for the Home Dept [2003] EWHC 2507 (Admin).

R (on the application of T) v Secretary of State for the Home Dept [2003] EWCA Civ 1285, [2004] HLR 254; *rvsg in part* sub nom *R (on the application of S) v Secretary of State for the Home Dept* [2003] EWHC 1941 (Admin), [2003] All ER (D) 14 (Aug), (2003) Times, 6 August.

R (on the application of Zardasht) v Secretary of State for the Home Dept [2004] EWHC 91 (Admin), [2004] All ER (D) 196 (Jan).

Rees v UK [1993] 2 FCR 49, ECt HR.

Runa Begum v Tower Hamlets London BC [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 AC 430, [2003] 2 WLR 388.

Soering v UK (1989) 11 EHRR 439, [1989] ECHR 14038/88, ECt HR.

Z v UK [2001] 2 FCR 246, ECt HR.

Cases also cited or referred to in skeleton arguments

Abuki v A-G of Uganda (1997) 3 BHRC 199, Ug Const Ct.

Anufrijeva v Southwark London BC, R (on the application of N) v Secretary of State for the Home Dept, R (on the application of M) v Secretary of State for the Home Dept

[2003] EWCA Civ 1406, [2004] 1 All ER 833, [2004] QB 1124, [2004] 2 WLR 603.

Bensaid v UK (2001) 11 BHRC 297, ECt HR.

Chapman v UK (2001) 10 BHRC 48, ECt HR.

East African Asians v UK (1973) 3 EHRR 76, ECom HR.

Iwanczuk v Poland (2001) 38 EHRR 148, [2001] ECHR 25196/94, ECt HR.

Kudla v Poland (2000) 10 BHRC 269, ECt HR.

McGlinchey v UK (2003) 72 BMLR 168, ECt HR.

Price v UK (2001) 11 BHRC 401, ECt HR.

R (on the application of G) v Barnet London BC [2001] EWCA Civ 540, [2002] LGR 34; *affd* [2003] UKHL 57, [2004] 1 All ER 97, [2004] 2 AC 208, [2003] 3 WLR 1194.

R (on the application of K) v Lambeth London BC [2003] EWCA Civ 1150, [2003] 3 FCR 222, [2004] 1 WLR 272.

R (on the application of Mani) v Lambeth London BC [2003] EWCA Civ 836, [2004] LGR 35.

Selmouni v France (1999) 7 BHRC 1, ECt HR.

Appeals

R (on the application of Limbuela) v Secretary of State for the Home Department

The Secretary of State for the Home Department appealed with permission of Collins J from his decision on 4 February 2004 ([2004] EWHC 219 (Admin), [2004] All ER (D) 56 (Feb)) allowing the application of Wayoka Limbuela for judicial review of the Secretary of State's decision on 16 May 2003 that his circumstances were not such as to fall within s 55(5) of the Nationality, Immigration and Asylum Act 2002. The facts are set out in the judgment of Laws LJ. The charity Shelter appeared as an intervener.

R (on the application of Tesema) v Secretary of State for the Home Department

The Secretary of State for the Home Department appealed with permission of Gibbs J from his decision on 16 February 2004 ([2004] EWHC 295 (Admin), [2004] All ER (D) 247 (Feb)) allowing the application of Binyam Tefera Tesema for judicial review of the Secretary of State's decision on 20 August 2003 that his circumstances were not such as to fall within s 55(5) of the Nationality, Immigration and Asylum Act 2002. The facts are set out in the judgment of Laws LJ. The charity Shelter appeared as an intervener.

R (on the application of Adam) v Secretary of State for the Home Department

The Secretary of State for the Home Department appealed with permission of Charles J from his decision on 17 February 2004 ([2004] EWHC 354 (Admin), [2004] All ER (D) 264 (Feb)) allowing the application of Yusif Adam for judicial review of the Secretary of State's decision on 16 October 2003 that his circumstances were not such as to fall within s 55(5) of the Nationality, Immigration and Asylum Act 2002. The facts are set out in the judgment of Laws LJ. The charity Shelter appeared as an intervener.

Nigel Giffin QC, John-Paul Waite and *Kate Grange* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Christopher Jacobs (instructed by *White Ryland*) for Tesema and Limbuela.

Susan Monaghan (instructed by *HCL Hanne & Co*) for Adam.

Stephen Knafler (acting pro bono) for Shelter.

Cur adv vult

21 May 2004. The following judgments were delivered.

LAWS LJ.

INTRODUCTORY

[1] These conjoined appeals raise important issues about the application of s 55(5) of the Nationality, Immigration and Asylum Act 2002 and art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Permission to appeal was in all three cases granted to the Secretary of State by the judge below. Pursuant to those grants of permission the appeals are brought against the judgment of Collins J in Limbuela's case ([2004] EWHC 219 (Admin), [2004] All ER (D) 56 (Feb)) given on 4 February 2004, that of Gibbs J in Tesema's case ([2004] EWHC 295 (Admin), [2004] All ER (D) 247 (Feb)) given on 16 February 2004, and Charles J in Adam's case ([2004] EWHC 354 (Admin), [2004] All ER (D) 264 (Feb)) given on 17 February 2004.

[2] In each case the judge in the Administrative Court granted relief by way of judicial review of the Secretary of State's decision not to provide support for the claimant asylum seeker. The three claimants are of course the respondents before us. We have been asked to give general guidance as to the operation of s 55(5) and art 3: there has been some divergence of view among the judges of the Administrative Court as to the correct approach to be applied, notwithstanding earlier learning in this court in *R (on the application of Q) v Secretary of State for the Home Dept* [2003] EWCA Civ 364, [2003] 2 All ER 905, [2004] QB 36 and *R (on the application of T) v Secretary of State for the Home Dept* [2003] EWCA Civ 1285, [2004] HLR 254. In addition to these authorities, and the three judgments under appeal, it will be necessary to pay attention to the decision of Newman J in *R (on the application of Zardasht) v Secretary of State for the Home Dept* [2004] EWHC 91 (Admin), [2004] All ER (D) 196 (Jan), given on 23 January 2004. At the time of the hearing of these appeals in this court on 23 and 24 March 2004, we were told that no fewer than 666 further cases awaited disposal which are likely to be affected by our judgment.

THE STATUTORY MATERIALS

[3] It is convenient to set out the material statutory provisions before coming to the facts of the three cases. Section 95 of the Immigration and Asylum Act 1999 provides in part:

> '(1) The Secretary of State may provide, or arrange for the provision of, support for—(a) asylum-seekers, or (b) dependants of asylum-seekers, who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed ...

(3) For the purposes of this section, a person is destitute if—(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.'

There is a statutory definition of 'asylum-seeker', but I need not set it out. There is no contest but that the three respondents to these appeals are asylum seekers within the meaning of the statute. The same will almost certainly be true of all or the overwhelming majority of the other claimants whose cases are in the pipeline. I should add that by force of other legislation, subject to certain qualifications and exceptions an asylum seeker has no access to state support or provision other than through s 95 of the 1999 Act. The provision of accommodation pursuant to s 95 is administered by the National Asylum Support Service (NASS), which is effectively an agency of the Secretary of State.

[4] Section 55 of the 2002 Act provides in part:

'(1) The Secretary of State may not provide or arrange for the provision of support to a person under a provision mentioned in subsection (2) if—(a) the person makes a claim for asylum which is recorded by the Secretary of State, and (b) the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom.

(2) The provisions are—(a) [section] ... 95 ... of [the 1999 Act] ...

(5) This section shall not prevent—(a) the exercise of a power by the Secretary of State ... for the purpose of avoiding a breach of a person's Convention rights (within the meaning of the Human Rights Act 1998 (c 42)) ...'

[5] It will at once be evident that an asylum seeker who is barred from support by the application in his case of s 55(1), for whom the bar is not lifted by the application of s 55(5), will be on the streets with nothing unless he has resources of his own or can get access to some form of support from other individuals or non-state groups or agencies. Article 3 of the convention, as is well known, provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' It is unnecessary to set out any of the measures in the 1998 Act, save to recall that s 6 renders it unlawful for any public authority (which includes the Secretary of State and the courts) to act incompatibly with a convention right. Consistently with that provision, s 55(5) of the 2002 Act lifts the prohibition imposed by s 55(1) if in any given case it is necessary to exercise the power given by s 95(1) of the 1999 Act to avoid a breach of the asylum seeker's right guaranteed by art 3. There are other statutory powers mentioned in s 55(2) (and so implicitly the subject of the reference to 'a power' in s 55(5)), and there are other convention rights which might be engaged by s 55(5). Section 95(1) and art 3 are the material provisions for the purpose of these appeals.

[6] In light of these statutory measures one formulation of the critical issue in these appeals might be expressed thus: how grave must the facts of any individual case be to require the Secretary of State to apply s 55(5)?

[7] I think it useful in the context of this recital of the relevant statutory materials to set out this description of the purpose of s 55 given at [26] of the judgment of this court, delivered by Lord Phillips of Worth Matravers MR, in *Q*'s case [2003] 2 All ER 905 (to which I shall have to return):

'... we consider that the primary object of s 55 can properly be treated as preventing (1) those who are not genuine asylum-seekers and (2) those who are not in fact in need of state support from obtaining assistance. The section assumes that genuine asylum-seekers can be expected to seek asylum on arriving in this country, not to go off and do something else before seeking support. Furthermore, those who do not claim asylum and support on arrival, but do so later, will ordinarily have demonstrated an ability to subsist without support in the interim. Section 55 is designed to ensure that the circumstances in which support is sought will be circumstances in which support is likely to be needed.'

THE FACTS

[8] I will first describe the facts in the individual appeals. For this purpose I have largely taken the narratives which follow from the summaries given in the skeleton arguments provided in each case on behalf of the Secretary of State. The summaries' accuracy is not I think disputed, but it is said for the respondents that they are too sparse, and if a fair view is to be taken of the facts they need to be filled out with rather more detail. I go a little way, but not very far, with that. The narrative I have given draws here and there on material in the respondents' skeleton arguments, on the account of the facts given in the court below, and on the primary documents. My aim has been to describe the facts to the extent necessary to determine the issues in the appeals and no further. I should notice that in each of the three cases the Secretary of State did not believe the respondent's account of how and when he arrived in the United Kingdom.

[9] However there are other more general factual issues of which I must give some account. The charity Shelter put in a skeleton argument with permission earlier granted by myself. They also submitted substantial written evidence. For that they had no permission; and it is very important that interveners, who take part in proceedings at the court's discretion and not by right, should strictly abide by the terms on which they are allowed to participate. That said, I acknowledge at once that much of the factual material submitted by Shelter has proved useful to the court, and I accept without hesitation the explanation and apology offered by Mr Knafler, counsel for Shelter, in his careful and courteous letter of 25 March 2004. At the hearing Mr Knafler addressed the court on behalf of Shelter to the extent that he was allowed to do so. I have to say that his skeleton is highly rhetorical, and that is by no means conducive to this court's better performance of its task. But I must certainly consider the essence of the factual material which Shelter has provided.

[10] The evidence also includes statements put in on behalf of the Secretary of State by Michael Sullivan, a caseworker with NASS. He produces a list of day centres for homeless people in London, and in his second statement confronts criticisms which had been levelled by Sophia Linehan, Adam's solicitor, at what he had first asserted. I need also to consider this material. Lastly there is a document titled 'Destitution by Design' issued in February 2004 by the office of the Mayor of London, which contains passages relied on by the Secretary of State as showing the extent to which asylum seekers without state support have been able to look to resources to be found in community-based organisations.

[11] I turn first to the facts of the individual cases.

LIMBUELA

[12] Wayoka Limbuela is a national of Angola born on 20 April 1980. He maintains that he arrived in the United Kingdom on 6 May 2003. He claimed asylum on 7 May 2003, and was provided with NASS accommodation in Margate. On 16 May 2003 the Secretary of State decided that Limbuela had not made his claim for asylum as soon as reasonably practicable so that by force of s 55(1) of the 2002 Act he was barred from support or further support under s 95 of the 1999 Act, subject to s 55(5). That decision, and decisions made to the same effect in Tesema's case and Adam's case, is not or is no longer the subject of any challenge.

[13] However the Secretary of State concluded also that in the circumstances of the case s 55(5) did not avail Limbuela. At length, on 22 July 2003, he was evicted from the NASS accommodation where he had been placed. After that he spent two nights sleeping rough outside Croydon Police Station. In that time he claims (and there is nothing, I think, to contradict it) to have had no money and no access to food or washing facilities. He asked the police for a blanket, but that was not provided; he begged passers-by for food, but was not given anything. Then from 24 July 2003 he was able to stay for four nights at the Lord Clyde night shelter, where he was also provided with food. On 28 July he was asked to leave the night shelter and advised to contact a solicitor. So he did, and on the same day solicitors instructed by him wrote to NASS stating that he faced violations of arts 3 and 8 because support was not being provided to him. There was no prompt reply to this letter, but the Secretary of State's effective continuing refusal to accept that this is a s 55(5) case and accordingly provide support is the subject of the judicial review challenge.

[14] Also on 28 July 2003 application was made on Limbuela's behalf to Eady J who granted an interim injunction against the Secretary of State pursuant to which Limbuela has since been housed and fed. No material was put before the Secretary of State or the judge on 28 July to indicate any medical problems. At length on 29 October 2003 (after judicial review permission had been granted by Jackson J) the Treasury Solicitor sought specific information from Limbuela's advisers in relation to what may be called his s 55(5) claim. Eventually, on 5 January 2004, Limbuela made a witness statement in which among other things he said he had suffered from stomach pains. Later a general practitioner's letter was produced (two days before the hearing of the judicial review). The doctor said that Limbuela had been to his surgery three times since August 2003. His complaints had been, variously, constipation, a cough, pain in the lower abdomen and testicles, dizziness and heartburn. He had been prescribed appropriate medication.

[15] The Secretary of State rejected Limbuela's asylum claim on 10 June 2003. The adjudicator dismissed his appeal on 1 September 2003. We were told at the hearing that on 24 February 2004 (thus after Collins J's judgment) the Immigration Appeal Tribunal gave leave to appeal and remitted the case for a rehearing before a different adjudicator. The rehearing is still awaited.

TESEMA

[16] Binyam Tefera Tesema was born on 22 July 1977 and is a national of Ethiopia. He claims to have arrived in the United Kingdom on 13 August 2003 and to have stayed that night in a hotel arranged by the agent with whom he had apparently travelled. By the next morning, however, the agent had disappeared.

On the same day, that is to say 14 August 2003, he made a claim for asylum and was thereafter housed in NASS emergency accommodation.

[17] He was interviewed on 14 August 2003. That was what is called the 'level 1' interview. The pro forma for level 1 is essentially restricted to questions concerning the claimant's identity, status and travel route, though it provides for some questions relating to health. In response to those Tesema complained of earache, backache, and pain in the left knee, but said he had not seen a doctor for three years. He was interviewed again on 17 August 2003. This was the 'level 2' interview, which deals with the claimant's identity, status and travel route. On that occasion he said he was in good general health. Difficulties he suffered with his ears, back and feet were, he said, due to his having been beaten.

[18] On 20 August 2003 the Secretary of State concluded that Tesema had not claimed asylum as soon as reasonably practicable within the meaning of s 55(1), and that there was nothing to justify his taking action under s 55(5). Tesema's solicitors wrote to the Secretary of State on 1 September 2003 to call into question both decisions. As I have indicated only the s 55(5) challenge is live. On 2 September Tesema was evicted from his NASS accommodation but on the same day upon application to Henriques J obtained an order for interim support. So he has not in fact had to sleep rough at any time.

[19] Jackson J granted judicial review permission on 27 October 2003. Thereafter the Treasury Solicitor, seeing that Tesema had complained of various medical problems in his first witness statement, asked his solicitors to provide evidence from a doctor as to the nature of his medical condition and any treatment he was receiving. At length on 21 January 2004 the solicitors sent a report dated 1 January 2004 from a psychiatrist, Dr Steadman. The report summarised Tesema's allegations of what had been done to him in his home country. It contained also an account of certain physical ailments—some loss of hearing, intermittent pain in the back and above the left knee—which Tesema described to the doctor. Then as Gibbs J was to put it ([2004] All ER (D) 247 (Feb) at [30]):

> '[Tesema] further reported to Dr Steadman ongoing, frequent, recurrent, intrusive and distressing thoughts of his experiences in his country ... Dr Steadman ... did not feel that he presented with the full syndrome of clinical depression. He did, however, present with some anxiety.'

Dr Steadman concluded that Tesema 'would benefit from being under the care of a local Community Health Team' and should be registered with a general practitioner.

[20] Some further medical material was submitted a little later in the shape of a letter dated 13 January 2004 from the Lambeth Primary Care Trust. However Gibbs J concluded (at [34]) that it added little to Dr Steadman's assessment.

[21] In light of all the medical evidence he had received since the grant of judicial review permission the Secretary of State issued a further decision, dated 5 February 2004, by which he concluded that Tesema had not provided evidence of a medical condition such as would engage s 55(5). After that further evidence was put in to show that Tesema had made two approaches for support and accommodation, one to the Ethiopian Community Centre and the other to the Eritrean Community Centre in Haringey, but neither was able to provide for him.

[22] The Secretary of State rejected Tesema's asylum claim on 20 August 2003, by the same letter that conveyed his decisions under s 55(1) and s 55(5). His

appeal to the adjudicator was allowed on 14 January 2004. On 11 March 2004 the Immigration Appeal Tribunal granted leave to the Secretary of State to appeal. The appeal has not yet been heard.

ADAM

[23] Yusif Adam was born on 25 December 1975. He claims to be a national of Sudan. He was to say that he left Port Sudan on 22 September 2003 by cargo ship arriving in the United Kingdom on 15 October. He claimed asylum on 16 October 2003. On the same day the Secretary of State reached decisions adverse to him under s 55(1) and s 55(5) of the 2002 Act. His substantive asylum claim has still not yet been determined.

[24] At his level 1 interview on 16 October 2003 Adam stated that his health was 'generally fine', he was not suffering from any medical condition, and he had last seen a doctor about two years previously. He is or claims to be illiterate. From 16 October until 10 November 2003, when Ouseley J granted judicial review permission and interim relief, he was on the streets. On his own account (in two witness statements of 28 October and 4 November 2003) he slept outside the Refugee Council in Brixton. During the day he had access to the Refugee Council premises where he could wash himself and his clothes, get tea and coffee in the morning, sometimes an evening meal, and a hot meal at 1 pm.

[25] Adam's judicial review claim form was issued on 7 November 2003. Attached to it was a doctor's note dated 27 October 2003 stating that he was suffering from haemorrhoids, back pain and gastritis, and giving details of the medicines which had been prescribed. After he was provided with accommodation following Ouseley J's order for interim relief a report dated 10 December 2003 from Dr Michael Peel of the Medical Foundation for the Care of Victims of Torture was served on the Treasury Solicitor. Given a particular criticism levelled at Charles J's reasoning by Mr Giffin QC for the Secretary of State (to which I will come in due course) it is convenient to cite this passage from Dr Peel's report:

> 'Mr Adam feels physically well but psychologically depressed. He has poor concentration and he does not sleep well. He cannot get to sleep easily then wakes with nightmares. He has been prescribed anti-depressants by his GP but did not collect the prescription because he did not know he was exempt from charges and could not afford the tablets.'

SHELTER'S EVIDENCE

[26] The background to what Shelter have to say rests in the undisputed fact that asylum seekers whose claims are not yet determined are prohibited from obtaining employment and at the same time barred (by force of s 115 of the 1999 Act) from state benefits; though this latter circumstance is mitigated by s 95 of the 1999 Act in cases where that provision applies.

[27] Shelter refer to what they describe as 'generic' evidence which they have deployed in the courts before. It was served on the Secretary of State in *R (on the application of T) v Secretary of State for the Home Dept* [2004] HLR 254 (material contained in certain statements has since been updated) and in another case, *R (on the application of Kumetah) v Secretary of State for the Home Dept* [2003] EWHC 3170 (Admin). It has been available to many other claimants. In summary, Shelter roundly assert that there is no realistic prospect of a destitute asylum seeker obtaining accommodation through a charity. Unless he has family or friends able

to provide him with accommodation or substantial funds, he will have to sleep rough. So far as charitable provision might be available, it does not stretch to things like umbrellas, plastic sheets or mats (let alone sleeping bags, warm and waterproof cagoules, tents and the like). In London (and these appeals are all, so to speak, London cases) charity food, drink and washing facilities are in limited supply. The asylum seeker's access to them depends on where he is sleeping rough, and whether he is (a) able to ascertain that such facilities exist, where they are and when they are open, (b) able to walk what will generally be substantial distances to find them, (c) able to find them when he gets to the relevant area, and (d) lucky enough to arrive when there is still some available provision. On all these points there is a good deal of detail before us, which I have of course considered. I will not set out all of it. I hope it goes without saying that I do not thereby intend to diminish its obvious force. I will highlight some specific points.

[28] Mr Adam Sampson, the director of Shelter, has made a very full statement, dated 17 March 2004. He says there are only two free hostels in London. One, in W9, is for women only and has a capacity of 15. It is said to be full every night. The other, for men who must be at least 30 years of age, is in SE1 and has a capacity of 36. No vacancies were recorded over a period of two months monitored by Shelter between November 2003 and January 2004. There are five winter night shelters operating free of charge, in Croydon (10 spaces), Hackney (15 spaces), Harrow (8 spaces), Islington (12 spaces) and West London (35 spaces). They offer a camp bed or a mattress in a church hall. Mr Sampson describes various formidable difficulties of access to these facilities.

[29] There are also three 'rolling shelters' which provide free accommodation, operated by St Mungo's. But Mr Sampson says that s 55 asylum seekers (a shorthand for those against whom s 55(1) and s 55(5) decisions have been made) are not regarded as 'an appropriate client group' for these shelters.

[30] Mr Hugo Tristram of the Refugee Council has also made a statement in support of Shelter's intervention. He describes, in particular, the Refugee Council's day centre. As its name implies it does not provide overnight accommodation. It is closed at weekends. Coffee, tea, breakfast and a hot lunch are available four days a week, and sandwiches on Wednesdays. There are limited laundry and shower facilities. Some clothing and blankets are given out.

[31] Mr Tristram also recounts incidents of bottles and stones being thrown at asylum seekers sleeping rough, and of the degrading condition to which they may be reduced.

MR SULLIVAN'S EVIDENCE

[32] In his first statement Mr Sullivan produces, as I have said, a list of some 54 day centres for homeless people in different parts of London, and a schedule giving details of each of them. He says they all offer help with such things as meals, showers, clothing and medical services, and advice on alcohol and drugs, benefits, and accommodation.

[33] There followed, as the written evidence took its course, what amounted to something of a debate between Sophia Linehan, Adam's solicitor, and Mr Sullivan about two matters. The first was the utility or otherwise of a facility called Hostels Online which Mr Sullivan had stated was a resource of which s 55 asylum seekers such as Miss Linehan's client might take advantage. The second went to the practical availability for asylum seekers of the day centre facilities in Mr Sullivan's list. As for the first, Miss Linehan crisply asserts (statement, 2 February 2004, para 5) that none of the organisations listed on the Hostels

Online website will take an asylum seeker with no access to public funds. That is not answered by Mr Sullivan in his statement of 5 February 2004 save in the vaguest terms. As regards the second, Mr Sullivan says that 13 of the day centres in his list state in terms that they are available to asylum seekers. Inquiries were made of 15 others by a representative of the Treasury Solicitor. These also offer some support by way of basic amenities which is available to asylum seekers.

[34] Mr Sampson of Shelter and Mr Tristram also comment on Mr Sullivan's list of day centres. Mr Tristram had been involved in drawing up the list. Mr Sampson emphasises their considerable distance, one from another. He states (cross-referring to Mr Tristram's evidence) that the list has proved of little value and is no longer distributed by the Refugee Council.

'DESTITUTION BY DESIGN'

[35] This document, issued as I have said by the Mayor of London's office in February 2004, is of particular interest because it asserts facts which might be said to weaken the case that it seeks to make; at least they do not go to support it. The facts so asserted may on that account be taken to be more likely than not to be true. The document's subtitle is: 'Withdrawal of support from in-country asylum applicants: An impact assessment for London.' It is heavily critical of the effects of s 55 of the 2002 Act, as exemplified in particular by the summary at the end of the document, in para 8.18. At the same time it contains these following assertions, which are necessarily selective:

> '7.1 ... With an estimated total of more than 500 community-based organisations, London's asylum seekers and refugees have developed self-organisation and self-help to an exceptional degree ...
>
> 7.4 ... Since 2000 many tens of thousands of asylum seekers – up to 29,000 at a time – have chosen to stay in London on subsistence-only support rather than undergo NASS dispersal ...
>
> 7.6 The level of need created by Section 55 has however proved too much for households to absorb entirely. They have not been able to save a substantial minority of these destitute newcomers from sleeping rough ...'

OBSERVATIONS ON THE BACKGROUND FACTS

[36] It must be obvious that it is not possible for this court to make full, accurate and detailed findings of fact as to the exact realities faced by s 55 asylum seekers in London, let alone elsewhere. Such an exercise could only be satisfactorily conducted by a process of factual inquiry involving a wide-ranging examination of the evidence, with oral testimony and cross-examination. A process of that kind is inapt for determination in the course of adversarial litigation in the judicial review jurisdiction, and particularly inapt in this court. I draw attention to this circumstance in order to point up the wisdom of Carnwath LJ's observations in the course of argument to the effect that it cannot be the court's task to judge the daily circumstances of the plight of individual s 55 asylum seekers so as to ascertain whether there is an actual or potential violation of art 3 of the convention. To that I will return; but despite its force we must surely reach and describe some impression of the general or background evidence. We are at least required to articulate a kind of touchstone for the application of art 3 in these cases.

[37] Looking at the factual material as a whole, my impression is that a significant proportion—I cannot give a tighter description—of s 55 asylum

seekers will not get access to overnight accommodation and will therefore be on the streets. Many, however, will obtain accommodation and are doing so. So much is plain from the Mayor of London's document. Both those who do and those who do not find accommodation will mostly, though sometimes with real difficulty, get access at least to rudimentary facilities including food during the daytime. This very broad, and (as I acknowledge) necessarily superficial view is I think consistent with the picture that emerges from the facts relating to the three individual cases. It must go without saying—I do not by that phrase mean to undervalue the point's importance—that the plight of living on the streets will bear more or less hardly according to the impact of a whole range of factors: not least, the state of the person's health, mental and physical, and the state of the weather.

THE LEARNING: *Q* AND *T*

[38] In [6] above I proposed what I described as 'one formulation' of the critical issue in these appeals in these terms: how grave must the facts of any individual case be to require the Secretary of State to apply s 55(5)? The formulation is useful and important in reflecting on the facts of the individual cases and the general background facts which I have described. But the issues of law with which we are in the end confronted in these appeals cannot in my judgment be reduced to so simple a question. They engage the nature of the obligation undertaken in art 3 by the states signatory to the convention, and also the proper construction of s 55 of the 2002 Act. In finding the way into these matters it is convenient to start with the two earlier decisions of this court in *Q* and *T*.

[39] *R (on the application of Q) v Secretary of State for the Home Dept* [2003] 2 All ER 905, [2004] QB 36 (Lord Phillips MR, Clarke and Sedley LJJ) concerned six test cases in which adverse decisions had been made under s 55(1) of the 2002 Act. The case's first focus was upon the approach to be taken to the decision-making process carried out under that subsection. At first instance Collins J ([2003] EWHC 195 (Admin), [2003] All ER (D) 251 (Feb)) held that the process adopted had been unfair. This court agreed. I would refer in particular to [37] (which contains the court's definition of the test propounded in s 55(1) by the phrase 'as soon as reasonably practicable'), [43], [81]–[92] and [97]–[100]. With respect I need not set them out.

[40] The court also, however, gave close attention to the effect of s 55(5). They considered (at [46]) two issues:

> '(1) Can failure to provide support ever constitute *subjecting* an asylum-seeker to inhuman or degrading *treatment*? If yes, (2) in what circumstances will the failure constitute such treatment?'

In relation to (1), as the court recorded (at [52]), the Attorney General submitted that failure to provide support could never of itself constitute treatment and so amount to a breach of a negative obligation imposed by art 3 of the convention. He conceded, however, that in extreme circumstances art 3 might impose a positive obligation on the state to provide support for an asylum seeker: the plight of a heavily pregnant woman was given by way of example. There follows in the court's judgment some discussion of the distance between positive and negative obligations in the context of art 3. I shall have more to say about the distinction between these forms of obligation when I come later to confront the

scope of art 3 and it will be more convenient to cite the relevant passages from *Q*'s case at that stage. *a*

[41] The court's conclusion on question (1) in *Q*'s case is given at [56] and [57]:

> '[56] In our judgment the regime that is imposed on asylum-seekers who are denied support by reason of s 55(1) constitutes "treatment" within the meaning of art 3. Our reasoning is as follows. Treatment, as the Attorney-General has pointed out, implies something more than passivity on the part of the state; but here, it seems to us, there is more than passivity. Asylum-seekers who are here without a right or leave to enter cannot lawfully be removed until their claims have been determined because, in accordance with the United Kingdom's obligations under art 33 of the Refugee Convention, Parliament has expressly forbidden their removal by what is now s 15 of the 1999 Act. But while they remain here, as they must do if they are to press their claims, asylum-seekers cannot work (Asylum and Immigration Act 1996, s 8) unless the Home Secretary gives them special permission to do so (Immigration (Restrictions on Employment) Order 1996, SI 1996/3225. *b c d*
>
> [57] The imposition by the legislature of a regime which prohibits asylum-seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum-seekers and not to mere inaction.'

[42] In confronting question (2), after observing (at [60]) that '[i]t is quite impossible by a simple definition to embrace all human conditions that will engage art 3', Lord Phillips MR proceeded to cite the decision of the Strasbourg court in *Pretty v UK* (2002) 12 BHRC 149 at 181 (para 52). *Pretty v UK* is with respect an important case and I shall have to return to it. It is convenient however at this stage to set out para 52, given its part in this court's reasoning in *Q*'s case: *e f*

> 'As regards the types of "treatment" which fall within the scope of art 3 of the convention, the court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering ... Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of art 3 ... The suffering which flows from naturally occurring illness, physical or mental, may be covered by art 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible ...' *g h*

[43] In *Q*'s case ([2003] 2 All ER 905) this court continued:

> '[61] The passages from the judgment of Collins J to which we have referred above suggest that he considered that there will be a breach of art 3 if the Secretary of State refuses permission to an asylum-seeker where there is a *real risk* that, because he will receive no support from any alternative source, he will decline into the kind of state described in *Pretty v UK*. The "real risk" test is one that Strasbourg has applied in the case of removal to a country in circumstances where the removing state will no longer be in a *j*

position to influence events. We do not believe that it is an appropriate test in the present context.

[62] Some who apply for asylum may already be in a condition which verges on the degree of severity capable of engaging art 3 described in *Pretty v UK*. For those s 55(5) of the 2002 Act will permit and s 6 of the 1998 Act will oblige the Secretary of State to provide or arrange for the provision of support. What of the others? Their fate will be uncertain. Those who have been in-country long enough to demonstrate that they have found other means of subsistence may be able to fend for themselves. But it is manifest that some recent arrivals who have no recourse to work, to funds or to help may also be caught by s 55(1). The Attorney General submitted that one cannot discount the possibility that charitable bodies or individuals will come to their assistance. This must be a possibility. But equally there must be a possibility that some will be brought so low that they will be driven to resort to crime or to prostitution in order to survive.

[63] Unlike Collins J we do not consider that the fact that there is a real risk that an individual asylum-seeker will be reduced to this state of degradation of itself engages art 3. It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself. That is what s 55(1) requires him to do. He must, however, be prepared to entertain further applications from those to whom he has refused support who have not been able to find any charitable support or other lawful means of fending for themselves. The Attorney General indicated that is always open to asylum-seekers who have been refused support to re-apply for this.'

I should finally set out this sub-paragraph from the court's conclusions in *Q*'s case (at [119]) (though in truth it replicates what had been said in [62]), in particular because of the echo it finds in the later case of *R (on the application of T) v Secretary of State for the Home Dept*:

'(vii) Where the condition of an applicant verges on that described in *Pretty* ... s 55(5) permits and s 6 of the 1998 Act obliges the Secretary of State to arrange for the provision of support.'

[44] *T*'s case [2004] HLR 254 (Kennedy, Peter Gibson and Sedley LJJ) was decided on 23 September 2003, six months after *Q*'s case. The appeal was brought by the Secretary of State from a judgment given by Maurice Kay J in the Administrative Court ([2003] EWHC 1941 (Admin), [2003] All ER (D) 14 (Aug)). There had been three claimants before Maurice Kay J: S, D and T. However this court was only concerned with the judge's findings as to the effect of s 55(5) in T's case. Kennedy LJ gave the judgment of the court.

[45] Kennedy LJ referred (at [9]) to the finding in *Q*'s case that the s 55(1) regime constitutes 'treatment' within the meaning of art 3. As regards the issue of severity of treatment the court proceeded (at [13]) on the footing, effectively agreed between counsel, that it was for the claimant to establish that his right to relief pursuant to art 3 was 'clear'. But that, of course, did not speak as to the level of suffering or potential suffering required to be established. Counsel for the appellant Secretary of State urged among other things that a claimant had to show 'that he [had] taken all available steps to help himself' (see [14]). It seems to have been accepted (again, at [14]) that the moment at which the circumstances

of the case had to be judged was immediately before the claimant obtained emergency interim relief, as T had done on 24 April 2003. a

[46] Counsel for the respondent T—in fact Mr Knafler—submitted (at [15]) 'that any asylum seeker who is homeless and without means is verging on the condition described in *Pretty*'. The court said (at [10]):

> 'It seemed to us at times that what we were being asked to do by both sides in this case was precisely that which was said in *Q* to be impossible, namely to provide a simple way of deciding when Art.3 will be engaged. As to that we agree with the court in *Q*. There is no simple solution, beyond what was said in *Pretty*. But, as was made clear in *Q*, even where there is a real risk that Art.3 will become engaged the Secretary of State is not obliged to act. At para.[63] the court said: b c
>
> > "It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself."
>
> At the end of the judgment in *Q*, ... the court said in para.[119] that the burden of satisfying the Secretary of State that support is necessary to avoid a breach of Art.3 lies upon the claimant. He has to show that the support is necessary to avoid his being subjected to inhuman or degrading treatment, and the threshold is a high one. Where the condition of an applicant verges on the degree of severity described in *Pretty* then the Secretary of State must act.' d e

Then (at [16]): 'As we have already said, we are not prepared to attempt to lay down any simple test which can be applied in every case.' The court said (at [19]):

> 'The question whether the effect of the State's treatment of an asylum seeker is inhuman or degrading is a mixed question of fact and law. The element of law is complex because it depends on the meaning and effect of Art.3. Once the facts are known, the question of whether they bring the applicant actually or imminently within the protection of Art.3 is one which [counsel for the Secretary of State] accepts can be answered by the court—assuming that viable grounds of challenge have been shown—without deference to the initial decision-maker. Equally, he submits and we would accept, this court is as well placed as the judge at first instance to answer the question.' f g

[47] In the event the court allowed the Secretary of State's appeal, holding that it was— h

> 'impossible to find that T's condition on April 24 had reached or was verging on the inhuman or the degrading. He had shelter, sanitary facilities and some money for food. He was not entirely well physically, but not so unwell as to need immediate treatment.'

The concept of 'verging on' art 3 mistreatment is clearly important for the reasoning in both *Q* and *T*. j

AFTER *Q* AND *T*: THE LATER DECISIONS AT FIRST INSTANCE

[48] Following two substantial judgments (if I may use the term) in this court dealing with s 55(5) of the 2002 Act, one might have expected to find a

consistency of approach among later decisions of the Administrative Court in the same area. But that is not what has happened. I make it clear I do not criticise the judges below on that account. I think the relevant principles in this area are more than usually elusive. I will deal with the cases before attempting any analysis. It is convenient to do so in chronological order.

Zardasht—*Newman J*

[49] As I have indicated the judgment in *R (on the application of Zardasht) v Secretary of State for the Home Dept* [2004] All ER (D) 196 (Jan) is not the subject of appeal to this court. It was decided by Newman J on 23 January 2004 (four months after this court's judgment in *T*'s case). The claimant was a 20-year-old Iraqi. Initially he received support but that was withdrawn following, as I understand it, an adverse decision under s 55(1) of the 2002 Act. He had no specific health problems. He was not given support under s 55(5) and spent 14 days sleeping rough. Newman J dismissed his application for judicial review, holding (at [39]) that it was not clear that 'the high threshold laid down by *Pretty* ... ha[d] been achieved in this case'.

[50] Newman J was of course referred to *Q* and *T*. He listed (at [5]) the main practical detriments facing asylum seekers arriving here. They must be especially applicable to persons denied support: having no home or income, being a stranger to the language and the people, loneliness, anxiety, vulnerability. Newman J recognised (at [6]) that special circumstances such as ill-health might exacerbate the burdens imposed by these conditions. Then he said this:

> '[7] But such special circumstances aside, it is, in my judgment, essential for practitioners to realise that simply to state what could be regarded as the obvious, namely that the applicant is homeless, sleeping rough, has no money, and is lonely and vulnerable, will not be likely to be regarded, in the normal run of things, as sufficient ...'

And this:

> '[9] In my judgment, the principled working out of this legislation leads to the conclusion that Parliament must be taken to have intended that, even if all the circumstances which I have listed above in [5] are present, a case will not necessarily have been made out for support ...
>
> [12] ... being destitute for weeks will not necessarily verge on a breach of art 3. This is because of the obligation on an applicant to establish, so that it is clear, that charitable support has not been provided and that the individual is incapable of fending for himself. By way of example, the claimant in this case is apparently a fit and healthy man of 20. If, despite being homeless ... he can obtain food from charities during the day, or other sources, and has some access to washing and sanitary facilities in the course of the day, it is possible that he could live for an extended period of time under such conditions without severe adverse consequences reducing his condition to the *Pretty* level ...
>
> [13] Within the concept of fending for himself falls the assistance or support which he might be able to obtain from friends, whether new or old, and family, as well as simply "fending for himself". For the legislation contemplates that from such efforts a palliative measure may ensue which will prevent the seriousness of his condition sinking to the *Pretty* level. It

follows that these factors must be eliminated by evidence, or covered in as much detail as makes the position clear.' a

[51] Newman J went on to place further emphasis (at [16], [17]) upon the need as he saw it for claimants to provide evidence of particular circumstances which might qualify them for s 55(5) support.

Limbuela—Collins J b

[52] Collins J ([2004] All ER (D) 56 (Feb) at [31]) cited the judgment of Maurice Kay J at first instance in *R (on the application of S) v Secretary of State for the Home Dept* [2003] All ER (D) 14 (Aug), including this passage (at [33]):

'... when a person without such access [sc to private or charitable funds or support] is refused asylum support and must wait for a protracted but indefinite period of time for the determination of his asylum application it will often happen that, denied access to employment and other benefits, he will soon be reduced to a state of destitution (not in the s 95 sense). Without accommodation, food or the means to obtain them, he will have little alternative but to beg or resort to crime. Many ... will have little choice but to beg and sleep rough. In those circumstances and with uncertainty as to the duration of their predicament, the humiliation and diminution of their human dignity with the consequences referred to in *Pretty* will often follow within a short period of time.' c d

Then Collins J struck a theme which has echoed loud in the to and fro of argument on these appeals. He said (at [32]): e

'I find it distasteful to require that a wait and see policy is adopted, that is to say, it is not possible to be sure that he will suffer as he says he will, so remove his support, let us see whether he does descend into the state which is indicated in that paragraph from Maurice Kay J's judgment, let us see whether his health does deteriorate, and then if it does, he can make an application.' f

[53] Collins J proceeded to refer to the judgment of Newman J in *Zardasht*'s case. He accepted (at [37]) that a claimant should put before the court evidence about— g

'what steps he has taken to try and get support, how he has fared and what effect it has had on him if he has had to sleep rough or beg or whatever.'

But he by no means accepted the general position adopted by Newman J. He said (at [42]) that he had 'not approached the matter in quite the same way as Newman J'. But that considerably understates the difference between them. Collins J took the view that in the case of any asylum seeker who— h

'shows that he has taken reasonable steps and that no assistance is available except by begging and hoping, then the fact that he will have to sleep rough, he has no money, he has no proper access to food or other facilities, will be likely to suffice to establish his case.' (See [37].) j

And I should set out [38] and [41]:

'[38] Treatment, as I say, which causes someone to sleep rough, in particular in winter, to have to beg or hope for the possibility that he might find someone prepared to provide him with food, to be required to live in the

a same clothes for days on end, which clothes may or may not be adequate to protect him from the English climate, will, as it seems to me, in most cases be sufficient to cross the relevant threshold. In winter, the imminence of serious injury to health, which is likely to result from sleeping rough, is all too obvious and, in my judgment, it needs no medical or other specific evidence to establish what, after all, is a matter of common sense ...

b [41] ... it seems to me that, on the facts of this case, this claimant has established that, were he to be deprived of support, he would have no access to overnight accommodation and his chances of obtaining food and other necessary facilities during the day would be remote. He would be, as it seems to me, reduced to begging or to traipsing around London in the hope of finding somewhere which might provide him, perhaps irregularly, with

c some degree of assistance. That, in my judgment, as I repeat, particularly in winter time, is quite sufficient to reach the *Pretty* threshold ...'

[54] I think it a fair reading of the essential reasoning in this judgment that once an asylum seeker who is denied NASS support under s 55(1) has shown that

d he has tried but failed to find accommodation and other support, so that he will have to sleep on the streets, he will have established an imminent breach of art 3 of the convention and a corresponding entitlement to be supported under s 55(5).

Tesema—Gibbs J; Adam—Charles J

[55] I can with respect deal with these two judgments rather more shortly.

e The position is that broadly speaking Gibbs J adopted the approach taken by Collins J, and Charles J that taken by Newman J. (I assume that Charles J did not see Gibbs J's judgment, which was given the day before his own.) I need only cite these passages from Gibbs J in Tesema's case ([2004] All ER (D) 247 (Feb)):

f '[59] On the question of whether art 3 can be infringed where the treatment in question is imminent, I adopt the approach of Collins J. It seems to me that to hold otherwise would be contrary to any reasonable concept of justice. In a situation where the evidence before [the] decision-maker is that without intervention the person concerned will imminently experience inhuman and degrading treatment, it would not be

g reasonable or sensible to say: "I require you to put it to the test just in case things do not turn out as I expect, but when they do, you can reapply." ...

[68] The question whether or not art 3 is infringed has to be determined on the basis of what a reasonable person, objectively applying the standards of a civilised society, would find to be acceptable or otherwise upon

h application of the test described in *Pretty* to the facts of the particular case. Applying that standard, I agree with the reasoning of Collins J in *Limbuela*. I consider that a decision which compels a person to sleep on the streets, or elsewhere in the open, without basic shelter and without any funds, is normally inhuman and degrading ...'

j **[56]** In Adam's case ([2004] All ER (D) 264 (Feb)) Charles J stated (at [55]; see also [68]) that subject to certain points about the availability of charitable support (as to which the evidence had moved on) he agreed with the judgment of Newman J in *Zardasht*'s case. He considered (at [58]) that Collins J's reasoning in Limbuela's case bore no more than 'fine distinctions' from the 'real risk approach' which this court had expressly rejected in *Q*'s case, and that (at [59]) Collins J's description of the *Pretty* threshold did not accord with earlier authority.

WHERE ARE WE NOW?

[57] I fear that the state of the law in this area has got into serious difficulty. So much is spoken to by the fact that judges of the Administrative Court have felt driven to take starkly contrasting positions as to the right test for the engagement of s 55(5) of the 2002 Act notwithstanding the attention given to the subsection in two previous decisions of this court. I think the difficulty has principally arisen from two circumstances. First, it has not been found possible to articulate the ingredients of a violation of art 3 of the convention in the case of a person put on the streets without support any more precisely than by reference to what was said by the Strasbourg court in *Pretty v UK* (2002) 12 BHRC 149 at 181 (para 52): see by way of example *T*'s case [2004] HLR 254 at [10]. Secondly, the prospect that the bare fact of being on the streets will not of itself engage art 3 seemingly faces the executive, and (upon a challenge being advanced) the courts, with the 'wait and see' approach excoriated by Collins and Gibbs JJ.

[58] The first of these circumstances breeds an inevitable uncertainty as to who is and who is not a proper candidate for s 55(5), and leaves that question to the factual arbitrament of the courts case-by-case: although this is in contrast to their proper role in judicial review, which is to hold public decision-makers to account for errors of law. The second circumstance has fuelled the division between first instance judges, and persuaded some to adopt an approach, namely to accord the benefit of s 55(5) once it is demonstrated that the claimant will otherwise go on the streets, which in my judgment (I deal with this below) eviscerates the subsection and misunderstands art 3. We are left with a state of affairs in which our public law courts are driven to make decisions whose dependence on legal principle is at best fragile, leaving uncomfortable scope for the social and moral preconceptions of the individual judge (I mean no offence to the distinguished judges who have heard these cases); and law and fact are undistinguished. We need to see whether there is room for a sharper, more closely defined approach.

ARTICLE 3

The distinction between category (a) and category (b): state violence and other cases

[59] The starting point for such an exercise must, I think, be to revisit the nature and extent of our obligations under art 3. Here, the first thing to emphasise is a distinction which is well recognised in the jurisprudence, but whose importance has perhaps not always been fully unravelled. It is between (a) breaches of art 3 which consist in violence by state servants, and (b) breaches which consist in acts or omissions by the state which expose the claimant to suffering inflicted by third parties or by circumstance. Given the historic crucible of the European Convention's beginnings it must be plain that category (a) is the paradigm case. It expresses a fundamental value, the abhorrence of state violence. It is qualified only by strictly confined exceptions allowed under the general law, namely the use of reasonable force for the purpose of arrest, lawful restraint, self-defence and the prevention of crime. The common law requires that reliance on any of these by a state servant—indeed by anyone—as authorising the use of force in any particular case must always be strictly justified, and no other justifications whatever are available.

[60] But it is plain that as the jurisprudence has developed, the scope of art 3 is not limited to category (a). Various sets of facts which can only fall within

category (b) have been accepted, in Strasbourg and here, as giving rise to violations. So much is recognised in general terms in *Pretty v UK* (2002) 12 BHRC 149 at 180–181 (para 50):

> 'An examination of the court's case law indicates that art 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of state agents or public authorities ... It may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of art 3, the court has reserved to itself sufficient flexibility to address the application of that article in other situations that might arise ...'

The distinction between negative and positive obligations

[61] I must in due course explain what seems to me to be the true importance of the distinction between categories (a) and (b) and its part in the resolution of these appeals. I should say first that it has links with another distinction familiar in the art 3 jurisprudence, that between a negative obligation not to inflict inhuman or degrading treatment and a positive obligation to take steps to protect persons from forms of suffering sufficiently grave to engage art 3. A like difference is especially clear in the jurisprudence relating to art 2 (the right to life): see for example *Osman v UK* (1998) 5 BHRC 293. The distinction between categories (a) and (b) and that between positive and negative obligations are not the same. The latter distinction is discussed by Lord Bingham of Cornhill in *R (on the application of Pretty) v DPP* [2001] UKHL 61, [2002] 1 All ER 1, [2002] 1 AC 800 in the House of Lords. The Strasbourg court incorporated into its judgment the whole of Lord Bingham's opinion, to which in reply Mr Giffin commended our attention. Lord Bingham (at [15]) had referred to *Rees v UK* [1993] 2 FCR 49 at 58 (para 37), in which the Strasbourg court had said:

> 'In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention ... In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph – in other words it is concerned with the negative obligations flowing therefrom ...'

Lord Bingham in *R (on the application of Pretty) v DPP* continued:

> 'That was an art 8 case, dealing with a very different subject matter from the present, but the court's observations were of more general import. It stands to reason that while states may be absolutely forbidden to inflict the proscribed treatment on individuals within their jurisdictions, the steps appropriate or necessary to discharge a positive obligation will be more judgmental, more prone to variation from state to state, more dependent on the opinions and beliefs of the people and less susceptible to any universal injunction.'

[62] The extent to which, in securing the rights of individuals under art 3, the court may allow an area of discretion or judgment to the Secretary of State is a

matter of great importance, and I must return to it. But first there is more to say about the distinction between positive and negative obligations. I have already referred (at [40], above) to the Attorney General's submission in *Q*'s case [2003] 2 All ER 905 at [52] that failure to provide support could never of itself amount to a breach of the negative obligation imposed by art 3 of the convention, and his contrasting concession that in extreme circumstances art 3 might impose a positive obligation on the state to provide support for an asylum seeker. The court in *Q*'s case proceeded to cite paras 49–51 of the judgment in *Pretty v UK* (2002) 12 BHRC 149 at 180–181. I have already set out para 50. I need only cite this extract from para 51:

> 'A positive obligation on the state to provide protection against inhuman or degrading treatment has been found to arise in a number of cases: see, for example, *A v UK* (1998) 5 BHRC 137 where the child applicant had been caned by his stepfather, and *Z v UK* (2001)10 BHRC 384, where four child applicants were severely abused and neglected by their parents. It also imposes requirements on state authorities to protect the health of persons deprived of liberty ...'

The judgment in *Q*'s case [2003] 2 All ER 905 continues:

> '[54] As the Attorney General pointed out, decisions of the European Court of Human Rights, typically *O'Rourke v UK* App No 39022/97 (26 June 2001, unreported), make it clear that the state's failure to provide shelter does not by itself amount to inhuman or degrading treatment. But, as he himself accepted, it does not follow that in a case of sufficiently acute individual need ... no positive obligation can arise; and such cases as *D v UK* ((1997) 2 BHRC 273) clearly establish that a breach of the constant negative obligation can occur where an affirmative act of the state is such as to result, indirectly, in inhuman or degrading consequences for the individual.
>
> [55] The distance between positive and negative obligation is thus not necessarily great. But the distinction is still real, not least because of its potential consequences for state policy.'

The distinctions compared

[63] I shall come later to *O'Rourke v UK*, which was much prayed in aid by Mr Giffin. *D v UK*, as the court in *Q*'s case stated, was a negative obligation case. But it fell within category (b), not category (a). As I have said the two distinctions are not the same: negative obligations are not to be equated with (a), nor positive obligations with (b). It is useful to describe D at this stage. D was a drugs dealer from St Kitts with a bad criminal record and an immigration history to match. He suffered from AIDS. The British authorities proposed to remove him to St Kitts. At length he complained to the Strasbourg court for breach of art 3. By the time the court considered the case D was close to death, and there was nothing to show that in St Kitts (where the population was beset with health and sanitation problems) he would receive any moral or social support nor even that he would be guaranteed a bed in either of the hospitals on the island which the United Kingdom government had stated cared for AIDS patients. The court regarded these facts as amounting to very exceptional circumstances (paras 53, 54) and held that the implementation of the decision to remove the applicant would be a violation of art 3.

[64] Some instances of category (b) are much closer to category (a) than others. These are the cases where the state owes a duty—a positive obligation—to protect individuals from violence by persons other than its own officials. Thus prisoners, who are in the care of the state, are entitled not only to be kept safe from assault by state servants such as the prison officers, but also to be protected from being attacked by fellow prisoners. (The decision in *Keenan v UK* (2001) 10 BHRC 319 repays attention: the complaint there was of a violation of art 2 of the convention by failure to protect a prison inmate from suicide or self-harm.) There will of course be other examples of category (b) cases which arise out of the need for an armoury against unlawful violence. Patients in hospitals (especially hospitals or hospital wards for the care of the mentally ill) and children (and nowadays, I fear, teachers also) in difficult or failing schools come readily to mind as vulnerable instances. And while it is a negative obligation case, not strictly an example of protection against assault, the decision in *Soering v UK* (1989) 11 EHRR 439 may perhaps be assimilated with these examples—the sub-class of category (b) that is concerned with the prevention of violence. As is well known the Strasbourg court held in *Soering* that art 3 would be violated were the United Kingdom to comply with a request to extradite the applicant, a German national, to the United States to face charges of murder in Virginia because he would be held on 'death row' facing the death penalty. There would be a 'a real risk' that the applicant would be exposed to inhuman or degrading treatment or punishment in the receiving state. Further, it is now uncontroversial that the United Kingdom may be in breach of its art 3 obligations if it returns a would-be immigrant to a state where he would suffer violence sufficiently grave to engage the article. The immigrant enjoys statutory appeal rights which enable him to raise both convention and asylum grounds of appeal against a decision to remove him.

[65] I have said that state violence—category (a)—is the paradigm case of violation of art 3. But the category is not unitary. It contains three different kinds of case. The first is where the violence in question is actually *authorised* by the state. That is by far the biggest beast which art 3 is there to slay. The second is where a state servant, acting on the face of it in the course of his official duty, assaults another but has no colour of sanction or permission from his superiors to do so. The third is where the state servant has authority to use force (e g to arrest a criminal) but exceeds what is reasonable. Both negative and positive obligations are in play in these cases. The state and its servants must absolutely refrain from violence which is not justified on the narrow basis to which I have referred. So there is an overall negative obligation. The state also is responsible, in the second and third of these three instances, to take positive steps to prevent its servants from so acting and to punish them as appropriate if they do. These considerations, coupled with the fact that the category (b) cases concerned with protection against violence by non-state agents are as I have said much closer to category (a) than others, tend to demonstrate that the distinction between negative and positive obligations is in principle of lesser importance than that between categories (a) and (b), and, it might be thought, less important than the further distinction between cases concerned with protection against violence (whether (a) or (b)) and other cases in category (b). I shall have more to say about this last distinction below.

The scope of executive judgment

[66] It is plain that the state has no lawful discretion or power whatsoever to authorise violence—the first category (a) instance—beyond cases of the use of reasonable force for the purpose of arrest, lawful restraint, self-defence and the prevention of crime. And those cases, indeed, involve no state discretion properly so-called, but are given by the law which is the sole arbiter of such justifications. Here art 3 is in truth absolute. But the other two category (a) instances, before one ever gets to category (b), begin to allow some space for judgment and discretion on the part of government. In both, such issues as the nature and intensity of any training which state servants ought to receive, and the rigour or severity with which defaulters should be pursued and punished, will admit of a range of lawful options. The range allowed by the court is likely to be very narrow, given the gravity of failure, and it will certainly be unlawful for the state to do nothing. The position is broadly the same in relation to those category (b) cases which I have described as lying closer to category (a) than others: those concerned with the duty of protection from violence by non-state actors. The state cannot fail to take steps to protect prisoners from their fellow inmates; but there must be an area of judgment, however narrow, as to the steps which are to be taken. The judgment belongs to executive government. Where the government's responsibility is less immediate, such as, for example, its responsibility to the public at large, its lawful range of choice is likely to be wider: compare *Keenan v UK* (2001) 10 BHRC 319 at 349 (para 91).

[67] Article 3 is said to be absolute; we are accustomed to hearing it so described. But the term is misleading. If it means only that the article is not qualified by an express entitlement of proportionate interference with the right in the public interest, of the kind conferred by para 2 in the case of each of the political rights guaranteed by arts 8–11, well and good. So also if it means that art 15 confers no right to derogate from art 3, as it does not. But if it is taken to mean that the executive government *in no case* has any legitimate power of judgment whatever as regards the protection of individuals from suffering which is inhuman or degrading to the extent which art 3 contemplates, then it is false. Article 3 indeed imposes a truly absolute requirement in this strict sense in the worst instance of category (a): state sponsored violence. In other cases within category (a) the negative obligation, prohibiting the state servant from unlawful violence, is absolute. The state's positive obligation of training, investigation and sanction is not.

[68] It is not enough to claim category (a), especially its worst instance, as a special case simply because any tolerance of state violence is barbarous, though that is plainly so. The true importance of the distinction between categories (a) and (b) has to be more closely articulated. I would express it thus. Whereas state violence (other than in the limited and specific cases allowed by the law, which I have described) is always unjustified, acts or omissions of the state which expose persons to suffering other than violence (at anyone's hands), even suffering which may in some instances be as grave from the victim's point of view as acts of violence which would breach art 3, are not categorically unjustifiable. They may be capable of justification if they arise in the administration or execution of lawful government policy; and if they do not so arise, they are liable to be struck down by the courts on conventional judicial review grounds irrespective of the impact of the convention. But even if the act or omission happens in the pursuance of lawful policy, art 3 still offers protection against suffering, albeit not occasioned by violence, where the suffering is sufficiently extreme.

[69] It will be seen that this approach tends to assimilate those category (b) cases where the duty is to protect the individual against non-state violence (as opposed to other forms of suffering) with category (a), and to proceed on the basis that tolerance or contemplation of violence from any quarter is always unlawful and can never be justified on policy grounds. In that case the distinction of real importance would not be between category (a) and category (b) (far less between negative and positive obligations) but between cases concerning protection against violence, state or non-state, and the rest. This is the distinction to which I referred at the end of [65] above. The state's response to the risk of violence to those who come within its jurisdiction, citizen or not, will always be a significant mark of its claim to civilised government. But in practice the degree of risk will vary very widely, and arise in an infinity of circumstances. Such risks include those which happen on deportation or removal to another country. I would not adopt an approach which might suggest the existence of a rule that art 3 imposes on the state a general over-arching duty of protection against violence in any and all circumstances.

[70] In my judgment the legal reality may be seen as a spectrum. At one end there lies violence authorised by the state but unauthorised by law. This is the worst case of category (a) and is absolutely forbidden. In the British state, I am sure, it is not reality, only a nightmare. At the other end of the spectrum lies a decision made in the exercise of lawful policy, which however may expose the individual to a marked degree of suffering, not caused by violence but by the circumstances in which he finds himself in consequence of the decision. In that case the decision is lawful unless the degree of suffering which it inflicts (albeit indirectly) reaches so high a degree of severity that the court is bound to limit the state's right to implement the policy on art 3 grounds.

[71] This figure of a spectrum seems to imply the existence of a point upon the spectrum which marks the dividing line, in terms of state acts or omissions, between what violates art 3 and what does not. There *is* such a point, but it does not, I fear, provide a brightline rule by which the court may readily determine whether any particular set of facts falls on this or that side of the line. The point is at the place between cases where government action is justified notwithstanding the individual's suffering, and cases where it is not. Various factors will determine where this place is to be found. They will include the severity of the threatened suffering, its origin in violence or otherwise, and the nature of the government's reasons or purpose in acting as it does. This last consideration illustrates an important point, material to what is or is not to be regarded as 'inhuman or degrading' treatment. Anyone suffering unlawful *violence* is degraded by it, and if it is meted out at the hands of the state, it is all the more degrading: the state, which should look after the citizen, treats him instead with contempt. It is what vile tyrannies do. But a person is not degraded in that particular, telling sense, if his misfortune is no more—and of course, no less—than to be exposed to suffering (not violence) by the application of legitimate government policy. I do not mean to sideline such a person's hardships, which may be very great. I say only that there is a qualitative difference, important for the reach of art 3, between such a case and one where the state, by the application of unlawful violence, treats an individual as a thing and not a person.

The scope of executive judgment limited by art 3

[72] I have said (at [68]) that even where act or omission by the state is done in pursuance of lawful policy, art 3 still offers protection against suffering, albeit not occasioned by violence, where the suffering is sufficiently extreme, and so it certainly does. What is 'sufficiently extreme'? *Pretty v UK* (2002) 12 BHRC 149 at 181 (para 52) is clearly very much in point. So is the consideration I have just addressed, that in such a case the sufferer is not degraded in the particular, disgusting sense in which a person brutalised by violence (especially state violence) is degraded. But there are two other points, closely connected. First, we ought to recognise a further reason to acknowledge a distance between the case where a person is exposed to hardship through circumstance, because the state declines (in pursuit of a proper policy) to give him food and shelter, and the case of state violence, and kindred cases of violence: it is surely this second category which, primarily at least, the drafters of the convention must by art 3 have intended to outlaw. Secondly, we should also recognise and respect the claim of the democratic arm of government to exercise and fulfil its powers and duties in matters which lie within its particular responsibility. Plainly these include the management of immigration control and so of asylum claims.

[73] On these two points I would refer, if I may, to a judgment given by myself in *N v Secretary of State for the Home Dept (Terrence Higgins Trust intervening)* [2003] EWCA Civ 1369, [2004] 1 WLR 1182. The case concerned a Ugandan woman who after her arrival in the United Kingdom was diagnosed HIV-positive. The Secretary of State, having rejected her asylum claim (to which decision there was no challenge), proposed to remove her to Uganda. She claimed that her removal would constitute a violation of art 3 because the facilities for her care and treatment in Uganda fell far short of those available to her here. I said:

> '[38] I am bound to declare, with great respect, that as a matter of principle I have much difficulty with *D* [to which I have already referred: (1997) 2 BHRC 273] ... The elaboration of immigration policy, with all that implies for the constituency of persons for whom within its territory a civilised State will undertake many social obligations, is a paradigm of the responsibility of elected government. One readily understands that such a responsibility may be qualified by a supervening legal obligation arising under the Convention where the person in question claims to be protected from torture or other mistreatment in his home country in violation of the article 3 standards, especially if it would be meted out to him at the hands of the state. But a claim to be protected from the harsh effects of a want of resources, albeit made harsher by its contrast with facilities available in the host country, is to my mind something else altogether. The idea of the "living instrument", which is a well accepted characterisation of the Convention (and some other international texts dealing with rights), no doubt gives the Convention a necessary elastic quality, so that its application is never too distant from the spirit of the time. I have difficulty in seeing that it should stretch so far as to impose on the signatory states forms of obligation wholly different in kind from anything contemplated in the scope of their agreement ...
>
> [40] But I am no less clear that *D* should be very strictly confined. I do not say that its confinement is to deathbed cases; that would be a coarse rule and an unwise one: there may be other instances which press with equal force. That said, in light of the considerations I have described I would hold that the application of article 3 where the complaint in essence is of want of resources

in the applicant's home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised state. This does not, I acknowledge, amount to a sharp legal test; there are no sharp legal tests in this area. I intend only to emphasise that an article 3 case of this kind must be based on facts which are not only exceptional, but extreme; extreme, that is, judged in the context of cases all or many of which (like this one) demand one's sympathy on pressing grounds. On its facts, *D* was such a case. I consider that any broader view distorts the balance between the demands of the general interest of the community, whose service is conspicuously the duty of elected government, and the requirements of the protection of the individual's fundamental rights. It is a balance inherent in the whole of the Convention: see, for example, [*Soering v UK* (1989) 11 EHRR 439 at 468 (para 89)].'

In that case Dyson LJ concurred with myself in dismissing the appeal, and Carnwath LJ dissented. I mean no disrespect if I do not set out their reasoning.

[74] In looking at the question what degree of suffering is in the present context 'sufficiently extreme' to engage art 3 I should at this stage recall this court's finding in *Q*'s case [2003] 2 All ER 905 at [56] to the effect that the regime imposed on an asylum seeker denied support by reason of s 55(1) of the 2002 Act constitutes 'treatment' within the meaning of art 3. With great respect I agree with this reasoning by which we are in any case bound. But there remains the question, in what kind of case should such 'treatment' be held to be inhuman or degrading. In seeking to offer an answer, I would not use quite the same language as I thought appropriate in *N*'s case. Because of the operation of s 55(1) the state is in part the author of the asylum seeker's misfortunes; their other author is the very fact of his status as an asylum seeker who cannot be removed before his case is decided. At the same time there is nothing in the convention jurisprudence to show or even suggest that the state is a compulsory guarantor of any minimum level of living standards.

[75] It is to my mind clear from this court's approach in *Q* and *T* that the Secretary of State will not violate art 3 by declining to act under s 55(5) so that a claimant in whose case there are no special considerations, such as age, infirmity, or any other special vulnerability in the applicant's circumstances, is put on the streets. And this is consistent with the Strasbourg court's decision in *O'Rourke v UK* App No 39022/97) (26 June 2001, unreported), to which I have already referred in passing. In that case the applicant was evicted from temporary accommodation which the local authority had provided for him while they considered his claim for housing as a homeless person. Thereafter he spent 14 months on the streets. At length he sought to complain in Strasbourg of violations of arts 3 and 8. The court declared the application inadmissible. It stated (para 2):

'The court recalls that, in order to fall within the scope of art 3, mistreatment must attain a minimum level of severity ... The court does not consider that the applicant's suffering following his eviction attained the requisite level of severity to engage art 3. Even if it had done, the court notes that the applicant failed to attend a night shelter ... contrary to the advice he was given ... He also indicated an unwillingness to accept temporary

accommodation ... The applicant was therefore largely responsible for his own deterioration following his eviction.'

I would accept Mr Giffin's submission that this passage shows that the Strasbourg court would not regard an act or omission by the state whose consequence is that an individual is then and there put on the streets without support as necessarily constituting a violation of art 3. However unlike asylum seekers affected by s 55(1) Mr O'Rourke was not (as I understand it) barred access to ordinary state welfare payments.

[76] I would however also accept (as this court accepted in *Q*'s case: see [2003] 2 All ER 905 at [63]) that a person initially deprived of support without breach of art 3 may in course of time become entitled to it on art 3 grounds, and thus to the benefit of s 55(5). He would have to show that some particular vulnerability had come upon him: that he was, in effect, an exceptional case. That might plainly be demonstrated by illness or accident materially affecting his ability to fend for himself. It may include the impact of conditions or circumstances external to the person himself, if these were distinctly shown to have grave effects. It would certainly also include a demonstrated inability, over time, to find food and other basic amenities. There will be other cases; this is the tightest test I can find. Its application should be capable of reasonable and objective ascertainment. In any concrete instance it will be for the Secretary of State to find the present facts and evaluate the future course of events (see *R v Secretary of State for the Home Dept, ex p Turgut* [2001] 1 All ER 719). In case of challenge the court cannot escape the final responsibility of decision, as to the application of art 3 to the facts found and events predicted in light of the test I have sought to describe.

Conclusions of principle on art 3

[77] (1) Unlawful violence which is authorised by the state is absolutely forbidden. In this instance the legal rule, given by art 3 and the common law, governs the whole field. There are no exceptions to the prohibition, no qualifications or legal space for manoeuvre. The prohibition is the law's first and only word. (2) Unlawful violence by state servants which is unauthorised is also forbidden; so, of course, is all unlawful violence. Here, the state's duty in fulfilment of art 3 of the convention (where it runs) lies, so far as it can be done, in prevention before and where prevention fails, investigation, sanction and punishment after. In these cases the prohibition of assault is not the law's only word. At the hands of the law the state enjoys a measure of judgment in the elaboration of measures to serve the aims of prevention and sanction. The closer the state's responsibility to the affected individual, the narrower will be the measure of judgment which the law allows. (3) Where art 3 is deployed to challenge the consequences of lawful government policy whose application consigns an individual to circumstances of serious hardship, the article is no more nor less than the law's last word: that is, it operates as a safety net, confining the state's freedom of action only in exceptional or extreme cases. This spectrum, as I have called it, is required by two dictates: first, the need of some respect for the nature of the obligations which the states parties to the convention advisedly undertook, and secondly the need for a measured balance in a democracy between the judicial domain of the protection of individual rights and the political domain of state policy evolved in the general interest.

CONSEQUENCES FOR THESE CASES

The true construction of s 55(5) of the 2002 Act

[78] If it is accepted that (1) the bare fact of putting a late asylum seeker on the streets, absent any special features of the case, will not then and there—on day one, as it were—constitute a violation of art 3, but (2) his condition may in time deteriorate so as to cross the art 3 threshold, the executive and the courts are faced with the 'wait and see' approach so vilified by Collins and Gibbs JJ: unless s 55(5) of the 2002 Act can be construed so as to require the Secretary of State to provide NASS support not only where the individual's condition will imminently cross the threshold, but also where it may do so in the reasonably foreseeable future. Such a construction may be thought supportable by the subsection's words: '... the exercise of a power by the Secretary of State ... *for the purpose of avoiding* a breach of a person's Convention rights' (my emphasis). However this construction cannot be correct. It would mean that s 55(5) obliges the Secretary of State to ensure that no asylum seeker is deprived of basic support. This would plainly emasculate the effect of s 55(1). In any event we are surely bound by the reasoning of this court in *Q*'s case [2003] 2 All ER 905 at [63], rejecting the approach adopted by Collins J at first instance in that case 'that the fact that there is a real risk that an individual asylum-seeker will be reduced to this state of degradation of itself engages art 3', and the court's further view (*Q*'s case (at [119]), *T*'s case [2004] HLR 254 at [10]) that it is when 'the condition of an applicant *verges on* the degree of severity described in *Pretty* [that] the Secretary of State must act' (again, my emphasis). We are fixed with the 'wait and see' approach. It is a function of the legislation. The courts cannot widen the scope of art 3 to avoid it.

The individual appeals

[79] Since writing this first draft of this judgment, I have had the advantage of reading draft judgments prepared by Carnwath and Jacob LJJ, in which in different ways they express very considerable anxiety as to the practical consequences if these appeals are allowed. Both point to the prospect of 600 and more asylum seekers being suddenly without support; to the 'practical certainty' (per Carnwath LJ) that the charitable agencies will be unable to cope; and the 'near certainty' (per Jacob LJ) that a substantial proportion will fall below the art 3 threshold.

[80] In referring to these passages I by no means intend to indicate any great distance, as to the facts, between Carnwath and Jacob LJJ and myself. Though for my part I would be a little more sceptical, the concerns they express are with respect obviously real enough. I desire only to say that such matters, however pressing, cannot in my judgment be allowed to divert us into adopting a role which is not our own. We cannot don the mantle of the statute's practical administrators. We certainly cannot do so (and I do not suggest that Carnwath and Jacob LJJ have any such thing in mind) in order to save s 55 from excoriation in the moral and political arena. In particular we cannot strain and extend the obligations of the United Kingdom under the art 3 of the convention beyond what, judicially, we conceive to be their proper limits.

[81] In light of all I have said the approach taken by Collins and Gibbs JJ, in Limbuela's case and Tesema's case respectively, was mistaken. As for Adam's case, I would accept Mr Giffin's criticism of the judgment of Charles J to the effect that the learned judge was not entitled to find on the medical evidence that

Adam's condition took him over the art 3 threshold as I have tried to describe it. On the proved or admitted facts none of these cases exhibits exceptional features so as to require the Secretary of State to act under s 55(5) of the 2002 Act.

[82] I would allow the appeals.

CARNWATH LJ.

INTRODUCTION

[83] This appeal concerns the extent of the Secretary of State's obligations to three asylum seekers whose applications for asylum were not made as soon as reasonably practicable, and who therefore fell through the safety net provided for the destitute asylum seekers by the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002. It raises issues first considered by this court in *R (on the application of Q) v Secretary of State for the Home Dept* [2003] EWCA Civ 364, [2003] 2 All ER 905, [2004] QB 36, upholding a decision of Collins J. It is worth noting that, although that case caused some political controversy at the time of Collins J's decision, the decision of this court was not subject to appeal, and, according to press reports, was welcomed both by the Home Secretary and by refugee groups (see Anthony Bradley 'Judicial independence under attack' [2003] PL 397 pp 404–405).

[84] The question raised by the present appeals, in its starkest form, is to what level of abject destitution such individuals must sink before their suffering or humiliation reaches the 'minimum level of severity' to amount to 'inhuman or degrading treatment' under art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). In this judgment I shall use the term 'art 3 threshold' to describe the level of suffering required to engage art 3.

[85] Although we are dealing with three appeals, we were told that at the time of the hearing there were before the Administrative Court over 650 'live' cases of the same kind, awaiting our decision, and that on average there were about two new cases per day. In all these, as I understand it, interim support has been ordered by the court.

THE ART 3 THRESHOLD

[86] In *Q*'s case this court held that destitution resulting from denial of assistance to asylum seekers could involve a breach of convention rights, if the art 3 threshold were crossed. The threshold was described by reference to the European Court of Human Rights decision in *Pretty v UK* (2002) 12 BHRC 149. The court spoke variously of 'the kind of state described in *Pretty v UK*' ([2003] 2 All ER 905 at [61]), or 'a condition which verges on the degree of severity ... described in *Pretty v UK*' (see [62]; see also [119](vii)–(viii)). It gave no further specific guidance, since '[i]t is quite impossible by a simple definition to embrace all human conditions that will engage art 3' (see [60]). Although the judges in the present cases purported faithfully to follow this guidance, all found some difficulty in using it to arrive at a principled decision on the facts of the individual cases.

[87] That is not surprising. The description in *Pretty v UK* was not designed as a precise legal formula. The case concerned the wholly different (if no less intractable) problem of the right of a terminally ill patient to die, the 'treatment' alleged being the failure of the prosecuting authorities to give an assurance that they would not prosecute a person who assisted her suicide. From that judgment

((2002) 12 BHRC 149 (para 52)) we learn that, under the case law of the court, the ill-treatment in question must reach a 'minimum level of severity' and involve 'actual bodily injury or intense physical or mental suffering'; but that in addition treatment may be characterised as 'degrading' if it—

> 'humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance ...'

[88] Under this analysis, there are two broad categories: in short, intense suffering (physical or mental), or humiliation of a degree sufficient to 'break moral or physical resistance'. However, the passage (understandably in the context) was clearly intended as a general statement to cover a range of possible circumstances, rather than a precise formula for determining where or how the threshold is to be set in any particular case or category of case. On the facts of *Pretty v UK*, the court did not need to decide that issue, because the claimant's undoubted suffering was held not to be the result of any relevant 'treatment' by the state (paras 54, 55).

VARIABLE CIRCUMSTANCES

[89] Even if there were a precise criterion for defining the art 3 threshold, the factual circumstances are so varied and so variable, as to make it practically meaningless to attempt to assess them by reference to a single test at a single point in time. They include the physical and mental resistance of the particular individual; the season of the year and the state of the weather; the incidence of any epidemics or illnesses affecting the area; the availability of medical help and drugs; the extent if any of the help available from other sources, such as charities, community support groups or passers-by; and (if one is considering humiliation) the degree of toleration or lack of it shown by other parties or the public at large.

[90] A further unknown is the period for which the destitution is likely to last. The assumption seems to be that responsibility under art 3 does not extend beyond the final determination of the asylum application. However that is a very uncertain criterion. We were told that 80% of asylum applications are decided by the Secretary of State within two months. However, appeals have to be taken into account. Mr Limbuela's case illustrates the potential circularity of the problem. His application for asylum was dealt with relatively speedily. It was made on 6 May 2003 and rejected by the Home Office on 10 June, and his appeal to the adjudicator was dismissed in his absence on 1 September 2003. However, he subsequently appealed out of time on the grounds that he had not been aware of the hearing. On 24 February 2004 the Immigration Appeal Tribunal remitted the matter for a new hearing. It found that there were special circumstances 'arising from the situation in which the claimant found himself (including being evicted, having to sleep rough and being confused over who was acting for him)' which made it unjust to allow the decision to stand. Thus almost a year after the application it remains undetermined, much of the delay being directly attributable to the fact that the applicant was without any support.

[91] The most important variables, however, are the will and ability of charities working in this field, and the resources available to them. The court in *Q*'s case [2003] 2 All ER 905 at [63] thought that the Secretary of State could lawfully wait 'until it is clear that charitable support has not been provided and the individual is incapable of fending for himself.' However, this begs at least two

important questions. (i) What part of their resources it is reasonable to expect charities to devote in supporting those whom they (or their funders) may fairly regard as a state responsibility. (ii) Even assuming the willingness of charities to help, much will depend on the extent of resources available to them, and how they order their priorities, but above all on the competition for those resources from others in a similar position. A small number of destitute asylum seekers may be able to obtain adequate support from the charities dedicated to that purpose, but there is no evidence of any existing organisations able to cope with a sudden influx of several hundred new clients with no resources of their own and no state support of any kind.

[92] The practical realities are well illustrated by the evidence from the Refugee Council (in a statement by Hugo Tristram, a team leader responsible for advising asylum seekers). The council have a day centre open on weekdays from 9.30 am to 5.30 pm (2 pm to 5.30 pm on Wednesdays), and they are able to offer asylum seekers some meals during those times. They have no sleeping accommodation. They are closed in the evenings and at weekends. They have four showers in total (two for women, two for men), but no separate hand basins. Mr Tristram comments:

> 'Many [asylum-seekers] sleep outside our offices, in doorways, in the gardens of a local church and sometimes in telephone boxes (the only place where they are able to keep dry). They do not have enough blankets and clothing to keep them warm. They are often lonely, frightened and feel humiliated and distressed ... Staff have seen the condition of asylum-seekers visibly deteriorating after periods of rough sleeping ... On one occasion I had to tell a group of three homeless asylum-seekers to leave the building on a Friday evening during a torrential downpour with nothing more than a blanket each, a food parcel ... and a list of day centres. When I saw them the following Monday their condition had deteriorated considerably, their clothes were filthy, they had started to smell, and they had been unable to find any of the centres listed. Other clients have become depressed and have threatened suicide; one was sectioned after she was found lying across a railway track. Their story is not exceptional—we see people in this situation on a daily basis.'

WAIT AND SEE?

[93] Having accepted the *Pretty* formula as the test of the level of suffering, physical or mental, required to engage art 3, the court in *Q*'s case was faced with a separate question: whether the state's function is simply 'to wait and see' until that threshold is crossed, or whether it must take preventative action. The court identified one of the questions with which it would have to grapple ([2003] 2 All ER 905 at [7]):

> '... is it compatible with art 3 of the convention to provide no assistance to those who are destitute on the basis that art 3 will not be engaged unless and until that destitution results in ill-health or some other similarly severe adverse consequence?'

Taken to extremes such an approach would, as Gibbs J said in *Tesema*'s case ([2004] EWHC 295 (Admin) at [59]–[61], [2004] All ER (D) 247 (Feb) at [59]–[61]), lead to a legal adviser having to say to a destitute refugee, sleeping on the streets:

'You are not ill enough; go away and come back when you are really suffering.' He understandably described such an approach as 'abhorrent'.

[94] The court's answer was that it must be a condition which 'verges on' the degree of severity described in *Pretty v UK*. That term 'verging on' seems to have been designed to mitigate the worst effects of a pure 'wait and see' approach. It was contrasted with the view of Collins J, which the court rejected, that art 3 would be engaged—

> 'where there is a *real risk* that, because he will receive no support from any alternative source, he will decline into the kind of state described in *Pretty v UK*.' (See [2003] 2 All ER 905 at [61].)

The court commented (at [63]):

> 'It is not unlawful for the Secretary of State to decline to provide support *unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself*. That is what s 55(1) requires him to do. He must, however, be prepared to entertain further applications from those to whom he has refused support who have not been able to find any charitable support or other lawful means of fending for themselves. The Attorney General indicated that is always open to asylum-seekers who have been refused support to re-apply for this.' (Emphasis added.)

[95] As I understand that passage, it is not necessary for the claimant to show the actual onset of severe illness or suffering. If the evidence establishes clearly that charitable support in practice is not available, and that he has no other means of 'fending for himself', then the presumption will be that severe suffering will imminently follow. He has done enough to show that he is 'verging on' the necessary degree of severity, and that art 3 is accordingly engaged.

[96] To explain why there should be such a presumption, I cannot do better than repeat the words of Maurice Kay J in July 2003, as presiding judge of the Administrative Court, explaining the problem facing the Secretary of State and the courts, in *R (on the application of S) v Secretary of State for the Home Dept* [2003] EWHC 1941 (Admin), [2003] All ER (D) 14 (Aug)). Having dealt with the individual cases, he added some more general comments (at [33]):

> 'It is not inevitable that anyone refused asylum support will be able to rely on art 3. For one thing, they may have access to private or charitable funds or support such that art 3 will simply not arise. Some are more resilient or resourceful than others. However, when a person without such access is refused asylum support and must wait for a protracted but indefinite period of time for the determination of his asylum application it will often happen that, denied access to employment and other benefits, he will soon be reduced to a state of destitution (not in the s 95 sense). Without accommodation, food or the means to obtain them, he will have little alternative but to beg or resort to crime.' Many, like the claimants in the present case, will have little choice but to beg and sleep rough. In those circumstances and with uncertainty as to the duration of their predicament, the humiliation and diminution of their human dignity with the consequences referred to in *Pretty* will often follow within a short period of time.'

In my view, that is not undermined by anything in the decision of the Court of Appeal in that case (confined to T's case—see below).

[97] That interpretation of *Q*'s case, as I understand it, accords with those of Collins and Gibbs JJ in the present cases. A stricter view was taken by Newman J in *R (on the application of Zardasht) v Secretary of State for the Home Dept* [2004] EWHC 91 (Admin), [2004] All ER (D) 196 (Jan). He said (at [6]):

> 'The extent to which these circumstances are shown to affect an individual claimant, will be central to the question *whether the threshold of severity has been reached*. It may have been reached in respect of that individual, but whether it has or not will be a matter of evidence in connection with that individual's particular position. Of course, in individual cases, special circumstances outside those I have listed may exist, such as: bad physical health, disability, age, or mental disease or disorder. Their existence undoubtedly can significantly affect the position of an individual claimant. Where they do, they must be clearly stated in evidence and where possible supported by independent evidence.' (Emphasis added.)

If by 'threshold of severity', Newman J intended to indicate that there must be evidence of the actual onset of severe illness or suffering, I would respectfully disagree. I agree of course that s 55 of the 2002 Act is 'not intended to be a piece of benevolent legislation' (see [10]). If we are to give effect to the intention of Parliament we may have to accept (harsh as it may seem) that, in Newman J's words (at [7]):

> '... simply to state ... that the applicant is homeless, sleeping rough, has no money, and is lonely and vulnerable, will not be likely to be regarded, in the normal run of things, as sufficient.'

However, we must also give effect to Parliament's intention to abide by the convention, as explained in *Q*'s case. Where there is clear evidence that charitable or other support are simply not available, one does not need much imagination or evidence to conclude that the effect of such conditions, prolonged over a significant period will produce severe illness or suffering, under one or other of the *Pretty* tests.

T'S CASE

[98] Further guidance as to the application of the *Pretty* test was provided by this court in *R (on the application of T) v Secretary of State for the Home Dept* [2003] EWCA Civ 1285, [2004] HLR 254, decided in September 2003. The background to the case, and the main conclusions of the court have been described by Laws LJ. The case is of particular interest because of the comparison made by the court between T's case, and that of S, which was not subject to appeal. While allowing the appeal in T's case, the Court of Appeal specifically indorsed the judge's decision in S's case, observing that—

> 'a comparison of the facts of S and T may be of assistance to those who have to decide where the line is to be drawn if the obligations imposed by the Convention are to be met.' (See [16].)

It is instructive therefore to contrast the two sets of facts.

[99] In S's case the facts (summarised by Kennedy LJ (at [17])) were as follows:

> 'He arrived in the United Kingdom by air on January 7 2003 ... Until the National Asylum Support Service (NASS) gave him interim support through the charity Migrant Help Line, he slept rough on the streets. The charity arranged for him to see a doctor, who reported symptoms of psychological disturbance and considerable malnutrition ... Migrant Help Line eventually gave S his bus fare from Dover, where he was being accommodated, to London, where he slept rough again. He had to beg for money in order to eat, but received very little. He begged for shelter, but without success. His physical condition deteriorated, and a further medical report from the hospital where he had gone because of abdominal pains confirmed his loss of weight. He became unable to eat more than a few mouthfuls of food when it was available.'

[100] The judge had concluded ([2003] All ER (D) 14 (Aug) at [29]):

> '... it was clear beyond all doubt that S had no access to charitable support and could not fend for himself from mid-June. Indeed, he had been forced to beg for food for a considerable time before that and the medical report of 20 May provided evidence of psychological disturbance and significant weight loss at that time. His condition was verging on the degree of severity described in *Pretty* at the time when he commenced these proceedings ... His is a state of destitution which, to use the words of Q's case, "results in ill-health or some other similarly severe adverse consequence".'

The Court of Appeal agreed, describing that conclusion as 'inexorable'. In T's case the relevant facts as found by the judge (quoted by Kennedy LJ (at [19])) were as follows:

> 'He was ... accommodated by NASS until 15 April. Apart from some unsuccessful attempts to plead for shelter in churches, T then "lived" at Heathrow until the Secretary of State provided him with accommodation on a without prejudice basis on 24 April ... T's art 3 claim is based on his circumstances when "living" at Heathrow. He found it difficult to rest or sleep because of the noise and the light and because he would be moved on by the police. Any ablutions were confined to public lavatories and he was unable to wash his hair or his clothes or to bathe or shower. He developed a problem with his left eye and also a cough. He carried his belongings around with him in holdalls and became increasingly worried ... [T's solicitors] referred to difficulties there and to T's health being affected. They referred to his becoming increasingly demoralised and humiliated. They also referred to his fear of sleeping on the streets lest he might be attacked and have his papers stolen ...' (See [2003] All ER (D) 14 (Aug) at [31], [32].)

Maurice Kay J (at [5]) recorded that the accommodation made available on 24 April was offered for seven days and then continued 'on a pragmatic basis "to avert the costs incurred by the application to court for an injunction"'. Interim relief was ordered by the court on 15 May and continued until the hearing on 31 July.

[101] The judge accepted T's account of the facts. He concluded (at [32]):

> 'In his case, too, I find that he has no access to charitable support and is incapable of fending for himself. I am satisfied that his condition verges on the degree of severity described in *Pretty*. The refusal or withdrawal of

support is debasing him and showing a lack of respect for his human dignity with the consequences referred to in *Pretty*.' a

[102] The Court of Appeal disagreed (in a judgment given by Kennedy LJ on 23 September 2003). It seems to have been common ground that the case should be considered as at 24 April 2003, when he was given emergency relief (see [2004] HLR 254 at [14]). Accepting the submission that 'this court is as well placed as the judge at first instance to answer the question', Kennedy LJ concluded (at [19]): b

'... the judge's conclusion in T's case does not follow from the facts he sets out. It is impossible to find that T's condition on April 24 had reached or was verging on the inhuman or the degrading. He had shelter, sanitary facilities and some money for food. He was not entirely well physically, but not so unwell as to need immediate treatment.' c

Although the appeal was allowed, Kennedy LJ noted that T appeared to be mentally ill (although denying it himself), and suggested that his case should be looked at again to see if he would qualify for help on that basis (whether under s 55(5) of the 2002 Act, or s 21 of the National Assistance Act 1948): see [20]. On the facts, therefore, it was an unusual case. d

[103] While acknowledging with respect the court's attempt, by use of two contrasting cases, to provide more precise guidance than in Q's case, I find the decision of limited help in the present context.

[104] In the first place, the main difference from S's case appears to have been that on 24 April, which was agreed to be the relevant time for the court to consider the matter, T had been living rough for only nine days; he had some shelter and sanitary facilities and some money; and, though unwell, he was not in need of immediate treatment. However, the shelter was of the most precarious kind and, as Collins J pointed out in *Limbuela*'s case ([2004] All ER (D) 56 (Feb) at [18]), probably involved a criminal offence under the Heathrow byelaws; and his remaining money (according to his evidence which we were shown) was only '£100 or so'. Thus the decision provides no indication of what his state would have been if he had not been provided with support for the five months from April until September, when the case came to the Court of Appeal. Having regard to the way in which the case was argued, the court's conclusion represents no more than a snapshot at a particular historic moment. e f g

[105] Secondly, it seems to have been common ground, both in the High Court and in the Court of Appeal, that the court was able to decide the issue for itself, rather than being confined to anything akin to *Wednesbury* review (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). This was explained by Kennedy LJ as follows ([2004] HLR 254 at [19]): h

'The question whether the effect of the State's treatment of an asylum seeker is inhuman or degrading is a mixed question of fact and law. The element of law is complex because it depends on the meaning and effect of Art.3. Once the facts are known, the question of whether they bring the applicant actually or imminently within the protection of Art.3 is one which Mr Eadie [for the Secretary of State] accepts can be answered by the court—assuming that viable grounds of challenge have been shown—without deference to the initial decision-maker. Equally, he submits j

a and we would accept, this court is as well placed as the judge at first instance to answer the question.'

[106] Mr Knafler informed us that his submissions on this aspect, which were not challenged by Mr Eadie, were based on a passage in the judgment of Simon Brown LJ in *R v Secretary of State for the Home Dept, ex p Turgut* [2001] 1 All ER 719 at 729 on the court's approach to allegations of breach of art 3. For b reasons which I shall explain, I am doubtful whether, had the point been in issue, the court would have regarded that passage as necessarily supporting the width of the interpretation which counsel put upon it. I shall return to this point.

[107] Before leaving *T*'s case, I would observe that the Court of Appeal did not attach any separate weight to the second part of the *Pretty* test, relating to c 'degrading' treatment. The judge's conclusion had been based, at least partly, on the view that refusal of support was 'debasing him and showing a lack of respect for his human dignity'. Although the court did not comment separately on this aspect, it must be assumed that, after only nine days, the non-physical aspects of T's condition were not regarded by this court as sufficient in themselves to bring the second part of the *Pretty* test into play. Given the unusual facts of the case, I d do not see that conclusion as precluding reliance on the second part of the test in other cases.

A CONTINUING PROBLEM

[108] In October 2003 (following the Court of Appeal's decision in *T*'s case) e Maurice Kay J drew attention to the mounting scale of the problem, involving some 800 outstanding cases (*R (on the application of Q) v Secretary of State for the Home Dept* [2003] EWHC 2507 (Admin)). He had issued a draft statement representing his views supported by the other nominated judges. That was intended as an attempt to encourage a practical approach to disposal of these cases which were 'clogging up the processes of the Administrative Court'. The f Secretary of State's policies for dealing with such cases were not working effectively, because of the lack of 'an adequate and efficient decision-making procedure'. He said (at [17]):

> 'In an area in which such a large number of claimants are being granted interim relief because they have at least an arguable case, it is incumbent on g the Secretary of State to establish an adequate and efficient decision-making procedure which applies the law as set out by the Court of Appeal, which does so within a timescale appropriate to self-evidently urgent issues and which does not give rise to the need for so many applications to this court.'

[109] In the papers before us for the appeal, we had no evidence as to the h Secretary of State's response to these strategic problems. However in response to a request made by me immediately before the hearing, Mr Giffin QC helpfully obtained some information, which has since been confirmed by witness statement. This indicated that, under arrangements established in November 2003 following the judgment of Maurice Kay J, requests for j reconsideration are dealt with by a body called the 'Post Refusal Casework Team' within NASS, and that the decision time has been reduced to 24 hours in over 80% of the cases.

[110] Unfortunately however as the present cases show, the problem has not gone away, although with the end of the winter period the practical effects are likely to be less. What Mr Giffin's statement does not do is to indicate what the Secretary of State expects to be the fate of the 600 or so refugees in the cases

currently pending before the court, if and when they are put back on the street. Whether or not any legal flaw is found in the particular decisions made in each of these cases some time ago, that provides little assistance on how they or the other cases should be dealt with in current circumstances, once the claimants are deprived of the interim support which they are presently enjoying. There is no doubt that the policy of the courts of giving interim relief in most of these cases has mitigated the problem for a time, but it is clearly impossible to treat that as offering any comfort for the future.

[111] The scale of the potential problem can be illustrated by the figures given in the Mayor of London's report, to which Laws LJ has referred. He takes comfort from the fact that many thousands of asylum seekers have apparently been able to find support in London outside the NASS scheme. However, the report also states that a 'substantial minority of these destitute newcomers' are forced to sleep rough. Elsewhere (para 8.13) government figures are given for the numbers thought to be sleeping rough in London; as a result of government initiatives, they are said to have reduced from 650 in 1998 to 267 in June 2003. Thus the numbers currently before the court, and at risk of being forced onto the streets following our decision, would be equivalent to more than twice the total number currently sleeping rough in London.

[112] Accordingly, in my view, we cannot look at the present cases in isolation. Nor are we invited to do so. In his skeleton argument on behalf of the Secretary of State, Mr Giffin acknowledges that in spite of some success in reducing disputes 'it remains the position that a very large number of cases are outstanding, and that there continues to be a steady stream of new judicial review applications'. In these circumstances, he says, 'further guidance from the Court of Appeal is urgently required'.

[113] I agree. We cannot ignore the fact that the likely result of allowing these appeals is that the safety net of interim relief will be removed not only from the three respondents before us, but also from a large proportion of the other 600 applicants. Further, Mr Giffin accepts that it would not be realistic for us to confine attention to the circumstances of the three respondents at the time, some months ago in each case, when interim relief was first made available. He accepts that judicial review procedure is sufficiently flexible in an appropriate case to enable the court to consider the up-to-date position (see *E v Secretary of State for the Home Dept, R v Secretary of State for the Home Dept* [2004] EWCA Civ 49 at [43], [76], [77], [2004] QB 1044 at [43], [76], [77], [2004] 2 WLR 1351). If we are to provide any practical assistance in these and the other cases, we need to take account of the current facts.

[114] Before returning to that issue, it seems to me necessary, first, to revisit the nature of the potential breach of art 3, and then to seek to define the respective responsibilities of the executive and the courts.

THE OFFENDING 'TREATMENT'

[115] In *Q*'s case [2003] 2 All ER 905, the court concluded that the regime imposed on asylum seekers denied support under s 55(1) constituted 'treatment' within the meaning of art 3. The reasoning was that asylum seekers could not be removed lawfully until their claims had been determined, but while here they were prohibited from working except with special permission. The court summarised the position (at [57]):

> 'The imposition by the legislature of a regime which prohibits asylum-seekers from working and further prohibits a grant to them, when

a they are destitute, of support amounts to positive action directed against asylum-seekers and not to mere inaction.'

Thus the 'treatment' in question was the refusal of support combined with the denial of the right to work.

[116] There was no appeal against this decision, and the reasoning was not b challenged in argument before us. I would comment, however, that it appears to represent a significant extension of existing jurisprudence. We were not referred to any decision, whether of the European Court of Human Rights or of any court in the other member states, which goes so far as to impose a positive obligation on the state to provide support in such circumstances.

c [117] The only cases referred to in *Q*'s case in relation to the meaning of 'treatment' were two cases relating to protection of children (*A v UK* (1998) 5 BHRC 137 and *Z v UK* [2001] 2 FCR 246), and *D v UK* (1997) 2 BHRC 273, which concerned the removal under immigration legislation of a person dying from AIDS. None is directly in point. The state's function for the protection of children has always been regarded as in a special category. *D v UK* is a difficult d case, and, as Laws LJ has explained, it was narrowly applied by this court in *N v Secretary of State for the Home Dept (Terrence Higgins Trust intervening)* [2003] EWCA Civ 1369, [2004] 1 WLR 1182. Lord Bingham of Cornhill said, in the passage of his judgment in *R (on the application of Pretty) v DPP* [2001] UKHL 61 at [14], [2002] 1 All ER 1 at [14], [2002] 1 AC 800 to which Laws LJ has referred:

e

> 'In [*D v UK*] the state was proposing to take direct action against the applicant, the inevitable effect of which would be a severe increase in his suffering and a shortening of his life. The proposed deportation could fairly be regarded as "treatment".'

f The same could not be said in *Q*'s case. Indeed the basis of the court's decision was that art 3 suffering was not the 'inevitable result' of the state's 'treatment', but would only arise if and when charities or other agencies were shown to be unable to provide support.

[118] Accepting, however, that we are bound by *Q*'s case on this issue, I acknowledge with gratitude the illumination provided by Laws LJ's powerful g discussion of the scope of art 3, and its application in the present context. As he says, the legal reality is a spectrum. At one end is state-authorised violence. At the other are to be found executive decisions in exercise of a lawful policy objectives, which have consequences for individuals so severe that 'the court is bound to limit the state's right to implement the policy on art 3 grounds'. I agree h also with much of his analysis of the consequences of that distinction, and of the correct approach to the task of drawing a line in an individual case.

[119] Laws LJ accepts that art 3 may be engaged by a particular 'vulnerability' in the individual, or external circumstances which make it impossible for him to find food and other basic amenities. Where, with respect, I part company from j him is in his view that, on the evidence available to us, the judges were not entitled to find that such circumstances existed in the present cases. I would add that I find it difficult not to regard shelter of some form from the elements at night (even if as limited as it was in *T*'s case) as a 'basic amenity', at least in winter and bad weather. I would not regard *O'Rourke v UK* App No 39022/97) (26 June 2001, unreported) (where the facts were very different, and the applicant's plight was largely self-inflicted) as establishing the contrary.

THE RESPONSIBILITY OF THE STATE

[120] Once it is accepted that art 3 is potentially in play, it must follow in my view that the state has some responsibility in the matter. As the Strasbourg court said in *Pretty v UK* (2002) 12 BHRC 149 at 181 (para 51):

> '... the court has held that the obligation on the high contracting parties under art 1 of the convention to secure to everyone within the jurisdiction the rights and freedoms defined in the convention, taken together with art 3, require states *to take measures* designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment ...' (My emphasis.)

[121] The obligation 'to take measures' seems to me to imply more than simply acting as a longstop in individual cases as they arise. That may be sufficient if the alternative system of charitable support is able to cope with the generality of cases, so that art 3 suffering is truly the exception. However, if on the available information, the scale of the problem is such that the system is unable to cope, then it is the responsibility of the state to take reasonable measures to ensure that it can cope. How that is done, for example whether by direct support or by financial assistance to charities working in the field, is a policy matter for the state. As Lord Bingham said in *R (on the application of Pretty) v DPP* [2002] 1 All ER 1, there will be considerable room for executive judgment as to the steps necessary to achieve it, balanced against the policy objectives of the legislation (as explained in *Q*'s case [2003] 2 All ER 905 at [26], already quoted by Laws LJ).

[122] This is not inconsistent with the wording of s 55(5)(a) of the 2002 Act. That empowers the Secretary of State, as an exception to the general prohibition on providing support, to exercise his powers 'to the extent necessary for the purpose of avoiding a breach of a person's Convention rights'. On its face, this appears to be directed to avoiding a breach in an individual case. However, if the scale of the problem is such that individual breaches can only be avoided by more general action, such action can and must be taken 'for the purpose' of avoiding the individual breaches.

[123] Furthermore, fairness and consistency can only be achieved in practice if the Secretary of State has in place policies defining criteria to be applied by the decision-maker. As Lord Clyde said in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [143], [2001] 2 All ER 929 at [143], [2003] 2 AC 295:

> 'The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions.'

[124] We have been referred to the most recent guidance note issued to decision-makers by the Secretary of State (Policy Bulletin 75). It is of interest that, in dealing with the question of whether an application for asylum has been made as soon 'as reasonably practicable', detailed guidance is given including some ten examples based on hypothetical cases. By contrast the question of breach of art 3 is dealt with very briefly. The note states (para 6.10):

> 'It is lawful for the Secretary of State to refuse to provide support unless and until it is clear that charitable support has not been provided and the

a individual is incapable of fending for himself such that his condition verges on the degree of severity described in *Pretty*.'

It says that the cases show that there is no simple way of deciding when art 3 will be engaged, but adds (paras 6.11–6.12):

b 'In this regard it will be relevant to consider, for instance, whether the applicant is "street homeless" or has access to shelter on a temporary or intermittent basis, access to food and sanitary facilities, and his/her state of health. The onus is on the applicant to provide sufficient evidence to show that s/he is verging on the high threshold described in *Pretty*; mere assertions are not sufficient for this purpose. Cases where the asylum seeker or a dependant is pregnant should be handled with sensitivity and care.'

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[125] While this is a faithful reflection of the judgment in *Q*'s case, it provides little practical guidance as to how the decision-maker is to deal with individual cases in the light of the practical realities disclosed by the evidence before us. Case-by-case decision-making of this kind cannot reasonably regarded as a sufficient discharge of the Secretary of State's responsibilities, if, on the d information available to him, the numbers likely to need help are far greater than the ability of the alternative agencies to cope.

THE ROLE OF THE COURTS

[126] There is no statutory right of appeal against the refusal of support under e s 55. As the Court of Appeal said in *Q*'s case [2003] 2 All ER 905 at [110], s 55(10) 'is unequivocal in blocking access to the appeal mechanism for asylum support.' It was argued in that case that Parliament had thereby acted incompatibly with art 6 of the convention. That argument was rejected. This court, applying the decision of the House of Lords in *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 AC 430, held that a fair administrative f decision-making process, combined with the possibility of judicial review would satisfy the requirements of art 6 (see [114]–[117]). In so holding it noted that in human rights cases a more 'intensive' scrutiny is appropriate, following *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554:

g 'The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable …'

[127] In *T*'s case the court proceeded on the agreed basis that, the facts having been established, it was open to the court to form its own view as to whether the art 3 threshold was crossed. I have already expressed my doubt as to the h correctness of that approach. In practical terms, it is difficult to see how it differs from the right of appeal, which Parliament was careful to exclude.

[128] As I have noted, the basis of the agreed position appears to have been the judgment of Simon Brown LJ in *Ex p Turgut*. That case concerned the refusal by the Secretary of State of exceptional leave to remain to a Turkish Kurd draft j evader, who claimed that if returned to Turkey he would be subject to a real risk of suffering torture or other treatment contrary to art 3. It is important to note that case as argued did not depend on the individual circumstances of the applicant, but was as a test case for young Turkish draft evaders generally (see [2001] 1 All ER 719 at 722). Although the decision preceded the coming into force of the Human Rights Act 1998, the court considered whether judicial review, in accordance with the approach in *Ex p Smith*, satisfied the requirement for an

effective remedy under art 13 of the convention. The passage in Simon Brown LJ's judgment reads as follows (see 729):

> 'I therefore conclude that the domestic court's obligation on an irrationality challenge in an art 3 case is to subject the Secretary of State's decision to rigorous examination, and this it does by considering the underlying factual material for itself to see whether or not it compels a different conclusion to that arrived at by the Secretary of State. Only if it does will the challenge succeed. All that said, however, this is not an area in which the court will pay any especial deference to the Secretary of State's conclusion on the facts. In the first place, the human right involved here—the right not to be exposed to a real risk of art 3 ill-treatment—is both absolute and fundamental: it is not a qualified right requiring a balance to be struck with some competing social need. Secondly, the court here is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it. Thirdly, whilst I would reject the applicant's contention that the Secretary of State has knowingly misrepresented the evidence or shut his eyes to the true position, we must, I think, recognise at least the possibility that he has (even if unconsciously) tended to depreciate the evidence of risk and, throughout the protracted decision-making process, may have tended also to rationalise the further material adduced so as to maintain his pre-existing stance rather than reassess the position with an open mind. In circumstances such as these, what has been called the "discretionary area of judgment"—the area of judgment within which the court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal (see Lord Hope of Craighead's speech in *R v DPP, ex p Kebeline* ([1999] 4 All ER 801 at 843–844, [2000] 2 AC 326 at 380)—is a decidedly narrow one.'

[129] I find no difficulty with that approach as applied to the question at issue in that case, which turned on the inferences properly to be drawn from objective information as to the treatment of draft evaders in Turkey. However, I do not think the same approach can be applied without qualification to the present cases. I accept that the court, as a public authority, has its own separate responsibility under the 1998 Act not to act incompatibly with the convention. To that extent it may need to form its own view as to where the boundary is to be drawn in particular cases, or categories of case. I agree also that in a case involving a potential breach of art 3, the court's review must be relatively 'intense'. Even then, where the Administrative Court has made a reasoned assessment of the facts, applying the correct tests, I would not regard it as appropriate for this court to interfere unless the judge's decision is plainly wrong.

[130] However, the procedure remains one of review; it must not become an appeal, which Parliament has specifically excluded. Furthermore, account must be taken of the practicalities. The court cannot sensibly undertake a day-by-day review of individual cases in relation to art 3. Even if it could, it would be an absurd misuse of resources for it to attempt to do so. The public money spent on legal representation would be far better spent on providing practical support. (Each of the cases before us has generated some 300–500 pages of evidence and supporting material.) The court's primary task is to clarify the legal standard, and to ensure that there are in place adequate measures to ensure that the standard is generally met. If the Secretary of State has in place realistic arrangements for meeting his responsibilities under the convention, and deciding individual cases,

then the court's role will normally be limited to ensuring those arrangements have been applied fairly and consistently.

THE PRESENT CASES

[131] In Limbuela's case ([2004] EWHC 219 (Admin), [2004] All ER (D) 56 (Feb)) Collins J, after a careful examination of the evidence, including that of the charities, concluded (at [41]):

> 'In the circumstances, and applying the law as I believe it to be, it seems to me that, on the facts of this case, this claimant has established that, were he to be deprived of support, he would have no access to overnight accommodation and his chances of obtaining food and other necessary facilities during the day would be remote. He would be, as it seems to me, reduced to begging or to traipsing around London in the hope of finding somewhere which might provide him, perhaps irregularly, with some degree of assistance. That, in my judgment, as I repeat, particularly in winter time, is quite sufficient to reach the *Pretty* threshold and, therefore, on the facts of this case, I take the view that this application must succeed.'

[132] In Tesema's case ([2004] All ER (D) 247 (Feb)) Gibbs J held on the evidence before him (at [45]):

> '(a) The claimant and his legal advisers have made all reasonable efforts to find accommodation for him both before the making of the interim order and recently. (b) The claimant's medical condition, whether physical, psychological or psychiatric are not such, taken singly or as a whole, as would significantly impede reasonable function and activity, provided the claimant has basic shelter and support. (c) As far as they go, the medical complaints, as reported by the claimant, are genuine and would exacerbate the effects of any privations which destitution might cause to the claimant. (d) If the judicial review of the claimant's case fails and the claimant's interim support is terminated, it is clear that he will have to sleep rough. By "it is clear", I mean that the facts establish this as a strong probability. It is essentially impossible to prove a future event beyond reasonable doubt, even an imminent event. It remains possible, despite the failure hitherto to find accommodation, that something might turn up within a few days to allow the claimant to be accommodated. (e) The claimant will have no roof over his head. (f) He will have no money and no legitimate means to obtain money. (g) He will have to endure these conditions as an alien with a limited command of English. (h) He is in genuine fear of what may come of him and what others may do to him or think about him if he sleeps rough. These fears are justified since some hold rough sleepers in contempt and they are vulnerable to exploitation and assault. (i) His physical condition will be affected by exposure to the elements during the winter nights, against which his protection will be the clothing he owns and any coverings he may beg or borrow. (j) He may he able to acquire some kind of support. On a Tuesday he could go to the West Croydon Baptist Church for a free lunch; if he can find Nightwatch in Queen's Gardens, and Nightwatch is in operation, he may get some food there at night; he could beg; he could walk to other parts of London to try and find more promising sources of help as listed in Mr Sullivan's chart. On the other hand, he will have no money or resources either to travel or to purchase legitimately any provisions. (k) He will be legally entitled, as the defendant's evidence confirms, to medical care

if he can overcome the undoubted practical difficulties of gaining access to it. (l) Having regard to the limited facilities available, he is, by inference, likely within a short time to become unkempt. Despite all efforts, his hygiene will suffer and he will thus tend to become physically repellent to those who approach. His health is likely to deteriorate.' a

On these facts he concluded (at [69]):

'These features, however common or otherwise they are to destitute asylum seekers, in my judgment do cumulatively represent a situation so severe as to amount to a breach of art 3.' b

[133] For the reasons I have already given I see no error of law in either decision, and I see no other reason for this court to interfere. c

[134] In Adam's case ([2004] EWHC 354 (Admin), [2004] All ER (D) 264 (Feb)) Charles J applied a stricter test, following Newman J in *R (on the application of Zardasht) v Secretary of State for the Home Dept* [2004] All ER (D) 196 (Jan). I have already explained why I think that test does not follow from *Q*'s case. As Laws LJ has explained, Mr Adam was on the streets between 16 October and 10 November 2003. During that time he slept outside the Refugee Council d premises in Brixton, and survived by using their washing facilities and obtaining occasional meals from them. After that he had the benefit of interim relief ordered by the court. Charles J found, even applying the strict test advocated by the Secretary of State (following *Zardasht*'s case), that three weeks in such conditions, supported by 'the inferences ... drawn from ... unsatisfactory medical e evidence' was sufficient to cross the threshold. It is clear that, applying the correct test, he would have come to the same conclusion. Again I see no reason to interfere.

CONCLUSIONS

[135] Before the decision of this court in *Q*'s case, there were three possible f approaches in art 3 to cases such as the present: (i) that it has no application because the conditions of the claimants were not the result of state 'treatment'; (ii) that its application is confined to the specially vulnerable (for example, pregnant woman or the old); (iii) that it is of general application provided the circumstances of an individual applicant are sufficiently serious. By that decision g (i) and (ii) were excluded. There was no appeal. As a consequence the state must be taken to have accepted responsibility for taking 'measures' necessary to ensure that individuals who qualify for help under the test established by *Q*'s case can obtain it.

[136] For the reasons given I see no reason to interfere with the conclusions of the judges in the individual cases, viewed as such. However, I think that is too h narrow an approach, particularly given the way in which the appeals have properly been presented by Mr Giffin. We are asked to give current guidance. To do that, we must look at the overall position in current circumstances, and we must take account of the realities.

[137] We had no direct evidence as to the current condition of the individual j respondents at the time of the hearing. I would assume that, having had the benefit of interim relief for some months, and pending our decision, none of them currently is 'verging on' art 3 suffering. However, if we allow the appeal, we must anticipate that they and up to 600 others will become dependent on charitable support. We have no evidence from the Secretary of State as to how in practice he expects that sudden influx to be handled, or that he has policies in

place adequate for the purpose. On the evidence presented by Shelter and others (already summarised by Laws LJ), there is not simply a 'real risk', but a practical certainty that the current charitable agencies will be unable to cope with such an influx; that many of the claimants will (in the words of *Q*'s case [2003] 2 All ER 905 at [63]) 'not [be] able to find any charitable support or other lawful means of fending for themselves'.

[138] I am conscious that the wider picture has been brought in to the discussion at a relatively late stage, partly in response to questions from me before the hearing, and partly due to the late intervention of Shelter, and its supporting evidence. Although Mr Giffin fairly did not object to this widening of the debate, the Secretary of State may not have been able to respond fully to it. I had hoped that, in response to my questions, he would have been in a position to give the court a clearer picture as to how in practice the Secretary of State expected the overall problem to be dealt with following a successful appeal. I accept that there was little time to do this, and that my questions may not have been as specific as I intended. Having said that, however, we have to proceed on the basis of the evidence before us.

[139] On that basis I would dismiss these appeals.

JACOB LJ.

[140] If it were appropriate to deal with the three cases simply on the materials concerning the three individuals, I would agree with the conclusion of Carnwath LJ in [135]–[138] of his judgment. I also agree with his much wider analysis of the problems posed in this case. I also agree with Laws LJ's 'spectrum analysis'. To my mind however, that analysis does not help one resolve where, on the spectrum, these cases fall. Having said all that, I am however, clear that these appeals should be dismissed. My reasons are brief—any further elaboration would serve no useful purpose.

[141] Overshadowing the facts of these individual three cases is the fact that there are 666 others where the position is similar. In all these cases the individual concerned is seeking asylum in this country and his or her case has not been decided. No one knows whether their claims to asylum are good or bad. All that can be said at this stage is that it has been decided that they did not claim asylum within two days of arrival in this country.

[142] What is to be done about destitute people in this position? A case-by-case analysis of the situation of each individual is costly—it involves solicitors (at the state's expense) ringing round all possible charities, the charities devoting scarce resources to answering inquiries, evidence of weather forecasts, examination by doctors (at the state's expense) to see how unwell the individual is, and a myriad of other inquiries, all designed to show that the applicant has 'passed' the art 3 threshold. These are followed up by applications to the court. Implicit in this approach are repeated applications for those that have failed—has the weather changed, has the capacity of charities to cope changed, and above all has the health of the individual sunk to a sufficiently low level? And in those cases where the individual has sunk below the threshold and so is provided with minimal food and shelter, the time may come when he or she is 'better' and can be put out on the streets again—there is a real prospect of an endless cycle. The 'verging on' test is abhorrent, illogical and very expensive. I am not surprised that some judges cannot accept that it can be correct, even though it may follow from this court's decision in *R (on the application of Q) v Secretary of State for the Home*

Dept [2003] EWCA Civ 364, [2003] 2 All ER 905, [2004] QB 36 in that the 'real risk' test was rejected. 'Verging on' seems to be the only next logical stopping place.

[143] Certain figures in the evidence bring out the scale. As I have said there are 666 cases similar to the three we have. In some cases the applicant may have 'passed' the art 3 test at the time of the relevant judge's order. Many will not—and of those who 'passed' probably some are now better (having received food and shelter for some time) and might fail the test now. Any reasonable estimate of the number likely to put on the streets (and the Secretary of State has not himself made any estimate) is that it must be of the order of 500 or more. Most of these will be in London.

[144] Set against that is the general position as regards homelessness, the availability of shelter and the level of demand. From 1998 to 2002, according to the government's Rough Sleepers Unit, the government target of reducing the number of rough sleepers by two-thirds had been met. By June 2002 there were estimated to be only 532 people sleeping rough throughout England, an impressive achievement.

[145] Of course even these homeless people (assuming they are not asylum seekers subject to s 55 of the Nationality, Immigration and Asylum Act 2002) would not be entirely penniless too—not only are they free to earn money by working but there will be financial state support. That was the position in *O'Rourke v UK* App No 39022/97) (26 June 2001, unreported)—a case, in my view, miles away from our present problem.

[146] As regards the availability of charitable shelter, the evidence indicates virtually no spare capacity. So much appears from Mr Tristram's (of the Refugee Council) statement—there are a couple of hostels in London which take asylum seekers but they are essentially full up.

[147] As regards the availability of charitable food, the position is not much better. It is evident that the established charities could not feed the 500. Nor are there adequate facilities for personal hygiene for this number.

[148] These stark figures to my mind show that if this sort of number of people are put on the streets, without money and with no entitlement to earn any, there is a near certainty that a substantial proportion will fall below the art 3 threshold. Of course some might, to survive, resort to theft, prostitution, or illegal working (very likely for so-called 'gangmasters'). But all these forms of survival would not pass the art 3 threshold and cannot be prayed in aid by the state—which, to be fair, it does not seek to do.

[149] It follows that although one may not be able to say of any particular individual that there is more than a very real risk that denial of food and shelter will take that individual across the threshold, one can say that collectively the current policy of the Secretary of State will have that effect in the case of a substantial number of people. It seems to me that it must follow that the current policy (which includes having no policy save in the case of heavily pregnant women) is unlawful as violating art 3. And it follows that the treatment of the particular individuals the subject of these appeals in pursuit of that policy is also unlawful.

[150] For that reason I would dismiss all the appeals. Unless and until the time comes when it can no longer be said that a substantial number of people will fall below the threshold, art 3 will prevent the state from standing by and letting them do so.

[151] I must add a few words about *R (on the application of Q) v Secretary of State for the Home Dept* [2003] 2 All ER 905 and *R (on the application of T) v Secretary of*

State for the Home Dept [2003] EWCA Civ 1285, [2004] HLR 254. In *Q*'s case this court decided two things. First that art 3 could be engaged in these s 55 cases. This is because the state was saying to the individual: 'Though you are destitute you may not work for money for your food and shelter.' I do not question that reasoning, indeed if it were open in this court (which it is not) I would agree with it. Second, however, that in the case of a particular individual, a 'real risk' test is not enough. Again it is not open to this court to disagree. *T*'s case merely decided that on the facts the individual had not fallen below the threshold at the time—he had a little money and was managing (probably illegally) to survive at Heathrow Airport. The court did not address what would happen when his money ran out or if he were removed from the airport.

[152] Both of these cases addressed the problem from the point of view of considering just the individual. Neither of them addressed what I see is the real problem thrown up by these three test cases and the hundreds pending—that unless the interim orders are continued, a substantial number of people will have their art 3 rights violated. I therefore do not think that either decision precludes these appeals from being dismissed on that ground.

Appeals dismissed. Permission to appeal granted.

Kate O'Hanlon Barrister.

R (on the application of Napier) v Secretary of State for the Home Department

[2004] EWHC 936 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

GOLDRING J

24 MARCH, 29 APRIL 2004

Prison – Discipline – Offence against discipline – Right to a fair trial – Determination of criminal charge – Prisoner charged with disciplinary offence – Prisoner refused legal representation for hearing – Prisoner found guilty – Additional days imposed as penalty – Secretary of State remitting penalty – Secretary of State refusing to quash finding of guilt – Whether breach of right to fair trial – Human Rights Act 1998, Sch 1, Pt I, art 6.

The claimant was a serving prisoner. He was charged with the disciplinary offence of assaulting a prison officer. The claimant's request for legal representation was refused and after a hearing before the prison governor the charge was found proved. A penalty of additional days was imposed. Several months later the European Court of Human Rights decided that certain disciplinary adjudications faced by prisoners constituted the determination of a criminal charge within art 6[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). As a result the Secretary of State generally remitted the award of additional days imposed by prison governors after the coming into force of the 1998 Act on determinate sentence prisoners such as, and including, the claimant. The claimant requested that the finding of guilt also be quashed on the basis that the refusal of legal representation violated art 6 of the convention. The Secretary of State refused and the claimant applied for judicial review of that refusal. An issue arose as to whether the decision to remit the imposition of additional days amounted to an acknowledgement of, and sufficient redress for, the violation of the claimant's rights under art 6 of the convention.

Held – Prison discipline adjudications in which additional days were imposed crossed the boundary between administrative and criminal and for that reason had to comply with art 6 of the convention. In the instant case, stripped of its penal consequences, the finding of guilt fell properly to be analysed as an administrative finding of fact. It did not involve the stigma of a conviction and such a finding could be put to the legitimate use of the making of sensible and informed decisions regarding the claimant's management in prison. As the Secretary of State had acknowledged that because days had been added the claimant should have been afforded his art 6 rights and had remitted the sentence, he had both acknowledged his breach of the claimant's convention rights and afforded sufficient redress. It was not also necessary for the finding of guilt to be quashed, and the application would therefore be refused (see [51], [56]–[58], [60], [61], below).

Ezeh v UK (2003) 15 BHRC 145 explained.

a Article 6, so far as material, is set out at [14], below

Notes

For the right to a fair trial, for criminal charges, and for the right to defend or have legal assistance, see 8(2) *Halsbury's Laws* (4th edn reissue) 134, 136, 145.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 706.

Cases referred to in judgment

A-G's Ref (No 2 of 2001) [2003] UKHL 68, [2004] 1 All ER 1049, [2004] 2 AC 72, [2004] WLR 1.

Anufrijeva v Southwark London BC, R (on the application of N) v Secretary of State for the Home Dept, R (on the application of M) v Secretary of State for the Home Dept [2003] EWCA Civ 1406, [2004] 1 All ER 833, [2004] QB 1124, [2004] 2 WLR 603.

Engel v Netherlands (No 1) (1976) 1 EHRR 647, [1976] ECHR 5100/71, ECt HR.

Ezeh v UK (2003) 15 BHRC 145, ECt HR.

Posokhov v Russia [2003] ECHR 63486/00, ECt HR.

R v Togher [2001] 3 All ER 463, CA.

R (on the application of Al-Hasan) v Secretary of State for the Home Dept, R (on the application of Carroll) v Secretary of State for the Home Dept, R (on the application of Greenfield) v Secretary of State for the Home Dept [2001] EWCA Civ 1224, [2002] 1 WLR 545, [2001] All ER (D) 249 (Jul).

Application for judicial review

The claimant, Scott Napier, applied for judicial review of the decision of the Secretary of State for the Home Department on 9 September 2002 refusing to quash a finding of guilt made against him by a Prison Governor at a disciplinary adjudication. The penalty of 35 additional days imposed had been remitted by the Secretary of State. The facts are set out in the judgment.

Hugh Southey (instructed by the *Prisoners' Advice Service*) for the claimant.

Sam Grodzinski (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

29 April 2004. The following judgment was delivered.

GOLDRING J.

INTRODUCTION

[1] The decision which the claimant seeks to quash in this application for judicial review is that of the Secretary of State of 9 September 2002 in which he refused to quash a finding against the claimant following an adjudication. The issue it raises is the effect of the decision of the European Court of Human Rights in *Ezeh v UK* (2003) 15 BHRC 145.

BACKGROUND

[2] The claimant is a serving prisoner. On 9 July 1999, he was convicted of an offence of robbery. He was at the time on licence for an earlier offence of robbery and kidnapping. He was sentenced to a total period of eight-and-a-half years' imprisonment. On 21 March 2002 he threw a bucket of excrement and urine over a prison officer. Next day he was charged with a disciplinary offence. It was

alleged that contrary to r 51(1) of the Prison Rules 1999, SI 1999/728, he had assaulted the prison officer. The claimant's request for legal representation was refused. The hearing before the governor took place on 28 May 2002. The claimant did not dispute that he had thrown the excrement and urine. He argued that the day before he had been falsely accused of assault by the prison officer. He suggested he had acted in self-defence. The charge was found proved. A penalty of 35 additional days was imposed. That had the effect of delaying by 35 days his non-parole release date and his parole eligibility date.

[3] On 15 July 2002 a chamber of the European Court of Human Rights in the case of *Ezeh v UK* decided that the disciplinary adjudications faced by the two applicant prisoners in that case, in which 40 and 7 additional days were imposed respectively, constituted the determination of a 'criminal charge' within the meaning of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Albeit the United Kingdom government had requested a reference to the Grand Chamber, that decision had far-reaching consequences. As a result of it the Secretary of State generally remitted the award of additional days imposed by prison governors after 2 October 2000 on determinate sentence prisoners such as and including the claimant. There is no question therefore of the claimant serving the additional days.

[4] On 28 August 2002 the claimant's then solicitors wrote to the Directorate of High Security Prisons asking for the finding of guilt to be quashed. The directorate responded on 9 September 2002 refusing to do so. In doing so the directorate said:

> 'The charge about which you were concerned has been thoroughly reviewed by the Directorate of High Security Prisons. The outcome of that review is that the finding of guilt should stand. As you will be aware, the punishment has already been remitted. Although [the claimant] was denied legal representation, the hearing was adjourned on several occasions, which would have afforded him the opportunity to consult with his solicitors. The adjudication was conducted in line with the Prison Discipline Manual and before the recent EC ruling concerning *Ezeh v UK* ... Therefore legal representation was not a legal requirement ... This decision has been sent by the Deputy Director of High Security on behalf of the Director ...'

[5] On 1 October 2002 the claimant's present solicitors wrote to the Prisons Ombudsman's Office. In a letter dated 8 November 2002 it responded, saying, among other things:

> 'As you will no doubt be aware the Prison Service have remitted all punishments of added days imposed on or after 2 October 2000 as a result of [*Ezeh v UK*]. Having had the benefit of legal advice in the light of the European Court's decision, and the action taken by the Prison Service to remit punishments of added days, I am not persuaded there are sufficient grounds for recommending that this adjudication be quashed because you were not granted legal representation.'

[6] Subsequently the defendant declined to quash the finding of guilt.

[7] At present the claimant is at HMP Whitemoor. He is held in a closed supervision centre (CSC). By r 46 of the 1999 rules the Secretary of State may order such a placement. According to the statement of Mr Dyne, an operational manager in the Directorate of High Security Prisons, the function of the CSC unit

is to house prisoners whose presence in ordinary locations would give rise to an unacceptable level of disruption and/or danger to other people in the prison.

[8] The 'CSC Referral Manual', among other things, sets out the procedure to be followed before such an order can be made. Appendix 5, headed 'Operational Manager Risk Assessment Report Guidelines', refers to the matters to be taken into account when considering the making of a CSC referral. Behaviour in custody is relevant. So too are adjudications. Of adjudications, it states: 'Official records of behaviours that have broken the rules of the establishment are a clear and easy way to assess levels of risk.'

[9] I should underline the limits and somewhat theoretical nature of this application. Mr Southey, on behalf of the claimant, is not seeking to quash the decision of the Secretary of State to allocate the claimant to a CSC. Neither is he submitting that the Secretary of State was not entitled to take into account the *allegations* which formed the basis of the adjudication as part of his decision to allocate. This finding of guilt was only one aspect of that decision. The limit of his submission as far as allocation to the CSC is concerned is that no reliance should have been placed on the finding of guilt as determinative of the underlying facts.

[10] Moreover, he submits, the finding of guilt means that there is a finding of culpability against the claimant which should not be permitted to stand.

[11] On behalf of the claimant there has been filed the statement of Simon Creighton, a solicitor who has specialised in the field of prison law since 1993. He states that he has made in excess of 300 applications to the Prison Service to review findings of guilt arising from adjudications at prison establishments. He has never had a case where the punishment was remitted on review but the finding of guilt allowed to stand. Mr Grodzinski, on behalf of the Secretary of State, has told me that there are large numbers of cases in which the added days have been remitted, but the finding of the adjudication allowed to stand. If that is unlawful, it would have repercussions in all those cases.

[12] It seems to me that I must consider this matter irrespective both of Mr Creighton's experience and the possible repercussions.

THE LAW

[13] Rule 61(1) of the 1999 rules provides:

> 'The Secretary of State may quash any finding of guilt and may remit any punishment or mitigate it either by reducing it or by substituting another award which is, in his opinion, less severe.'

[14] In so far as relevant, art 6 provides:

> '1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...'

[15] In *R (on the application of Al-Hasan) v Secretary of State for the Home Dept, R (on the application of Carroll) v Secretary of State for the Home Dept, R (on the application of Greenfield) v Secretary of State for the Home Dept* [2001] EWCA Civ 1224, [2002] 1 WLR 545 the Court of Appeal decided that the imposition of additional days in an adjudication did not mean that the claimant was inevitably

to be treated as being charged with a criminal offence for the purposes of art 6. Mr Grodzinski accepts that as far as additional days are concerned, *Ezeh v UK* (2003) 15 BHRC 145 now sets out the applicable law. The Secretary of State is not contesting appeals to the House of Lords in that regard (although as will become clear, Mr Grodzinski submits that part of the Court of Appeal's decision is still good law). There is therefore no issue in this application, but that I should apply *Ezeh v UK*. The dispute is as to its effect. Mr Southey contends that *Ezeh v UK* requires that irrespective of the imposition of added days an adjudication such as the present must be art 6 compliant. If not, any finding must be quashed. An art 6 compliant rehearing could then take place. Mr Grodzinski submits that stripped of the penalty of additional days, the proper characterisation of the adjudication's finding is that of an administrative finding of fact based on the evidence presented to the governor: that given the remission of the additional days, the claimant can no longer be said to be a 'victim' within the meaning of art 34 of the convention.

[16] I need not go into the facts of *Ezeh v UK* except to say that the second applicant was charged with assault. It was alleged that he had run deliberately into a prison officer. As I have indicated, seven additional days' custody was imposed.

[17] The issue in *Ezeh v UK* was where to place the dividing line between the 'criminal' and the 'disciplinary'. If the hearing was 'criminal' art 6 applied. If disciplinary or administrative, it did not. It was agreed that the line should be drawn by reference to the threefold test set out in the case of *Engel v Netherlands (No 1)* (1976) 1 EHRR 647 at 677–678 (paras 82–83) (the '*Engel* criteria'). They are set out in *Ezeh v UK* (2003) 15 BHRC 145 at 163ff (paras 82ff):

> '"[I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent state, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import ... However, supervision by the court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental ... It is on the basis of all these criteria that the court will ascertain whether some of all of the applicants were the subject of a 'criminal charge' within the meaning of art 6(1) of the convention."'

[18] At 164–165 (paras 85–86) the Grand Chamber says:

> '... the Grand Chamber agrees with the Chamber that it is correct to apply the "*Engel* criteria" to the facts of the present cases in determining where to place the dividing line between the "criminal" and the "disciplinary". The court will do so in a manner consistent with the object and purpose of art 6 of the convention, while making "due allowance" for the prison context and

for the "practical reasons and reasons of policy" in favour of establishing a special prison disciplinary regime.

86. In addition, it is the court's established jurisprudence that the second and third criteria laid down in *Engel v Netherlands* [1976] ECHR 5100/71 are alternative and not necessarily cumulative: for art 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as "criminal" from the point of view of the convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere ... This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.'

[19] At 165 (para 88):

'... the court would not question the importance of preserving an effective system of order and control in prison. However, it does not find compelling the government's argument that the loss by the governor of the power to award "additional days" would undermine the prison disciplinary regime in England and Wales.

In this regard, the court notes that other sanctions were available to the governor at the relevant times (including forfeiture of privileges, exclusion from associated work and cellular confinement) and that the range and severity of sanctions other than additional days has been extended and increased since the applicants' adjudication proceedings, most recently in August 2002 (paras 37 and 55, above). The court considers that it has not been convincingly explained why these other sanctions would not have an impact comparable to awards of additional days in maintaining the effectiveness of the prison disciplinary system, including the authority of the prison management. In this regard, the government did not address how a sanction with immediate application would be less effective than an award of additional days which is not served until a prisoner's early release date (set pursuant to s 33 of the CJA [Criminal Justice Act] 1991) and which in many cases will be therefore served some time, even years, after the adjudication hearing.'

[20] At 166 (para 89) the court stated that its task was 'to determine how [the *Engel* criteria] are to be applied to [a] system ... under which governors had the power to award up to 42 days of [additional] custody'.

[21] As to the first *Engel* criterion, it was said (at 166 (para 91)) that the domestic classification of the offence had 'only a formal and relative value; the "very nature of the offence is a factor of greater import"...'.

[22] Mr Southey emphasises the second *Engel* criterion. The Grand Chamber considered it at 168ff (paras 100ff):

'104. ... It is also clear that the charge of assault against the second applicant is an offence under the criminal law as well as under the prison rules. It is true that the latter charge involved a relatively minor incident of deliberately colliding with a prison officer which may not necessarily have led to prosecution outside the prison context. It is also true that the extreme gravity of the offence may be indicative of its criminal nature ... However, that does not conversely mean that the minor nature of an offence can, of itself, take it outside of the ambit of art 6 as there is nothing in the convention

to suggest that the criminal nature of an offence, within the meaning of the second of the *Engel* criteria, necessarily requires a certain degree of seriousness ... Accordingly, and even noting the prison context of the charges, the theoretical possibility of concurrent criminal and disciplinary liability is, at the very least, a relevant point which tends to the classification of the nature of both offences as "mixed" offences ...

105. ... The court considers that awards of additional days were, on any view, imposed after a finding of culpability ... to punish the applicants for the offences they had committed and to prevent further offending by them and other prisoners ...

106. Accordingly, the court considers that these factors, even if they were not of themselves sufficient to lead to the conclusion that the offences with which the applicants were charged are to be regarded as "criminal" for convention purposes, clearly gives them a certain colouring which does not entirely coincide with that of a purely disciplinary matter.

107. ... it is therefore necessary to turn to the third criterion ...'

[23] Mr Southey submits that in each case it is necessary for the Secretary of State to assess whether the allegation is sufficiently serious to cross the line from disciplinary to criminal under the second *Engel* criterion. If it is, irrespective of the outcome, the adjudication must be art 6 compliant. Although he submits the allegations in this case are more serious than those relating to the second applicant in *Ezeh v UK* (2003) 15 BHRC 145, and would 'almost certainly' lead to a prosecution, given his submissions in respect of the third criterion, he does not argue it is necessary for me to decide whether here the line is crossed.

[24] The Grand Chamber considered the third *Engel* criterion (at 169ff (paras 108ff)). It rejected the United Kingdom government's submissions.

[25] It stated (at 171 (para 120)) that:

'The nature and severity of the penalty which were [sic] "liable to be imposed" ... is determined by reference to the maximum potential penalty for which the relevant law provides ... The actual penalty imposed is relevant to the determination ...'

[26] It then turned to the penalties which were imposed. As it was put (at 172 (para 124)), the 'awards of additional days by the governor constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability'.

[27] It went on to say (at 173–174):

'126. ... in *Engel v Netherlands* ... the court found as follows:

"In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental ..."

Accordingly, given the deprivations of liberty, liable to be and actually imposed on the present applicants, there is a presumption that the charges against them were criminal within the meaning of art 6, a presumption which could be rebutted entirely exceptionally, and only if those deprivations of liberty could not be considered "appreciably detrimental" given their nature, duration or manner of execution ...

128. ... The court also observes that there was nothing before the Chamber, and nothing was submitted to the Grand Chamber, to suggest that

awards of additional days would be served other than in prison and under the same prison regime as would apply until the normal release date ...

129. In these circumstances, the court finds that the deprivations of liberty which were liable to be, and which were actually, imposed ... cannot be regarded as sufficiently unimportant or inconsequential as to displace the presumed criminal nature of the charges against them.

The court notes that the maximum penalty that could have been awarded against Mr Engel and the actual penalty imposed on him—two days' strict arrest in both respects—was found to be of too short a duration to belong to the criminal sphere. However, it observes that, in any event, the lowest penalty imposed in the present cases was substantially greater than that ...

130. In such circumstances, the court concludes as did the Chamber that the nature of the charges together with the nature and severity of the penalties, were such that the charges against the applicants constituted criminal charges within the meaning of art 6 of the convention, which article applied to their adjudication hearings.'

[28] Mr Southey submits that means that not only the actual but the potential penalty has to be taken into account. Any adjudication which might realistically result in days being added must be art 6 compliant. Here there was plainly such a risk. Remission of the added days by the Secretary of State does not change the need for art 6 compliance.

REMEDY

[29] By art 34 of the convention, 'the court may receive applications from any person ... claiming to be the victim of a violation ...'.

[30] In *Posokhov v Russia* [2003] ECHR 63486/00 the court stated:

'32. ... it falls first to the national authorities to redress any alleged violation of the convention. In this regard, the question whether or not the applicant can claim to be a victim of the violation alleged is relevant to all stages of the proceedings under the convention ...

33. The court ... reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the convention ...'

[31] The Secretary of State, having remitted the imposition of 35 additional days, and accepted that the adjudication of 28 May 2002 amounted to the determination of a 'criminal charge' for the purposes of art 6 and that its requirements were not met, how does Mr Southey maintain the claimant is a 'victim who may seek a remedy'?

[32] He submits that in the light of his interpretation of the effect of *Ezeh v UK*, both the acknowledgment and the remedy were insufficient. The finding still left the claimant culpable. The acknowledgment of a violation of art 6 failed adequately to recognise the extent of the art 6 breach. Only the element of added days was acknowledged. There was no acknowledgment that because of the breach the quality of the decision was adversely affected. Had the claimant been represented by a lawyer, the decision might have been different. A proper acknowledgment of the breach would have resulted in the quashing of the decision. Only quashing would amount to adequate redress.

[33] He submits that what was said in *A-G's Ref (No 2 of 2001)* [2003] UKHL 68, [2004] 1 All ER 1049, [2004] 2 AC 72, a criminal prosecution in which the very

different issue of the effect of delay was considered, has application to this case. He draws attention to the observations of Lord Bingham of Cornhill ([2004] 1 All ER 1049 at [20]), where he said:

> 'If the hearing is shown to have been by a tribunal lacking independence or impartiality or legal authority, a conviction can be quashed and a retrial ordered if a fair trial can still be held.'

[34] Lord Millett said ([2004] 1 All ER 1049 at [134]):

> 'If the hearing is not fair, or is before a tribunal which is not independent and impartial ... then the correctness of the ... decision is brought into question. The object of these rights is to secure to the individual a just determination of the dispute or criminal charge which is as far beyond challenge as human justice can make it.'

[35] Those observations are consistent, submits Mr Southey, with what is said in the domestic criminal law context as exemplified by such decisions as *R v Togher* [2001] 3 All ER 463.

[36] Mr Southey also submits that adequate redress means that the claimant should be put in the position he would have been had the art 6 violation not occurred. He relies on the observations of Lord Woolf CJ in *Anufrijeva v Southwark London BC, R (on the application of N) v Secretary of State for the Home Dept, R (on the application of M) v Secretary of State for the Home Dept* [2003] EWCA Civ 1406 at [59], [2004] 1 All ER 833 at [59], [2004] QB 1124, where Lord Woolf CJ spoke of—

> 'The fundamental principle [of the European Court] underlying the award of compensation is that the court should achieve what it describes as restitutio in integrum. The applicant should, in so far as this is possible, be placed in the same position as if his convention rights had not been infringed.'

[37] Damages would not be appropriate argues Mr Southey because the adjudication might not be correct. The only remedy is quashing and a possible retrial.

THE SUBMISSIONS ON BEHALF OF THE SECRETARY OF STATE

[38] Mr Grodzinski, in my view rightly, defined the key question in these terms. Is it sufficient in order for the claimant to be awarded proper redress for the punishment of added days to be remitted, or does art 6 also require the governor's factual finding to be quashed, so that it must thereafter be regarded as inherently unreliable for all purposes connected with the management of the claimant in prison? He submits that only by answering that question can one answer the question of whether the claimant is still a victim.

[39] Mr Grodzinski submits the Secretary of State's acknowledgement of a violation of art 6 was plain. To adopt the wording in *Posokhov v Russia* [2003] ECHR 63486/00 (at para 33) the Secretary of State 'acknowledged, either expressly or in substance, and then afforded redress ...'.

[40] The sufficiency of the acknowledgment and redress, accepted Mr Grodzinski, depended on the basis on which the Secretary of State accepted a violation occurred. That basis was a correct acceptance of the effect of the decision in *Ezeh v UK* (2003) 15 BHRC 145. Mr Grodzinski submitted that the decisive factor in *Ezeh v UK* was the third *Engel* criterion. Paragraph 105 of the

judgment (at 169) referred to the imposition of added days both as punishment for offences and prevention of further offending (see [22], above). Here, as Mr Dyne made clear, there was no punishment following the adjudication. Placement in CSC does not amount to a punishment.

[41] The fact the court spoke of features of the offences giving a 'certain colouring' was not sufficient to lead to the conclusion the proceedings were criminal, submitted Mr Grodzinski. Paragraph 107 of the judgment (at 169) (see [22], above) stated in terms that it was 'therefore necessary' to consider the third *Engel* criterion to resolve the issue.

[42] The court's assessment (at 171–174 (paras 120–129)) underlined the importance of the punishment imposed: the added days. Here, because of the absence of punishment following the remission of the added days, nothing 'appreciably detrimental' had happened to the claimant, as referred to in para 126 of the judgment (at 173–174) (see [27], above).

[43] As to Mr Southey's submission that the potential for adding days would be sufficient to bring the proceedings within art 6, Mr Grodzinski does not agree. The only issue with which the claimant is concerned is whether he will serve added days. That cannot happen.

[44] In short, submits Mr Grodzinski, the decisive factor in *Ezeh v UK* was the added days. Absent those added days, the proceedings did not have to comply with art 6.

[45] Mr Grodzinski also relies on that part of the decision in *R (on the application of Al-Hasan) v Secretary of State for the Home Dept, R (on the application of Carroll) v Secretary of State for the Home Dept, R (on the application of Greenfield) v Secretary of State for the Home Dept* [2002] 1 WLR 545 which he submits is still good law.

[46] Al-Hasan was serving a life sentence. No additional days could be imposed in his case. In Carroll's and Greenfield's 2 and 21 respectively were. In giving the judgment of the court, Lord Woolf CJ, referring to Al-Hasan and Carroll said at [48] that 'In [their cases] ... the severity of the penalty actually imposed ... point in our judgment uncontestedly to the conclusion that no criminal charge is involved'.

[47] Finally, Mr Grodzinski submits that stripped of its penal consequences the finding of 'guilt' falls properly to be analysed as an administrative finding of fact, made by the adjudicating governor based on the evidence before him. That is different from those cases in domestic criminal law in which a conviction is quashed because the trial did not meet art 6 requirements. There the conviction has to be quashed. Otherwise the defendant would continue to suffer from the stigma of a criminal conviction. No lawful purpose could be served by such a conviction remaining on the record as a record of fact. Here, the position is quite different. There has been no conviction. Additionally, there is a legitimate purpose in the prison authorities keeping the governor's factual finding on the claimant's file. Such a finding is relevant when making informed decisions regarding his management, something they are obliged to do.

[48] Further, it is unarguably the case that the prison authorities are entitled to make decisions about the appropriate conditions in which to hold prisoners based on the evidence before them. No formal finding of guilt need be made. There is no obligation to charge the prisoner with a criminal offence. The CSC committee, which to some extent relied on the adjudication, could if it wished have made precisely the same finding on the same evidence without having to comply with art 6.

[49] As to the argument that restitutio in integrum applies, Mr Grodzinski submits it is misplaced. Such a principle applies in a claim for financial compensation. As is stated in *Ezeh v UK* (2003) 15 BHRC 145 (at 176–77 (para 141)), the Grand Chamber, approving what was said in the chamber, decided that it could not speculate as to what might have occurred had there been no breach of art 6. A finding of a violation was sufficient just satisfaction of any non-pecuniary damage sustained.

MY CONCLUSION

[50] At the heart of this application is the claimant's case that he is still a victim in respect of whom the court should make an order. The basic question can be reduced to this. Having regard to the Grand Chamber's decision in *Ezeh v UK*, has the Secretary of State sufficiently acknowledged his violation of the claimant's art 6 rights and afforded him adequate redress?

THE EFFECT OF THE DECISION IN *EZEH v UK*

[51] In my view a proper reading of *Ezeh v UK* leads to the conclusion that absent the imposition of added days, absent the requirement that the adjudication needed to be art 6 compliant. In other words, without those added days, application of the *Engel* criteria would have led to a different conclusion. I say that for several reasons.

[52] First, as the summary of the applicants' and government's submissions to the Grand Chamber make clear (at 160–63 (paras 70–81)), the argument before the Grand Chamber essentially revolved around the effect of adding days having regard to the requirements of art 6. It seems to me the observations of the court should be considered in that light.

[53] Second, when considering the *Engel* criteria in the context of the prison environment, the court drew a distinction between the sanction of adding days and the other, lesser, sanctions available to the prison governor for the control of prison discipline. It is difficult to read the observations at para 88 of the judgment without concluding that in the court's view it is the nature of the punishment which makes the difference (see [19], above).

[54] Third, the fact that there was a charge of assault against the second applicant in *Ezeh v UK* did not of itself mean that the second *Engel* criterion was made out. Although there was 'a certain colouring', it was not enough to cross the threshold from administrative to criminal. It was 'therefore necessary' for the court to consider the third *Engel* criterion. Although the nature of the allegations against the claimant was more serious than that of the second applicant in *Ezeh v UK*, it was not such in my view as to bring it independently within the second *Engel* criterion. Indeed, Mr Southey has not urged such a conclusion upon me. At most, it amounts to no more than 'colouring' here.

[55] Fourth, it is by reference to the penalty which was 'liable to be imposed' and which was in fact imposed that the court considers the applicability of art 6. Paragraph 120 (at 171) suggests that. Paragraph 124 (at 172) refers to the additional days constituting fresh deprivations of liberty imposed as a punishment after a finding of culpability. Paragraph 126 (at 173) states that 'given the deprivations of liberty, liable to be and actually imposed ... there is a presumption that the charges ... were criminal'. That presumption could only be displaced if those deprivations were not detrimental as described. Paragraph 128 (at 173) refers to the fact the additional days would be served in prison under the normal prison regime. Finally, as it is put in para 129 (at 173–174), those

deprivations of liberty in such circumstances were not sufficiently unimportant or inconsequential as to displace the presumed criminal charges.

[56] Fifth, I do not take the court to mean, as Mr Southey submitted, that a potential penalty of added days without more would be enough to require an adjudication to be art 6 compliant. Further, it seems to me Mr Grodzinski is right when he submits that the only thing which interests the claimant is whether he is to serve more days in prison. He is not concerned with a theoretical risk which will not arise. Such a risk is irrelevant.

[57] In short, I agree with Mr Grodzinski that the decisive factor in *Ezeh v UK* was the addition of days. That was why the boundary between administrative and criminal was crossed and why such adjudications had to comply with art 6. I agree too that on facts such as the present, an adjudication not involving the imposition of added days does not fall foul of *Ezeh v UK*: that what was stated by the Court of Appeal to that effect in *R (on the application of Al-Hasan) v Secretary of State for the Home Dept, R (on the application of Carroll) v Secretary of State for the Home Dept, R (on the application of Greenfield) v Secretary of State for the Home Dept* [2002] 1 WLR 545 is still good law.

ACKNOWLEDGMENT AND REDRESS

[58] In my view the Secretary of State has both acknowledged his breach of the claimant's convention rights and afforded sufficient redress. He has acknowledged that because days were added, the claimant should have been afforded his art 6 rights. He has remitted the sentence. I do not accept Mr Southey's submissions to the effect that proper acknowledgment and redress would have involved quashing the decision: that the claimant's position is analogous to that of the defendant in a criminal trial whose conviction was obtained in breach of his convention rights. It does seem to me that stripped of its penal consequences the finding of guilt falls properly to be analysed as an administrative finding of fact based on the evidence before the governor. It can be reached quickly. It does not involve the stigma of a conviction. There is a legitimate use to which such a finding can be put: the making of sensible and informed decisions regarding the claimant's management in prison.

[59] Neither do I accept Mr Southey's submissions that the applicability of the doctrine of restitutio in integrum requires the conviction to be quashed. It does not seem to me the observations of the Lord Woolf CJ in *Anufrijeva v Southwark London BC, R (on the application of N) v Secretary of State for the Home Dept, R (on the application of M) v Secretary of State for the Home Dept* [2004] 1 All ER 833, [2004] QB 1124 are to the point. This is not a claim for financial compensation. The court cannot speculate as to what might have happened had there been no breach of the claimant's art 6 rights (as was said in *Ezeh v UK* (2003) 15 BHRC 145 at 176–77 (para 141)). The claimant has received just satisfaction for the non-pecuniary loss he has suffered.

[60] As I stated earlier, Mr Grodzinski, in my view rightly, defined the issues in these terms. Is it sufficient, in order for the claimant to be awarded proper redress, for the punishment of added days to be remitted, or does art 6 also require the governor's factual finding to be quashed, so that it must thereafter be regarded as inherently unreliable for all purposes connected with the management of the claimant in prison? Only then can one decide whether the claimant is still a victim.

[61] In my view, for the reasons I have stated, proper redress does not require the quashing of the finding. The claimant is no longer a victim. This application for judicial review must be refused. a

Application dismissed.

Martyn Gurr Barrister.

Amendment to the Consolidated Criminal Practice Direction (Jury service)

COURT OF APPEAL, CRIMINAL DIVISION

LORD WOOLF CJ

22 MARCH 2005

Practice – Criminal proceedings – Consolidation of existing practice directions, practice statements and practice notes – Amendment – Excusal from jury service.

LORD WOOLF CJ gave the following direction.

This practice direction amends the Consolidated Criminal Practice Direction handed down by Lord Woolf CJ on 8 July 2002 ([2002] 3 All ER 904). This practice direction replaces the guidance contained in *Practice Note (jury: juror: excuse)* [1988] 3 All ER 177 previously reproduced at paras IV.42.1–IV.42.3[a] of the Consolidated Criminal Practice Direction.

IV.42.1 The effect of s 321 Criminal Justice Act 2003 was to remove certain categories of persons from those previously ineligible for jury service (the judiciary and others concerned with the administration of justice) and certain other categories ceased to be eligible for excusal as of right, (such as members of Parliament and medical professionals). Jury service is an important public duty which individual members of the public are chosen at random to undertake. The normal presumption is that everyone, unless mentally disordered or disqualified, will be required to serve when summoned to do so. This legislative change has, however, meant an increase in the number of jurors with professional and public service commitments. One of the results of this change is that trial judges must continue to be alert to the need to exercise their discretion to adjourn a trial, excuse or discharge a juror should the need arise. Whether or not an application has already been made to the jury summoning officer for deferral or excusal it is also open to the person summoned to apply to the court to be excused. Such applications must be considered with common sense and according to the interests of justice. An explanation should be required for an application being much later than necessary.

IV.42.2 Where a juror appears on a jury panel, it may be appropriate for a judge to excuse the juror from that particular case where the potential juror is personally concerned with the facts of the particular case or is closely connected with a prospective witness. Where the length of the trial is estimated to be significantly longer than the normal period of jury service, it is good practice for the trial judge to enquire whether the potential jurors on the jury panel foresee any difficulties with the length and if the judge is satisfied that a juror's concerns are justified he may say that they are not required for that particular jury. This does not mean that the judge must excuse the juror from sitting at that court altogether as it may well be possible for the juror to sit on a shorter trial at the same court.

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a Editor's note: For the new approach to the numbering of the consolidated criminal practice direction, see *Amendment to the Consolidated Criminal Practice Direction (Appeals against sentence—the provision of notice to the prosecution)* [2003] 4 All ER 665.

IV.42.3 Where a juror unexpectedly finds him or herself in difficult professional or personal circumstances during the course of the trial, jurors should be encouraged to raise such problems with the trial judge. This might apply, for example, to a parent whose childcare arrangements unexpectedly fail or a worker who is engaged in the provision of services the need for which can be critical or a member of Parliament who has deferred their jury service to an apparently more convenient time, but is unexpectedly called back to work for a very important reason. Such difficulties would normally be raised through a jury note in the normal manner. In such circumstances, the judge must exercise his or her discretion according to the interests of justice and the requirements of each individual case. The judge must decide for himself whether the juror has presented a sufficient reason to interfere with the course of the trial. If the juror has presented a sufficient reason, in longer trials it may well be possible to adjourn for a short period in order to allow the juror to overcome the difficulty. In shorter cases it may be more appropriate to discharge the juror and to continue the trial with a reduced number of jurors. The power to do this is implicit in s 16(1) of the Juries Act 1974. In unusual cases (such as an unexpected emergency arising overnight) a juror need not be discharged in open court. The good administration of justice depends on the co-operation of jurors who perform an essential public service. All applications for excusal should be dealt with sensitively and sympathetically and the trial judge should always seek to meet the interests of justice without unduly inconveniencing any juror.

Stephen Leake Barrister.

Amendment to the Consolidated Criminal Practice Direction (Case management)

COURT OF APPEAL, CRIMINAL DIVISION
LORD WOOLF CJ
22 MARCH 2005

Practice – Criminal proceedings – Consolidation of existing practice directions, practice statements and practice notes – Amendment – Case management.

LORD WOOLF CJ gave the following direction.

This practice direction amends the Consolidated Criminal Practice Direction handed down by Lord Woolf CJ on 8 July 2002 ([2002] 3 All ER 904).

It replaces the existing Pt IV.41 of the Consolidated Criminal Practice Direction (Plea and Directions Hearings). It adds a further part to Pt V of the consolidated criminal practice direction and a further annex (Annex E) which sets out forms to be used under r 3.11(1) of the Criminal Procedure Rules 2005. Those forms may be amended from time to time under the authority of the Lord Chief Justice to take account of changes in the law. They will be found, as amended, at the website of HM Courts Service.

This practice direction will take effect from 4 April 2005, when the Criminal Procedure Rules 2005 come into force. It applies to the sending, committal or transfer of cases by magistrates' courts to the Crown Court for trial where that event takes place on or after that date, and to the subsequent management of those cases in the Crown Court. The existing Pt IV.41 continues to apply to cases sent, committed or transferred for trial before that date. In cases to be tried in the magistrates' court this practice direction applies where a defendant pleads not guilty on or after that date.

IV.41 MANAGEMENT OF CASES TO BE HEARD IN THE CROWN COURT

IV.41.1 This section of the practice direction supplements the rules in Pt 3 of the Criminal Procedure Rules as they apply to the management of cases to be heard in the Crown Court. Where time limits or other directions in the consolidated criminal practice direction appear inconsistent with this section, the directions in this section take precedence.

IV.41.2 The case details form set out in Annex E should be completed by the Crown Court case progression officer in all cases to be tried on indictment.

Cases sent for trial

IV.41.3 A preliminary hearing (PH) is not required in every case sent for trial under s 51 of the Crime and Disorder Act 1998 (see r 12.2 (which altered r 24ZA fothe Crown Court Rules 1982 from which it derived)). A PH should be ordered by the magistrates' court or by the Crown Court only where such a hearing is considered necessary. The PH should be held about 14 days after sending.

IV.41.4 The case progression form to be used in the magistrates' court and the PH form to be used in the Crown Court are set out in Annex E with guidance notes. The forms provide a detailed timetable to enable the plea and case management hearing (PCMH) to be effective.

IV.41.5 Whether or not a magistrates' court orders a PH it should order a PCMH to be held within about 14 weeks after sending for trial where a defendant is in custody and within about 17 weeks after sending for trial where a defendant is on bail.

Cases committed for trial

IV.41.6 For cases committed to the Crown Court for trial under s 6 of the Magistrates' Courts Act 1980 the case progression form to be used in the magistrates' court is set out in Annex E with guidance notes. A PCMH should be ordered by the magistrates' court in every case, to be held within about 7 weeks after committal.

Cases transferred for trial

IV.41.7 In a case transferred to the Crown Court for trial under s 4(1) of the Criminal Justice Act 1987 or under s 53(1) of the Criminal Justice Act 1991 the directions contained in the case progression form used in cases for committal for trial apply as if the case had been committed on the date of the notice of transfer. A PMCH should be listed by the Crown Court to be held within about 7 weeks after transfer.

Plea and case management hearing

IV.41.8 Active case management at the PCMH should reduce the number of ineffective and cracked trials and delays during the trial to resolve legal issues. The effectiveness of a PCMH hearing in a contested case depends in large measure upon preparation by all concerned and upon the presence of the trial advocate or an advocate who is able to make decisions and give the court the assistance which the trial advocate could be expected to give. Resident judges in setting the listing policy should ensure that list officers fix cases as far as possible to enable the trial advocate to conduct the PCMH and the trial.

IV.41.9 In Class 1 and Class 2 cases, and in all cases involving a serious sexual offence against a child, the PCMH must be conducted by a High Court judge; by a circuit judge or by a recorder to whom the case has been assigned in accordance with para IV.33 (allocation of business within the Crown Court); or by a judge authorised by the presiding judges to conduct such hearings. In the event of a guilty plea before such an authorised judge, the case will be adjourned for sentencing by a High Court judge or by a circuit judge or recorder to whom the case has been assigned.

Use of the PCMH form: pilot schemes

IV.41.10 The pilot courts will be the Central Criminal Court, Preston Crown Court and Nottingham Crown Court. In pilot courts the PCMH form as set out in Annex E will be used in accordance with the guidance notes.

Use of the PCMH form: general

IV.41.11 In other courts, the resident judge should exercise discretion as to the manner in which the form is used taking account of the views of the local criminal justice agencies and of practitioners. In the event of the resident judge deciding to use the forms in a manner that is not agreed to by either the local criminal justice agencies or the practitioners, the resident judge should consult the presiding judges of his circuit before doing so.

Further pre-trial hearings after the PCMH

IV.41.12 Additional pre-trial hearings should be held only if needed for some compelling reason. Where necessary the power to give, vary or revoke a direction without a hearing should be used. Paragraph 5 of the PCMH form enables the court to require the parties' case progression officers to inform the Crown Court case progression officer that the case is ready for trial, that it will proceed as a trial on the date fixed and will take no more or less time than that previously ordered.

V.56 CASE MANAGEMENT IN MAGISTRATES' COURTS

V.56.1 This section of the practice direction supplements the rules in Pt 3 of the Criminal Procedure Rules as they apply to the management of cases in magistrates' courts. Where time limits or other directions in the consolidated criminal practice direction appear inconsistent with this section, the directions in this section take precedence. To avoid unnecessary and wasted hearings the parties should be allowed adequate time to prepare the case, having regard to the time limits for applications and notices set by the Criminal Procedure Rules and by other legislation. When those time limits have expired the parties will be expected to be fully prepared.

Cases to be tried summarily by the magistrates' court

V.56.2 The case progression form to be used is set out in Annex E with guidance notes. The form, read with the notes, constitutes a case progression timetable for the effective preparation of a case.

Cases sent, committed or transferred to the Crown Court for trial

V.56.3 The case progression forms set out in Annex E with guidance notes are to be used in connection with cases that are sent to the Crown Court for trial under s 51 of the Crime and Disorder Act 1998 and cases that are committed to the Crown Court for trial under s 6 of the Magistrates' Courts Act 1980. In a case transferred to the Crown Court for trial under s 4(1) of the Criminal Justice Act 1987 or under s 53(1) of the Criminal Justice Act 1991 the directions contained in the case progression form used for committal for trial apply as if the case had been committed on the date of the notice of transfer.

V.56.4 A preliminary hearing (PH) is not required in every case sent for trial under s 51 of the Crime and Disorder Act 1998 (see r 12.2 (which altered r 24ZA of the Crown Court Rules 1982 from which it derived)). A PH should be ordered only where such a hearing is considered necessary. The PH should be held about 14 days after sending.

V.56.5 Whether or not a magistrates' court orders a PH, a plea and case management hearing (PCMH) should be ordered in every case sent or committed to the Crown Court for trial. The PCMH should be held within about 7 weeks after committal for trial, within about 14 weeks after sending for trial where a defendant is in custody and within about 17 weeks after sending for trial where a defendant is on bail.

Use of the forms: directions that apply by default

V.56.6 The case progression forms to be used in magistrates' courts contain directions some of which are determined by Criminal Procedure Rules or by other legislation and some of which are discretionary, as explained in the

guidance notes. All those directions apply in every case unless the court otherwise orders. *a*

[Annex E contains the following forms and their guidance notes:

Magistrates' Court Case Progression—Case to be tried in the Magistrates' Court;
Magistrates' Court Case Progression—Case committed for trial to the Crown Court under s 6 of the Magistrates' Courts Act 1980; *b*
Magistrates' Court Case Progression—Case sent to the Crown Court under s 51 of the Crime and Disorder Act 1998;
Crown Court Case Progression—Preliminary hearing;
Plea and Case Management Hearing in the Crown Court.

Annex E is reproduced on our daily online service, All England Direct, at [2005] All ER (D) 385 (Mar).] *c*

Stephen Leake Barrister

R v Z

[2005] UKHL 35

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD WOOLF, LORD RODGER OF EARLSFERRY, LORD CARSWELL, LORD BROWN OF EATON-UNDER-HEYWOOD

18, 19 APRIL, 19 MAY 2005

Criminal law – Proscribed organisation – Belonging or professing to belong to a proscribed organisation – Proscribed organisations listed or operating under same name as organisation listed – 'Irish Republican Army' listed – Whether person belonging or professing to belong to 'Real Irish Republican Army' belonging or professing to belong to proscribed organisation – Northern Ireland (Sentences) Act 1998, s 3(8) – Terrorism Act 2000, ss 3(1), 11(1), 107.

Certain defendants were charged, among other counts, with belonging 'to a proscribed organisation, namely the Real Irish Republican Army' (the Real IRA), contrary to s 11(1)[a] of the Terrorism Act 2000. Section 3(1)[b] of the 2000 Act provided that an organisation was proscribed if (a) it was listed in Sch 2 to the 2000 Act, or (b) it operated under the same name as an organisation listed in that schedule. The Irish Republican Army (the IRA) was listed in Sch 2, the Real IRA, as such, was not. The defendants were acquitted in the Crown Court, where the judge held that the Real IRA was not a proscribed organisation. The Attorney General for Northern Ireland referred to the Northern Ireland Court of Appeal the question whether a person committed an offence contrary to s 11(1) of the 2000 Act if he belonged or professed to belong to the Real IRA. The Court of Appeal answered the question in the affirmative. It took judicial notice of the history of the IRA, the Provisional IRA, and the Real IRA, and inferred first, that in making it a criminal offence to belong or profess to belong to the IRA the legislature had considered that such a provision was efficacious to make membership of both the IRA and the Provisional IRA illegal, and secondly, that Parliament had plainly intended to proscribe the Real IRA in the 2000 Act. One of the acquitted persons appealed. The House of Lords considered the history of the provisions by which Parliament had previously legislated to make it a criminal offence to belong or profess to belong to proscribed organisations including the Northern Ireland (Emergency Provisions) Act 1973, s 19(3)[c] of which had provided: 'The organisations specified in Schedule 2 to this Act are proscribed organisations for the purposes of this section; and any organisation which passes under a name mentioned in that Schedule shall be treated as proscribed, whatever relationship (if any) it has to any other organisation of the same name.' The House also considered the specification provisions in s 3 of the Northern Ireland (Sentences) Act 1998 under which the Secretary of State had a duty in certain circumstances to specify any organisation which he believed was concerned in terrorism connected with the affairs of Northern Ireland, or in

a Section 11, so far as material, provides: '(1) A person commits an offence if he belongs or professes to belong to a proscribed organisation …'

b Section 3 is set out at [2], below

c Section 19, so far as material, is set out at [4], below

promoting or encouraging it. Section 107[d] of the 2000 Act cross-referred to those provisions, providing in relation to certain purposes of the 2000 Act that, 'an organisation is specified at a particular time if at that time—(a) it is specified under section 3(8) of the Northern Ireland (Sentences) Act 1998, and (b) it is, or forms part of, an organisation which is proscribed for the purposes of this Act'.

Held – The appeal would be dismissed and the referred question answered in the affirmative for the following reasons.

(1) Per Lord Bingham of Cornhill and Lord Woolf. Section 3(1) of the 2000 Act reproduced the effect of the formula first enacted in s 19(3) of the 1973 Act and it imposed a single composite test: was this the body listed in Sch 2 to the 2000 Act or a part or emanation of it or did it in any event operate under the name of an organisation listed in the Schedule. To that question the only possible answer in the instant case was the affirmative answer given by the Court of Appeal (see [23], [24], [37], [43], [46], [47], below.

(2) Per Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood. Section 3(1) of the 2000 Act provided for two mutually exclusive ways in which an organisation could properly be found to be proscribed. In the instant case the critical question, which arose under s 3(1)(a), could be posed in either of two ways: was the Real IRA listed in Sch 2 to the 2000 Act; or did a member of the Real IRA belong to the IRA. It was therefore necessary to construe what was meant by the term 'The Irish Republican Army' within Sch 2 and it was clear that the words had been intended as an umbrella term, capable of describing all manifestations or splinter groups. Moreover, it followed from the definition of a 'specified' organisation in s 107 of the 2000 Act that a specified organisation could be part of a larger proscribed organisation. The scheme of the legislation was custom built for the Real IRA, a specified organisation, to be regarded as part of the proscribed organisation, the IRA (see [48], [51], [54], [55], [60]–[62], [67]–[69], below).

Notes

For membership, support and meetings of proscribed organisations, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 111.

For the Northern Ireland (Sentences) Act 1998, s 3, see 31 *Halsbury's Statutes* (4th edn) (2003 reissue) 980.

For the Terrorism Act 2000, ss 3, 11, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 2066, 2072.

For the Terrorism Act 2000, s 107, see 31 *Halsbury's Statutes* (4th edn) (2003 reissue) 1188.

Cases referred to in opinions

A-G for Canada v Hallet & Carey Ltd [1952] AC 427.

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.

Brophy v A-G of Manitoba [1895] AC 202, PC.

Coles v Odhams Press Ltd [1936] 1 KB 416, [1935] All ER Rep 598, DC.

Corocraft Ltd v Pan American Airways Inc [1969] 1 All ER 82, [1969] 1 QB 616, [1968] 3 WLR 1273, CA.

d Section 107 is set out at [9], below

DPP v Campbell (19 December 2003, unreported), Ir CA.
DPP v Quilligan [1986] IR 495, Ir SC.
Karpavicius v R [2002] UKPC 59, [2003] 3 LRC 445, [2003] 1 WLR 169.
Kokkinakis v Greece (1994) 17 EHRR 397, [1993] ECHR 14307/88, ECt HR.
R (on the application of Quintavalle) v Secretary of State for Health [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 AC 687, [2003] 2 WLR 692.
River Wear Comrs v Adamson (1877) 2 App Cas 743, [1874–80] All ER Rep 1, HL.
Salomon v Salomon & Co Ltd [1897] AC 22, [1895–9] All ER Rep 33, HL.
Tuck & Sons v Priester (1887) 19 QBD 629, CA.
Ulster Transport Authority v James Brown & Sons Ltd [1953] NI 79, DC.

Cases referred to in list of authorities

A-G's Ref (No 4 of 2002) [2003] EWCA Crim 762, [2004] 1 All ER 1, [2005] 1 AC 264, [2003] 3 WLR 1153; *rvsd in part* sub nom *Sheldrake v DPP, A-G's Ref (No 4 of 2002)* [2004] UKHL 43, [2005] 1 All ER 237, [2005] 1 AC 264, [2004] 3 WLR 76.
DPP v Campbell (23 April 2004, unreported), Ir SC.
Harrison v Lewis [1989] FCR 765, CA.
Kingsbury v Martin (1901) 1 SR (NSW) 272, NSW SC.
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
R v A [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45, [2001] 2 WLR 1546.
Rhondda's (Viscountess) Claim [1922] 2 AC 339, HL.
Sales-Matic Ltd v Hinchcliffe [1959] 3 All ER 401, [1959] 1 WLR 1005, DC.

Reference

Z, the acquitted person, appealed with leave of the Court of Appeal in Northern Ireland (Kerr LCJ, Nicholson and Campbell LJJ) given on 30 June 2004 (as amended on 9 July 2004 and 15 September 2004) from its decision on 30 June 2004 ([2004] NICA 23, [2005] NI 106) on the point of law of general public importance (set out at [1], below) in a question referred by the Attorney General for Northern Ireland pursuant to s 15(1) of the Criminal Appeal (Northern Ireland) Act 1980. The reference followed the acquittal of Z and three others by Girvan J in the Belfast Crown Court on 25 May 2004 of offences of belonging to a proscribed organisation, namely the Real Irish Republican Army, contrary to s 11(1) of the Terrorism Act 2000. The facts are set out in the opinion of Lord Bingham of Cornhill.

Barry MacDonald QC SC and *Martin O'Rourke* (both of the Northern Ireland Bar) (instructed by *Kevin R Winters & Co*, Belfast) for the acquitted person.
Lord Goldsmith QC, A-G, Gordon Kerr QC (of the Northern Ireland Bar), *David Perry* and *Peter Ratcliffe* (instructed by the *Director of Public Prosecutions for Northern Ireland*, Belfast) for the Crown.

Their Lordships took time for consideration.

19 May 2005. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, in an indictment dated 11 June 2003, four defendants were charged (among other counts) with belonging 'to a proscribed organisation,

namely the Real Irish Republican Army', contrary to s 11(1) of the Terrorism Act 2000. They objected that the Real Irish Republican Army (to which I shall for convenience refer as the Real IRA) was not a proscribed organisation within the meaning of s 11(1). Girvan J, sitting in the Crown Court at Belfast, upheld the objection for reasons given in a judgment delivered on 25 May 2004 and acquitted the defendants on those counts. The acquittals prompted the Attorney General for Northern Ireland to refer the following point of law for the opinion of the Court of Appeal in Northern Ireland under s 15 of the Criminal Appeal (Northern Ireland) Act 1980:

> 'Does a person commit an offence contrary to s 11(1) of the Terrorism Act 2000 if he belongs or professes to belong to the Real Irish Republican Army?'

The Court of Appeal (Kerr LCJ, Nicholson and Campbell LJJ) ([2004] NICA 23, [2005] NI 106), for reasons given by Kerr LCJ in a judgment of 30 June 2004, differed from the judge and answered that question in the affirmative. In this appeal, the acquitted person (anonymised as Z) contends that the question should be answered negatively.

[2] The statutory provision most directly in issue in the appeal is s 3 of the 2000 Act, which provides:

> '**3.** *Proscription.*—(1) For the purposes of this Act an organisation is proscribed if—(a) it is listed in Schedule 2, or (b) it operates under the same name as an organisation listed in that Schedule.
>
> (2) Subsection (1)(b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.
>
> (3) The Secretary of State may by order—(a) add an organisation to Schedule 2; (b) remove an organisation from that Schedule; (c) amend that Schedule in some other way.
>
> (4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.
>
> (5) For the purposes of subsection (4) an organisation is concerned in terrorism if it—(a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism.'

Section 11 creates the offence of belonging or professing to belong to a proscribed organisation. Other sections create other offences related to proscribed organisations. In s 121 'organisation' is defined to include 'any association or combination of persons'. Schedule 2 to the Act, entitled 'Proscribed organisations', lists a number of such organisations, of which the first 14 have an Irish or Northern Irish provenance. First on the list is 'The Irish Republican Army' (henceforward, for convenience, the IRA). One of these listed organisations, the Orange Volunteers, is the subject of a note in the Schedule:

> 'The entry for The Orange Volunteers refers to the organisation which uses that name and in the name of which a statement described as a press release was published on 14th October 1998.'

The IRA entry is not the subject of any note. The Real IRA is not, as such, listed. Hence the simple submission made for the acquitted person that the Real IRA is not a proscribed organisation for purposes of the 2000 Act.

[3] The proscription of organisations dedicated to politically-motivated violence is not a novelty in Ireland. A scheme for proclaiming associations to be dangerous was established by the Criminal Law and Procedure (Ireland) Act 1887, and in 1918 five associations (not including the IRA) were proclaimed to be dangerous. After Partition similar provision was made. Regulation 24A, made by the recently-established government of Northern Ireland under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, criminalised membership of any of a number of organisations including the IRA. Over time, additions were made to the 1922 list, including (in 1966, by SR & O (NI) 1966/146):

> 'The organisation at the date of this regulation, or at any time thereafter, misappropriating, or claiming to use, or using, or purporting to act under, the name "the Ulster Volunteer Force" or any division or branch of such organisation howsoever described.'

In June 1939 the government of the Irish Free State, which had earlier prohibited a number of bodies including the IRA under the Constitution (Declaration of Unlawful Associations) Order 1931, No 73/1931), exercised a power conferred by s 18 of the Offences against the State Act 1939 to declare 'that the organisation styling itself the Irish Republican Army (also the I.R.A. and Óglaigh na hÉireann) is an unlawful organisation and ought, in the public interest, to be suppressed' (see the Unlawful Organisation (Suppression) Order 1939, No 162/1939).

[4] In s 19(1) of the Northern Ireland (Emergency Provisions) Act 1973 Parliament legislated to make it a criminal offence to belong or profess to belong to 'a proscribed organisation'. Subsections (3), (4) and (5) were to this effect:

> '(3) The organisations specified in Schedule 2 to this Act are proscribed organisations for the purposes of this section; and any organisation which passes under a name mentioned in that Schedule shall be treated as proscribed, whatever relationship (if any) it has to any other organisation of the same name.
>
> (4) The Secretary of State may by order add to Schedule 2 to this Act any organisation that appears to him to be concerned in terrorism or in promoting or encouraging it.
>
> (5) The Secretary of State may also by order remove an organisation from Schedule 2 to this Act.'

Schedule 2 listed six proscribed organisations, of which the first was the IRA. No express reference was made to any other organisation bearing the name IRA or any variant of that name.

[5] The subsections of the 1973 Act to which I have just referred were almost literally re-enacted in s 1 of the Prevention of Terrorism (Temporary Provisions) Act 1974 which, however, added in sub-s (5): 'In this section "organisation" includes an association or combination of persons.' The only proscribed organisation expressly specified in the Schedule to this Act was the IRA.

[6] The legislative formula adopted in 1973 and 1974 was repeated in a series of counter-terrorism statutes relating to either Northern Ireland or Great Britain: see s 1 of the Prevention of Terrorism (Temporary Provisions) Act 1976, when only the IRA was expressly specified in Sch 1; s 21 of the Northern Ireland (Emergency Provisions) Act 1978, when the IRA was the first of seven organisations expressly specified in Sch 2 (and the definition of 'organisation' was

omitted); s 1 of the Prevention of Terrorism (Temporary Provisions) Act 1984, when the IRA was the first of two organisations expressly specified in Sch 1 (and 'organisation' was defined to include 'any association or combination of persons', the definition now found in s 121 of the 2000 Act); s 1 of the Prevention of Terrorism (Temporary Provisions) Act 1989, when the IRA was the first of two organisations expressly specified in Sch 1; s 28 of the Northern Ireland (Emergency Provisions) Act 1991, when the IRA was the first of nine organisations expressly specified in Sch 2 (and the definition of 'organisation' was again omitted); and s 30 of the Northern Ireland (Emergency Provisions) Act 1996, when the IRA was the first of ten organisations expressly specified in Sch 2 (and the definition of 'organisation' was once more omitted). In none of these statutes was express reference made to any organisation other than the IRA bearing that name or any variant of it.

[7] The Northern Ireland (Sentences) Act 1998 (the 1998 Sentences Act) was enacted to give partial effect to the Multi-Party Agreement made on 10 April 1998 (The Belfast Agreement: An agreement reached at the Multi-Party Talks on Northern Ireland) (Cm 3883) (1998), commonly known as the Good Friday Agreement. It provides for the accelerated release of prisoners serving sentences of imprisonment for terrorist offences who meet four conditions. These conditions require the prisoner in effect to renounce violence. Thus the second of the conditions (see s 3(4)) is that the prisoner is not a supporter of a specified organisation. The third condition (see s 3(5)) is that, if the prisoner were released immediately, he would not be likely:

> '(a) to become a supporter of a specified organisation, or (b) to become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.'

The application of these conditions depends on the definition of 'specified organisation' and a mandatory duty imposed on the Secretary of State, to be found in s 3(8), which provides:

> 'A specified organisation is an organisation specified by order of the Secretary of State; and he shall specify any organisation which he believes—(a) is concerned in terrorism connected with the affairs of Northern Ireland, or in promoting or encouraging it, and (b) has not established or is not maintaining a complete and unequivocal ceasefire.'

Subsection (9) relates to the exercise of the Secretary of State's judgment under sub-s (8)(b), and is not germane to the present appeal. Subsection (10) imposes further duties on the Secretary of State:

> 'The Secretary of State shall from time to time review the list of organisations specified under subsection (8); and if he believes—(a) that paragraph (a) or (b) of that subsection does not apply to a specified organisation, or (b) that paragraphs (a) and (b) apply to an organisation which is not specified, he shall make a new order under subsection (8).'

[8] In exercise of the power conferred by s 3(8) of the 1998 Sentences Act, the Secretary of State made, up to June 2003, four Northern Ireland (Sentences) Act 1998 (Specified Organisations) Orders. In the first (SI 1998/1882, made on 30 July 1998), four organisations were specified: 'The Continuity Irish Republican Army', 'The Loyalist Volunteer Force', 'The Irish National Liberation Army' and 'The

"Real" Irish Republican Army'. In the second (SI 1998/2869, made on 18 November 1998), the Loyalist Volunteer Force was omitted but the three other organisations previously specified were again specified. In the third (SI 1999/1152, made on 11 April 1999) the Continuity Irish Republican Army and the 'Real' Irish Republican Army were again specified, the Irish National Liberation Army was not specified and two organisations were specified for the first time: 'The organisation using the name "The Orange Volunteers" and being the organisation in whose name a statement described as a press release was published on 14th October 1998' and 'The Red Hand Defenders'. In the fourth (SI 2001/3411, made on 12 October 2001), the four organisations specified in the third order were again specified, but there were three additions: the Loyalist Volunteer Force, the Ulster Defence Association and the Ulster Freedom Fighters. A fifth order (SI 2004/3009, made on 14 November 2004) postdated the judgment now under appeal.

[9] Reference has been made above to s 3 of the 2000 Act, the proscription provision on which this appeal turns. The 2000 Act does, however, cross-refer to the specification provisions of the 1998 Sentences Act. In s 107 it is provided:

> '*Specified organisations: interpretation.*—For the purposes of sections 108 to 111 an organisation is specified at a particular time if at that time—(a) it is specified under section 3(8) of the Northern Ireland (Sentences) Act 1998, and (b) it is, or forms part of, an organisation which is proscribed for the purposes of this Act.'

Section 108 relates to evidence and provides, so far as material:

> '(1) This section applies where a person is charged with an offence under section 11.
>
> (2) Subsection (3) applies where a police officer of at least the rank of superintendent states in oral evidence that in his opinion the accused—(a) belongs to an organisation which is specified, or (b) belonged to an organisation at a time when it was specified.
>
> (3) Where this subsection applies—(a) the statement shall be admissible as evidence of the matter stated, but (b) the accused shall not be committed for trial, be found to have a case to answer or be convicted solely on the basis of the statement.'

[10] Sections 107 and 108(1)–(3) of the 2000 Act were not new provisions. Following the atrocity perpetrated at Omagh on 15 August 1998, understood to be the responsibility of the Real IRA, Parliament was recalled in early September 1998 and enacted (on 4 September 1998) the Criminal Justice (Terrorism and Conspiracy) Act 1998 (the 1998 Terrorism and Conspiracy Act). Sections 1 and 2 of this Act amended the 1989 Act (which related to Great Britain) and the 1996 Act (relating to Northern Ireland) by inserting provisions corresponding to what were to become ss 107 and 108(1)–(3) of the 2000 Act. Sections 107 and 108 apply to Northern Irish-related terrorism whether in Northern Ireland or Great Britain. It was an important object of the 2000 Act to assimilate the proscription regimes which had previously operated separately for Northern Ireland and Great Britain, and also to extend the proscription regimes to terrorist organisations, at home or abroad, not involved in Northern Irish-related terrorism.

[11] When the list of proscribed organisations listed in Sch 2 to the 2000 Act is compared with the list of organisations specified in the fourth specification order,

it is evident that a number of Northern Irish-related bodies appear in the former list but not the latter. Of the seven organisations specified in the fourth specification order, five (all of them loyalist) are proscribed under Sch 2 to the 2000 Act also. But whereas the fourth specification order, like its predecessors, specifies 'The "Real" Irish Republican Army', Sch 2 refers to 'The Irish Republican Army', and whereas the fourth specification order specifies 'The Continuity Irish Republican Army', Sch 2 refers to 'The Continuity Army Council'.

[12] The reasoning of Girvan J can, I think, be analysed as involving six steps. (1) The Real IRA is identified under the 1998 Sentences Act as an organisation separate and distinct from the IRA. (2) Section 3(1)(b) of the 2000 Act focuses on whether the organisation of which a defendant is said to be a member operates as an organisation under the name specified in Sch 2 to the 2000 Act. (3) The members of the Real IRA have a programme and purpose different from that of members of the IRA. (4) A person who links himself to the Real IRA to participate in a programme of continued republican violence despite the ceasefire could scarcely be said to have become a member of the IRA. (5) The Real IRA is not a proscribed organisation for the purposes of s 3 of the 2000 Act. (6) Were it to be accepted that the Real IRA was an organisation operating under the name of the IRA, the Crown would have to adduce evidence to establish that the organisation to which a defendant belonged did carry on its operations and activities under the name of the IRA.

[13] The Court of Appeal ([2005] NI 106) took judicial notice of certain facts which Mr Barry Macdonald QC, SC, for the acquitted person, did not challenge as inaccurate. (1) Until 1969 an organisation calling itself the IRA existed as a cohesive unit dedicated to unification of the 32 counties of Ireland, to which end it resorted to occasional violence (para [28] of the judgment). (2) In about 1969 a major split occurred in the ranks of the IRA. Some members, claiming to be the true inheritors of the mantle of the IRA, in effect declared a ceasefire in 1972. They became known as the Official IRA. Other members (becoming known as the Provisional IRA) continued to assert their right and intention to use violence for the purpose of achieving unification. The two organisations existed independently of each other thereafter (para [28]). (3) In 1994 and again in 1997 the Provisional IRA declared a ceasefire. Dissident groups within the Provisional IRA opposed these moves, and in late 1997 one group (calling itself the Real IRA) dissociated itself from the leadership of the Provisional IRA and declared that the ceasefire was over (para [30]). (4) The Real IRA claimed responsibility for a number of acts of violence, most notably the bombing of Omagh in August 1998 (para [30]). (5) When the 2000 Act was passed, Parliament was well aware of the existence and activities of the Real IRA (para [32]).

[14] From these facts the Court of Appeal inferred, first (at [29]), that in making it a criminal offence to belong or profess to belong to the IRA the legislature considered that such a provision was efficacious to make membership of both the Official and the Provisional IRA illegal and, secondly (at [32]), that Parliament plainly intended to proscribe the Real IRA in the 2000 Act and intended that members of the Real IRA should be liable to prosecution under that Act for belonging to a proscribed organisation. The court concluded (at [34]):

> 'Given the history of proscription and in particular the fact that Parliament had frequently enacted proscription provisions designed to include both elements of the IRA (Official and Provisional) within the single rubric "The

> Irish Republican Army", we have concluded that it was the intention of the legislature to include the "Real" IRA within that term and that the legislation must be so construed.'

The court explained the difference between the language of the 1998 Sentences Act and the 2000 Act (at [35]):

> 'This simply reflects the fact that some organisations within the generic term, "The Irish Republican Army", were not on ceasefire and were not entitled to benefit from the accelerated release of prisoners scheme. They had to be identified separately, therefore. This was not necessary for the purpose of proscription since it was intended that all manifestations of the IRA should be proscribed.'

[15] In considering the meaning of s 3(1)(b) of the 2000 Act, the court considered (at [38]) that its purpose—

> 'is to ensure that organisations that grow up as a result of schism within a named terrorist organisation and operate under a broadly similar name should be proscribed.'

Had it been necessary to do so, the court would have held that the 'Real' IRA was the same name as 'The Irish Republican Army' for the purposes of s 3(1)(b) (para [41]). The court rejected a submission that art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) had been violated. While acknowledging, on the authority of *Kokkinakis v Greece* (1994) 17 EHRR 397 at 423 (para 52), that a criminal offence must be clearly defined in law, the court was of opinion ([2005] NI 106 at [51], [52]) that the offence charged against the acquitted person had been clearly defined.

[16] In argument before the House, as in the Court of Appeal (at [23], [33] of the judgment), Mr Macdonald realistically accepted that the Real IRA is a terrorist organisation deserving of proscription and that the intention of Parliament was that it should be proscribed. But he insisted that the task of the court is to interpret the provision which Parliament has enacted and not to give effect to an inferred intention of Parliament not fairly to be derived from the language of the statute. For this proposition he was able to cite a wealth of familiar but powerful authority: *Salomon v Salomon & Co Ltd* [1897] AC 22 at 38, [1895–9] All ER Rep 33 at 41 per Lord Watson; *River Wear Comrs v Adamson* (1877) 2 App Cas 743 at 763, [1874–80] All ER Rep 1 at 11 per Lord Blackburn; *Brophy v A-G of Manitoba* [1895] AC 202 at 216 per Lord Herschell LC, for the Privy Council; *A-G for Canada v Hallet & Carey Ltd* [1952] AC 427 at 449 per Lord Radcliffe for the Privy Council; *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 at 114 per Lord MacDermott CJ; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616 at 638 per Donaldson J; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 814, [1975] AC 591 at 613 per Lord Reid. Mr Macdonald also relied on the important principle of legal policy, exemplified by *Tuck & Sons v Priester* (1887) 19 QBD 629, that a person should not be penalised except under a clear law, should not (as it is sometimes said) be put in peril on an ambiguity: see *Bennion on Statutory Interpretation* (4th edn, 2002) p 705. Thus Mr Macdonald submitted that, whatever Parliament may have wished or intended, the Real IRA is not an organisation listed in Sch 2 and no process of construction, properly so called, could lead to the conclusion that it is. Similarly, the Real IRA does not operate under the same name

as an organisation listed in that Schedule: it operates under a name which is different, and intentionally different because chosen to convey that the Real IRA is a body separate in its membership and distinct in its aims from the IRA.

[17] The Attorney General in his argument did not take radical issue with the principles of construction on which Mr Macdonald relied, and I would not for my part wish to throw doubt upon them. But the interpretation of a statute is a far from academic exercise. It is directed to a particular statute, enacted at a particular time, to address (almost invariably) a particular problem or mischief. As was said in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at [8], [2003] 2 All ER 113 at [8], [2003] 2 AC 687:

> 'The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'

In the present case the historical context seems to me to be of fundamental, and in the end conclusive, importance.

[18] All the Westminster and Stormont statutes to which I have referred above, whether taking effect in Northern Ireland or Great Britain, were directed to a common end: the elimination of Irish-related terrorism. (The Irish Act of 1939 had additional, rather wider, objects: see *DPP v Quilligan* [1986] IR 495 at 504 per Walsh J). The object of all these statutes, with the exception of the 1998 Sentences Act, was to suppress such terrorism by stifling the organisations which were dedicated to violence for political ends. By criminalising membership or professed membership of such bodies and other more active acts of participation, it was intended if possible to close them down but at least to impede their functioning. For nearly half a century after 1922 references to the IRA were unproblematical since, however shadowy and secretive that body might be, there was never more than one body bearing, or claiming to bear, that name or any part or variant of it.

[19] By 1973, when the first in the modern series of statutes was enacted, that was no longer so. Nor, importantly, was it thought to be so. As the Court of Appeal recorded, the existence of two groups, the Official IRA and the Provisional IRA, each claiming to be the true embodiment of the IRA, loyal to its aims and ideals, was a known fact. In designing a proscription regime to counter the formidable threat which terrorism then presented, there was no doubt a choice of legislative techniques, one particular, one general. The particular approach would have proscribed the Provisional but not the Official IRA. The general approach was to proscribe the IRA using a blanket description to embrace all emanations, manifestations and representations of the IRA, whatever their relationship to each other, including the Provisional IRA. One course which would, if considered, have been rejected out of hand would have been to proscribe the IRA, meaning only the original IRA if it still existed or the Official IRA if it did not, since it would have been entirely futile to proscribe a body believed to have foresworn terrorism and omit a body believed to present a potent terrorist threat.

[20] While a case could have been made for what I have called the particular approach, I do not find it hard to understand why (if considered) it was not adopted. The fissiparous nature of republican paramilitarism was already

evident. One schism had already occurred. There might be further schisms. Or the separated groups might coalesce. And then perhaps split again. It would be very hard, if not impossible, for the authorities to prove the identity of a particular group or the relationship of one group to another at a given time. They would, to borrow language used by Lord Hewart CJ in a very different context (see *Coles v Odhams Press Ltd* [1936] 1 KB 416 at 426, [1935] All ER Rep 598 at 601), be 'taking blind shots at a hidden target'. So the name IRA, intended to be comprehensive as embracing 'any organisation which passes under a name mentioned in [Sch 2] ... whatever relationship (if any) it has to any other organisation of the same name' (see s 19(3) of the 1973 Act), was understandably favoured. There was, no doubt, a risk on this approach that a group within the extended IRA family would be proscribed which was currently non-violent although appearing to be concerned in terrorism or in promoting or encouraging it, but it might well have been thought unlikely that a body bearing the name IRA or any variant of it would be at all friendly to parliamentary democracy.

[21] What was well known in 1973 became even better known over the blood-stained years which followed, during which Parliament had occasion to consider proscription not only when enacting the series of statutes already referred to but also when renewing, on an annual basis, those in force. Nothing can be clearer than that the Provisional IRA, as the principal authors of terrorist violence over these years, were understood to fall within the proscription regimes laid down in the various statutes.

[22] The situation was, I think, transformed in 1998: first, because of the Good Friday Agreement, to which partial effect was given in the 1998 Sentences Act; and secondly, because of the Omagh bombing, attributed to the Real IRA as currently the active purveyors of IRA violence, and the 1998 Criminal Justice Act. The 1998 Sentences Act was no doubt directed to the objective of ending terrorist violence in Northern Ireland but its method, of offering freedom to convicted terrorists willing to renounce violence, was quite different from that adopted in the earlier legislation. To achieve its object a particular legislative approach was called for, so as to deny freedom only to supporters or likely supporters of groups currently practising or judged likely to practise violence. This, in my opinion, explains the particularity of, and the frequent changes in, the series of Specification Orders, which at all times included the Real IRA. When, in the wake of the Omagh bombing, Parliament amended the proscription provisions in the 1989 and 1996 Acts by enacting ss 1 and 2 of the 1998 Terrorism and Conspiracy Act (substantially repeated in ss 107 and 108 of the 2000 Act), it would have been nonsensical to leave the Real IRA outside the reach of those provisions. That Parliament did not intend to do so is in my opinion clearly shown by s 2B(1) inserted into the 1989 Act and s 30B(1) inserted into the 1996 Act, reproduced in s 107 of the 2000 Act and quoted in [9], above. There is here the clearest recognition that an organisation may be specified under s 3(8) of the 1998 Sentences Act and either be or (importantly) form part of an organisation which was proscribed for purposes of the 2000 Act. The Real IRA was consistently specified under s 3(8). It either was, or formed part of, the IRA, an organisation proscribed for purposes of the Act. It may very well be that the Real IRA and other groups within the IRA family are separate in their membership and distinct in their aims, but this is precisely the type of unfathomable inquiry which sub-ss (1)(a) and (b) of s 3, read together, were intended to preclude. It would invite an almost theological inquiry, as in deciding whether the Old Believers in Russia or the Old Catholics in the Netherlands, Germany, Austria,

Switzerland, Poland and elsewhere are the true keepers of the faith. Subsections (1)(a) and (b), although expressed in different language, in my opinion reproduce the effect of the formula first enacted in s 19(3) of the 1973 Act, and it imposes a single composite test: is this the body listed in the Schedule or a part or emanation of it or does it in any event operate under the name of an organisation listed in the Schedule? To that question the only possible answer on the admitted facts of the present case is the affirmative answer which the Court of Appeal gave. It is noteworthy that the Special Criminal Court sitting in Dublin on 10 October 2001, on more extensive evidence, reached a somewhat similar conclusion, quoted by the Court of Criminal Appeal (McGuinness, O'Donovan and Herbert JJ) (see *DPP v Campbell* (19 December 2003, unreported):

> '... the labels such as "official", "provisional", "continuity" or "real" are irrelevant in considering whether a particular person or group of persons are within the ambit of the Suppression Order i e that he or they belong to an organisation which styles itself the Irish Republican Army or the IRA or Óglaigh na hÉireann. The so-called "Real IRA" are on all fours with the original IRA as it existed in 1939 in terms of the philosophy, objectives and structure and members of that group are within the ambit of the 1939 Suppression Order.'

[23] Mr Macdonald did not in oral argument press his submission based on art 7 of the convention, no doubt recognising that if he did not succeed on his construction argument he could scarcely succeed on this. His judgment was in my opinion correct. The principle expressed in para 52 of the European Court's judgment in *Kokkinakis v Greece* (1994) 17 EHRR 397 at 423 (see [15], above) is not in question. A person should not be exposed to criminal liability if the law does not clearly define the offence he is said to have committed at the time of his committing it. It would be unjust to punish him for conduct he could not reasonably have known to be criminal. But that is not this case. No member of the Provisional IRA in the years after 1973 and no member of the Real IRA in the late 1990s could have been unaware that he was a member of a proscribed organisation.

[24] For these reasons I would answer the referred question in the affirmative and dismiss the appeal. In accordance with the ordinary practice, the acquitted person will receive his costs of the appeal to the House out of central funds and the Attorney General will bear his own costs.

LORD WOOLF.

[25] My Lords, I have had the advantage of being able to read the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft and gratefully adopt his account of the facts leading up to the present appeal and the history of the statutory provisions dealing with the proscription of terrorist organisations in Northern Ireland and in the United Kingdom. I have also had the advantage of reading the speech of my noble and learned friend, Lord Brown of Eaton-under-Heywood. I also adopt the account of the history of the activities of the three different organisations of the Irish Republican Army (the IRA), the Official IRA, the Provisional IRA and the Real IRA set out by Kerr LCJ in his judgment in the Court of Appeal ([2004] NICA 23, [2005] NI 106). I do so because Mr Barry J Macdonald QC SC who appeared on behalf of Z accepted that this account of the history was generally accurate.

[26] Her Majesty's Attorney General for Northern Ireland, Lord Goldsmith QC, rightly described the issue which we are required to decide as a short point of interpretation. However, 'short points of interpretation' are not always easy to resolve and I have not found the issue that we are required to determine on this appeal entirely straightforward. Its difficulty is illustrated by the fact that although Lord Bingham and Lord Brown are in agreement as to what should be the result of the appeal their reasons for coming to their opinions differ.

[27] The issue is set out in the reference of the Attorney General, pursuant to s 15(1) of the Criminal Appeal (Northern Ireland) Act 1980 as raising the following question:

> 'Does a person commit an offence contrary to s 11(1) of the Terrorism Act 2000 if he belongs or professes to belong to the Real Irish Republican Army?'

[28] This question requires your Lordships to give their opinion on the following two points of law:

> 'i. Is the "Real Irish Republican Army" an organisation listed in Sch 2 of the Terrorism Act 2000 ("the 2000 Act")?
>
> ii. Does the "Real Irish Republican Army" operate under the same name as an organisation listed in Sch 2 of the 2000 Act?'

[29] Because it is so important to the issues I set out the terms of s 3 of the 2000 Act:

> '(1) For the purpose of this Act an organisation is proscribed if—(a) it is listed in Schedule 2, or (b) it operates under the same name as an organisation listed in that Schedule.
>
> (2) Subsection (1)(b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.
>
> (3) The Secretary of State may by order—(a) add an organisation to Schedule 2; (b) remove an organisation from that Schedule; (c) amend that Schedule in some other way.
>
> (4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.
>
> (5) For the purposes of subsection (4) an organisation is concerned in terrorism if it—(a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism.'

[30] Section 121 of the 2000 Act defines 'organisation' as including 'any association or combination of persons'. This is clearly a wide and flexible definition.

[31] Schedule 2 sets out 35 proscribed organisations of which the relevant organisation 'the Irish Republican Army' is mentioned first. There is no other organisation which includes the words 'the Irish Republican Army' mentioned.

[32] The only other section that it is necessary to refer to is s 107 of the 2000 Act which makes it clear that an organisation which is proscribed by the 2000 Act can have constituent parts. (See s 107(b)).

[33] Mr Macdonald's submissions on behalf of the acquitted person are attractively simple in relation to s 3. He relies upon two well-established

approaches to the interpretation of legislation which I would not question. The first is that it is the court's function to ascertain the intention of Parliament *as expressed in the legislation*. To emphasise this point, Mr Macdonald cited various well-known authorities but for my purposes, it is not necessary to do other than accept the general principle already stated. The same is true of his other principle of interpretation, namely that, as the provisions of the 2000 Act with which we are concerned are penal in effect (since s 11 of the 2000 Act makes it an offence to belong or profess to belong to a proscribed organisation), the provisions of the 2000 Act must be construed strictly. Here, Mr Macdonald relies upon the statement of Lord Esher MR in *Tuck & Sons v Priester* (1887) 19 QBD 629 at 638. Lord Esher MR stated:

> 'If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.'

[34] Basing himself upon those two well-established principles, it is Mr Macdonald's case that, as s 3 does not refer to the *Real* Irish Republican Army, the Real IRA is not a proscribed organisation. Realistically, Mr Macdonald accepts that all members of Parliament will have intended to proscribe the Real IRA but he submits Parliament passed an Act which, contrary to the intention of its members, did not contain the language needed to achieve Parliament's objective. This, submits Mr Macdonald, may be unfortunate, but it is not a disaster because as s 3 makes clear, action can be taken which should have been taken in the 2000 Act before it was enacted to include the Real IRA expressly. As to the ability to correct the situation, if this is necessary, Mr Macdonald is undoubtedly correct, but if he is correct it also follows that, if the Real IRA changes its name to the New IRA or a further organisational split takes place in which the Real IRA and the Real IRA 2 was created, there would be the same problem as is raised on this reference.

[35] The position is, however, not as simple as Mr Macdonald would wish on behalf of his clients. There is now no organisation which can claim that it and it alone is entitled to be known as the IRA. In fact, there are at least three organisations which it would not be inaccurate to describe as being the IRA. There is the Official IRA, the Provisional IRA and the Real IRA. Faced with this situation, notwithstanding the principles on which Mr Macdonald relies and indeed, because of those principles, the House is, as it seems to me, forced to ascertain the intention of Parliament when it included the words 'Irish Republican Army' in Sch 2. Was Parliament referring to one or more and if so which of the organisations to which I have referred, or perhaps to other organisations that might claim that they are the IRA? When the issue is approached in this manner, it is ironic that it is the Real IRA, an organisation that claims now to personify the principles for which the IRA, in its opinion, stands, should be arguing so strenuously not to be the IRA.

[36] Faced with this situation it is not in conflict with the principles on which Mr Macdonald relies for the courts to examine appropriate material to ascertain what Parliament meant should be the effect of s 3 and Sch 2 to the 2000 Act when it used the language they contain. The proper approach, in my view, has been admirably expressed in terms upon which I could not improve by Lord Bingham in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13,

[2003] 2 All ER 113, [2003] 2 AC 687. There relating to a different context, Lord Bingham stated the position as follows:

> '[7] Such is the skill of Parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.
>
> [8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'

[37] In accord with Lord Bingham's approach, here the controversial provision, namely to whom the reference to the IRA should be applied, has to be read not only in the context of the statute as a whole but in the context of the situation which led to its enactment. When this is done, there can be no doubt and any other view would be absurd, that the words of s 3 and Sch 2 were intended to include the Real IRA which was the most active of the different organisations at the time of enactment. This conclusion is re-enforced when the relevant language of s 19 of the Northern Ireland (Emergency) Provisions Act 1973 is considered which for present purposes is as follows:

> '(1) Subject to subsection (7) below, any person who—(a) belongs or professes to belong to a proscribed organisation; or (b) solicits or invites financial or other support for a proscribed organisation, or knowingly makes or receives any contribution in money or otherwise to the resources of a proscribed organisation, shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £400, or both, and on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both.
>
> (2) The court by or before whom a person is convicted of an offence under this section may order the forfeiture of any money or other property which

at the time of the offence he had in his possession or under his control for the use or benefit of the proscribed organisation.

(3) The organisations specified in Schedule 2 to this Act are proscribed organisations for the purposes of this section; and any organisation which passes under a name mentioned in that Schedule shall be treated as proscribed, *whatever relationship (if any) it has to any other organisation of the same name.*

(4) The Secretary of State may by order add to Schedule 2 to this Act any organisation that appears to him to be concerned in terrorism or in promoting or encouraging it.

(5) The Secretary of State may also by order remove an organisation from Schedule 2 to this Act.' (My emphasis.)

[38] A comparison of s 19(3) of the 1973 Act with s 3(1) of the 2000 Act makes it clear that, allowing for the difference in style in drafting in 1973 and today, s 19(3) of the 1973 Act is virtually identical in meaning to s 3(1) of the 2000 Act. The only difference is that the final words of s 19(3), 'whatever relationship (if any) it has to any other organisation of the same name' have been discarded when drafting the 2000 Act.

[39] The concluding words of s 19(3) of the 1973 Act which are not repeated in s 3(1) of the 2000 Act convey a strong message that the language which preceded those concluding words was to be given a generous application.

[40] Schedule 2 to the 1973 Act contains the names of six proscribed organisations, the first of which is 'the Irish Republican Army'.

[41] Interestingly, by the time the 1973 Act was passed, the Provisional IRA were on the terrorist scene. It was, by the time of the 1973 Act, the most active of the terrorist bodies and it is inconceivable that the language of s 19(3) and Sch 2 could be interpreted in context as not proscribing the Provisional IRA. The Official IRA was, however, also on the scene, although quiescent.

[42] In the case of s 19(3), I do not understand Mr Macdonald to disagree with the view that the section as a whole was apt to proscribe both the Official IRA and the Provisional IRA or at least the Provisional IRA. So far as the IRA was concerned, it was a blanket provision. It matters not whether the Provisional IRA are regarded as being the Irish Republican Army for the purposes of s 19(3) or they are regarded as being a name 'which passes under a name mentioned in that Schedule'. The point is entirely academic. The effect of s 19(3) as a whole is that the organisation that chose to carry on its activities under the name 'Provisional IRA' was to be proscribed in the same way as the Official IRA was to be proscribed. The intent of the language that Parliament used was that there should be a seamless whole which was apt to make any organisation which operated under a name that included the words the 'Irish Republican Army' proscribed. After all, organisations calling themselves the Official, Provisional or Real IRA have no monopoly in the name IRA but claim to be the IRA. They use the preface to differentiate between themselves but the important parts of their names are the words IRA.

[43] Techniques in drafting of s 3 of the 2000 Act and s 19(3) of the 1973 Act differ. Section 3(1) of the 2000 Act is drafted more succinctly and more clearly than its predecessor. It is in a crisper, more contemporary style. However, there is no reason to think that the difference in style means that it should be interpreted in any different way from its predecessor in the 1973 Act. The concluding words of s 19(3) are omitted but although they gave an insight into

the intention of the earlier subsection, the omission does not mean that the later subsection should be interpreted differently from its predecessor. Both subsections were intended to ensure that any organisation which has the IRA as part of its name was proscribed.

[44] Parliament intended by the language it used that it should be unnecessary to engage in the sort of semantic and technical arguments that we have been involved in on the hearing of this appeal. In so far as it is of any relevance, the difficulty that I have with Mr Macdonald's argument is that if the *Provisional* IRA can be, for the purposes of s 3(1)(a), the IRA, why is the same not true of the *Real* IRA. Both organisations came into existence by the same process at different dates. Both organisations regarded themselves as the successors of the 'true' or *Official* IRA.

[45] It is interesting that s 3(2) recognises that there may be a note in Sch 2 which will prevent an organisation being proscribed as a result of s 3(1)(b). It is surprising that s 3(2) does not apply to both limbs of s 3(1). The only explanation that I find which is satisfactory for this difference in treatment is that s 3(1)(a) was intended to apply to the original organisation (the Official IRA) and s 3(1)(b) was intended to apply to any other organisation bearing the name IRA, including both the Provisional and the Real IRA who were both in existence at the time of the 2000 Act. The power to make a note was included because in 2000 it was recognised that the Provisional IRA, unlike the Real IRA, was engaged in the peace process. However, I do not find it necessary to come to any final decision about this because it is of no practical consequence. In any event, s 3(3) gives the Secretary of State ample power to add to or amend Sch 2 to respond to any changes on the ground which mean that it is no longer necessary to proscribe a particular organisation.

[46] I would, therefore, like my noble and learned friend, Lord Bingham encourage an approach to s 3(1) which involves treating the subsection as a composite whole.

[47] For the reasons given in this opinion and by Lord Bingham, in his opinion, I would dismiss this appeal.

LORD RODGER OF EARLSFERRY.

[48] My Lords, I have had the advantage of reading in draft the speech which is to be delivered by my noble and learned friend, Lord Brown of Eaton-under-Heywood. I am in entire agreement with it and, for the reasons he gives, I too would dismiss the appeal.

LORD CARSWELL.

[49] My Lords, this appeal serves as a very good example of the principle of statutory construction that in seeking to ascertain the mischief towards which a statute is directed it can be of prime importance to have regard to the historical context. My noble and learned friend Lord Bingham of Cornhill addressed this issue in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at [8], [2003] 2 All ER 113 at [8], [2003] 2 AC 687 when he said:

> 'The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty ... Every statute other than a pure consolidating statute is, after all, enacted to make

some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'

If the words of a statutory provision, when construed in a literalist fashion, produce a meaning which is manifestly contrary to the intention which one may readily impute to Parliament, when having regard to the historical context and the mischief, then it is not merely legitimate but desirable that they should be construed in the light of the purpose of the legislature in enacting the provision: cf *Karpavicius v R* [2002] UKPC 59 at [15], [16], [2003] 3 LRC 445 at [15], [16], [2003] 1 WLR 169 per Lord Steyn.

[50] Lord Bingham has set out in his opinion the material facts and the applicable legislation, which I gladly adopt and need not repeat. A summary of the history of the Irish Republican Army (IRA) since 1969 was set out in the judgment of Kerr LCJ in the Court of Appeal. I am satisfied that the Court of Appeal and this House were entitled to take judicial notice of these facts, none of which was disputed by Mr Macdonald. I think that it is important to bear in mind, first, that every manifestation of violent republican paramilitarism has been the result of a split from a previously existing organisation. Secondly, every such manifestation has regarded itself, in the words of McGuinness J in the Irish Court of Criminal Appeal in *DPP v Campbell* (19 December 2003, unreported) as 'the carrier of the flame of republicanism, the possessor of roots of legitimacy'. This is no doubt the reason why each has laid claim to the title Óglaigh na hÉireann, the name of the Irish Volunteers who played a part in the 1916 Easter Rising and subsequently became the original or 'Old' Irish Republican Army.

[51] At the time of passing the Terrorism Act 2000, as well as when it enacted the predecessor legislation, Parliament would have been very well aware of these facts. It has used the same term 'The Irish Republican Army' throughout the series of statutes by which the IRA has been proscribed, in the knowledge that during that time there have been no fewer than four organisations using that title with different prefixes. By the time that the 2000 Act was passed, the Real IRA was in active being and the Omagh bombing had been attributed to it. It is inconceivable that Parliament did not intend to proscribe it, as Mr Macdonald frankly accepted, but his argument was that the statutory wording was such that it had not succeeded in doing so. I cannot accept this argument. It is in my view entirely clear that the words 'Irish Republican Army' were intended as an umbrella term, capable of describing all manifestations or splinter groups. If this were not so, one could reach the absurd position that a group of disaffected members of one of the organisations could break away and give itself a similar prefix, such as 'Genuine' or 'Original', yet be free of the statutory proscription.

[52] Mr Macdonald for the appellant sought to escape from this by submitting that by the time Parliament passed the Northern Ireland (Emergency Provisions) Act 1973 the Provisional IRA was the only organisation regarded as the IRA and that in the public mind it and it only had become and still remained the Irish Republican Army. It therefore was the body at which the proscription in the 1973 Act and successive enactments was aimed, and this was certainly the case when Parliament passed the 2000 Act. In my opinion this argument is unsustainable. Whatever the standing in the popular mind of the Provisional IRA at the present

time, as to which I express no opinion, it cannot be successfully maintained that in 1973 it had succeeded in supplanting any other organisation to the extent of holding the position in ordinary parlance of *the* Irish Republican Army. The split from what became known as the Official IRA was of relatively recent occurrence and public documents such as the Diplock Report (*Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*) (Cmnd 5185), published in December 1972, regularly refer in the same breath to the Official IRA and the Provisional IRA. It cannot be supposed that a few months later Parliament could have regarded the Provisional IRA as the only body fitting the description of 'The Irish Republican Army'.

[53] A further argument advanced on behalf of the appellant was that the inclusion of the names of the Cumann na mBan and Fianna na hÉireann, the women's branch and junior wing respectively of the IRA, tended to show that the name 'Irish Republican Army' in the legislation was not intended to be an umbrella term, otherwise it would have been unnecessary to name these organisations specifically. I think that this argument also fails. It is not difficult to understand why the legislature should have named them separately for the sake of certainty. Unless judicial notice had been taken that they came under the umbrella of the IRA, a case might have been made that they were not proscribed and it would then have been necessary for the prosecution to adduce the very type of evidence that proscribing specific organisations by name was designed to avoid.

[54] I accordingly conclude that the Real IRA is included in the term 'The Irish Republican Army' in Sch 2 to the 2000 Act. I would answer the certified question in the affirmative. I would do so on the basis, like my noble and learned friend Lord Brown of Eaton-under-Heywood, that the case comes within s 3(1)(a) of the Act. Like him, I consider that paras (a) and b) of s 3(1) are mutually exclusive. I would reserve my opinion on the ambit of s 3(1)(b), which may require decision on some future occasion.

[55] I would therefore dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[56] My Lords, I have had the opportunity of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill and gratefully adopt his exposition of the relevant facts and the legislation as it has developed down the years. I agree with Lord Bingham's conclusion and with almost all of his reasoning. My only reservation will shortly become clear.

[57] The question for your Lordships' determination is whether a person commits an offence contrary to s 11(1) of the Terrorism Act 2000 if he belongs or professes to belong to the Real Irish Republican Army (the Real IRA). Section 11(1) provides that a person commits an offence if he belongs or professes to belong to a proscribed organisation.

[58] Section 3(1) provides that for the purposes of the 2000 Act an organisation is proscribed if '(a) it is listed in Schedule 2, or (b) it operates under the same name as an organisation listed in that Schedule'. Schedule 2 to the Act lists amongst other proscribed organisations: 'The Irish Republican Army' (the IRA).

[59] Lord Bingham concludes (at [22], above) that s 3(1)(a) and (b) 'imposes a single composite test: is this the body listed in the Schedule or a part or emanation of it or does it in any event operate under the name of an organisation listed in

the Schedule?' It is this part of Lord Bingham's reasoning with which I have some difficulty. a

[60] True it is, of course, that s 3(1) offers two alternative bases upon which an organisation can properly be found to be proscribed. True it is too that it is unnecessary for the prosecution to specify on which basis a s 11 charge is brought: ultimately all that matters is whether or not the accused belongs (or professes to belong) to a proscribed organisation, and not the basis of any finding b that he does. But what worries me about my Lord's approach is that it tends to obscure, if not evade, the specific questions which to my mind have to be addressed and answered on this appeal. Section 3 provides for two mutually exclusive ways in which an organisation may be regarded as proscribed. I think it necessary to examine whether the Real IRA is indeed proscribed in one of these ways. c

[61] In my opinion the Crown's case here stands or falls upon the first limb of s 3(1), their contention that the appellant belonged to an organisation listed in Sch 2. This particular appellant was charged under s 11 with belonging to the Real IRA. He might just as well, however, have been charged with belonging to the IRA. I repeat, the question for this House is whether a member of the Real d IRA commits an offence contrary to s 11: the particular form of charge cannot affect the answer to that question. One can therefore pose the critical question arising under s 3(1)(a) in either of two ways: (1) is the Real IRA listed in Sch 2? Or (2) does a member of the Real IRA belong to the IRA?

[62] Whichever way one poses the question it is necessary to construe what is e meant by the term 'The Irish Republican Army' within Sch 2. The Attorney General's submission is that this is an umbrella or generic name (a blanket description as Lord Bingham calls it) intended and apt to include all manifestations of that body. In the Northern Ireland (Emergency Provisions) Act 1973, following the split in 1969 between the Official IRA and the Provisional IRA (and the Official IRA's declaration of a ceasefire in 1972) the name covered both f branches. Similarly in 2000, after the further split in May 1997 between the Provisional IRA and the Real IRA (and the Real IRA's commission of the Omagh bombing in August 1998), the name covered both factions (and in turn Continuity IRA). The IRA, in short, as a named organisation, encompasses any and all smaller organisations which by their name claim to embody or represent the IRA. g

[63] Mr Macdonald QC, SC for the appellant is, of course, forced to acknowledge that the Real IRA was (even) more, rather than less, deserving of proscription than the Provisional IRA and that Parliament must have intended in 2000 to proscribe it but, he submits, the legislation simply failed to achieve this. He submits that the name, the IRA, certainly by the time Sch 2 was enacted in h 2000, unambiguously meant the Provisional IRA and nobody else. The question as to which body was referred to as the IRA in 1973—whether the Official IRA, the Provisional IRA or both—is more problematic for him but, he argues, by 2000 there could be no doubt about it: it was the Provisional IRA alone.

[64] He furthermore submits that the 2000 Act as a whole is drafted in terms j which make it clear that Sch 2 lists single organisations only and not groups of organisations even if they have the same object, let alone if they have conflicting objects and are thus in a real sense rival organisations. In this regard he relies in particular upon the statutory scheme for deproscription: s 3(3)(b) (which enables the Secretary of State by order to remove an organisation from Sch 2), s 4 (which

allows the organisation or any person affected by its proscription to apply for a s 3(3)(b) order), and ss 5–9 (which provide for appeals against the refusal of such a deproscription application). This whole deproscription scheme, he argues, cannot work if the Secretary of State is able to list an umbrella group of organisations under a generic name. Take this very case and assume that the Real IRA (or perhaps less unrealistically the Provisional IRA) had wished to be deproscribed: the Secretary of State could achieve this only by deproscribing *all* the organisations within the group.

[65] Finally Mr Macdonald submits that if an umbrella organisation can be listed there would be nothing to stop the Secretary of State from simply listing 'all organisations engaged in terrorism in Northern Ireland'.

[66] In my opinion there is no substance in any of these arguments. I see no warrant for construing 'the IRA' to mean 'the Provisional IRA' at any time, least of all after 1997 when plainly the Real IRA constituted the greater terrorist threat. Once the original IRA had begun to fracture into other organisations incorporating the name, the term 'the IRA' would most naturally apply to each and all of them. No problem in reality arises with regard to deproscription. In the situation postulated by Mr Macdonald, the Secretary of State, if minded to deproscribe a sub-group within a named umbrella organisation, would simply deproscribe the whole named organisation and immediately then reintroduce the remaining organisation(s) within the umbrella to the Schedule under a more specific label; alternatively amend the Schedule in some other way, perhaps by the addition of a note, to achieve this objective. Nor does this approach carry with it the consequence that the Secretary of State could simply list 'all organisations engaged in terrorism in Northern Ireland' as Mr Macdonald suggests. What the Secretary of State must proscribe are *named* organisations and 'the IRA' is precisely that: the issue is simply as to which persons comprise 'the IRA' within the meaning of the 2000 Act.

[67] Were there any conceivable doubt about all this, it is to my mind conclusively settled by an understanding of the effect of ss 107 and 108 of the 2000 Act. As Lord Bingham explains (at [9], [10], [22], above), these provisions had their precursors in amendments made to the Northern Ireland (Emergency Provisions) Act 1996 in the immediate aftermath of the Omagh bombing in 1998 and their effect is to allow opinion evidence to be given by a senior officer in a s 11 case that the person charged belongs to a *specified* organisation. A *specified* organisation is defined by s 107 as an organisation specified under s 3(8) of the Northern Ireland (Sentences) Act 1998, which is *or forms part of* a *proscribed* organisation. It necessarily follows from this that a *specified* organisation may be part of a larger *proscribed* organisation. Given, moreover, that s 3(8) of the 1998 Act provides for the specification of only those terrorist organisations which are not operating a full ceasefire, these, in cases where they form part only of a proscribed organisation, are likely to be following a different and more violent objective than the non-specified part(s) of the proscribed organisation. The scheme of the legislation, in short, is custom-built for the Real IRA, a specified organisation, to be regarded as part of the proscribed organisation, the IRA.

[68] As I said earlier, the Crown's case to my mind stands or falls on s 3(1)(a) of the 2000 Act. If the Real IRA are not comprised within the name 'the IRA' and thus listed in Sch 2 to the Act, I cannot see how they can be said to be operating under 'the same name'. Section 3(1)(b) seems to me intended and apt to cover only those cases where an organisation operates under an identical name to that

of an organisation listed in Sch 2—say, for example, the Irish National Liberation Army—but asserts that it is completely independent of the listed organisation. But for para (b) it could claim not itself to be proscribed under the Act. a

[69] It is therefore on the basis of s 3(1)(a) alone that I too would answer the referred question in the affirmative and dismiss the appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

R v Goodyear

[2005] EWCA Crim 888

COURT OF APPEAL, CRIMINAL DIVISION

LORD WOOLF CJ, JUDGE LJ, TREACY, WAKERLEY AND CALVERT-SMITH JJ

16 MARCH, 19 APRIL 2005

Criminal law – Trial – Plea – Advance indication of sentence by trial judge – Guidance.

(1) The rule of practice that a judge should never indicate the sentence which he is minded to impose (subject to the exception that it is permissible for him to say that whether a defendant pleads guilty or not guilty the sentence will or will not take a particular form) no longer need be followed in circumstances where a defendant personally instructs his counsel to seek an indication from the judge of his current view of the maximum sentence which would be imposed on the defendant. The following guidelines apply to ensure common process and continuing safeguards against the creation or appearance of judicial pressure on the defendant (see [49]–[52], below); dictum of Lord Parker CJ in *R v Turner* [1970] 2 All ER 281 at 285 not followed.

(2) A judge should not give an advance indication of sentence unless one has been sought by the defendant; however he remains entitled, if he sees fit, to indicate that the sentence, or type of sentence, on the defendant would be the same whether the case proceeds as a plea of guilty or goes to trial, with a resulting conviction. He is also entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence. A judge may refuse altogether to give an indication, or may postpone doing so, with or without giving reasons. Where the judge has in mind to defer an indication, he will probably explain his reasons, and further indicate the circumstances in which, and when, he would be prepared to respond to a request for a sentence indication. If at any stage a judge refuses to give an indication it remains open to the defendant to seek a further indication at a later stage. However, once a judge has refused to give an indication, he should not normally initiate the process, except to indicate that the circumstances have changed sufficiently for him to be prepared to consider a renewed application for an indication. Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect (see [55]–[61], below).

(3) Subject to the judge's power to give an appropriate reminder to the advocate for the defendant, the process of seeking a sentence indication should normally be started by the defendant. Whether or not the judge has given such a reminder, the defendant's advocate should not seek an indication without written authority, signed by his client, that the client wishes to seek an indication. The advocate is personally responsible for ensuring that his client fully appreciates (a) that he should not plead guilty unless he is guilty; (b) that any sentence indication given by the judge remains subject to the entitlement of the Attorney General (where it arises) to refer an unduly lenient sentence to the

Court of Appeal; (c) that any indication given by the judge reflects the situation at the time when it is given and if a guilty plea is not tendered in the light of that indication the indication ceases to have effect; and (d) that any indication which may be given relates only to the matters about which an indication is sought. An indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea or pleas to the indictment, or any factual basis relating to the plea. Any agreed basis should be reduced into writing before an indication is sought. Where there is a dispute about a particular fact, which counsel for the defendant believes to be effectively immaterial to the sentencing decision, the difference should be recorded, so that the judge can make up his own mind. A judge should never be invited to indicate levels of sentence which he may have in mind depending on possible different pleas. An unrepresented defendant is entitled to seek a sentence indication of his own initiative, but for either the judge or prosecuting counsel to take any initiative and inform an unrepresented defendant of this right may too readily be interpreted as, or subsequently argued to have been, improper pressure (see [63]–[68], below).

(4) As the request for an indication comes from the defence, the prosecution is obliged to react, rather than initiate the process. If there is no final agreement about the plea, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of this guidance. If an indication is sought, the prosecution should normally inquire whether the judge is in possession of or has had access to all the evidence relied on by the prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant. If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than (a) draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and (b) where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected. In any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown (see [69], [70], below).

(5) If counsel for the prosecution has addressed his responsibilities, the discretion of the Attorney General to refer a sentence under the Criminal Justice Act 1988 will be wholly unaffected by the advance sentence indication process. The defendant's entitlement to apply for leave to appeal against sentence if, for example, insufficient allowance has been made for matters of genuine mitigation, is similarly unaffected (see [71], [72], below).

(6) Any sentence indication will normally be sought at the plea and case management hearing. A judge is most unlikely to be able to give an indication, even if it is sought, in complicated or difficult cases, unless issues between the prosecution and the defence have been addressed and resolved, and therefore in such cases, no less than seven days' notice of an intention to seek an indication should normally be given in writing, to the prosecution, and the court. If an application is made without notice when it should have been given, the judge may conclude that any inevitable adjournment should have been avoided and

that the discount for the guilty plea should be reduced accordingly. The hearing should normally take place in open court, with a full recording of the entire proceedings, and both sides represented, in the defendant's presence. The fact that notice to the Crown has been given, and any reference to a request for a sentence indication, or the circumstances in which it was sought, will be inadmissible in any subsequent trial. There should be very little need for a judge to involve himself in the discussions with the advocates, although obviously he may wish to seek better information on any aspect of the case which is troubling him. It is not envisaged that there will be an opening by the Crown, or a mitigation plea by the defence. Reporting restrictions should normally be imposed, to be lifted if and when the defendant pleads or is found guilty (see [73]–[77], below).

(7) It would be impracticable for the new arrangements to be extended to proceedings in the magistrates' court. Accordingly, for the time being, the magistrates should confine themselves to the statutory arrangements in Sch 3 to the Criminal Justice Act 2003 (see [78], below).

Notes

For pleading generally, and for plea of guilty, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 975, 977.

Cases referred to in judgment

A-G's Reference (No 1 of 2004), R v Edwards [2004] EWCA Crim 1025, [2004] 1 WLR 2111.

Amendment to the Consolidated Criminal Practice Direction (Case Management) [2005] 3 All ER 91.

R v Newton (1982) 77 Cr App R 13.

R v Simpson [2004] EWCA Crim 1499, [2003] 3 All ER 531, [2004] QB 118, [2003] 3 WLR 337.

R v Turner [1970] 2 All ER 281, [1970] 2 QB 321, [1970] 2 WLR 1093, CA.

Appeal

Karl Goodyear appealed against sentence following his plea of guilty to an offence of corruption on 19 April 2004 at the Doncaster Crown Court before Judge Jack. The facts are set out in the judgment of the court.

Nigel Godsmark QC (instructed by *Crown Prosecution Service*) for the Crown.

Martin Sharpe (assigned by the *Registrar of Criminal Appeals*) for the appellant.

Cur adv vult

19 April 2005. The following judgment of the court was delivered.

LORD WOOLF CJ.

[1] This is the judgment of the court prepared by the deputy Chief Justice, Judge LJ.

[2] On first analysis this is an unremarkable appeal against sentence by Karl Goodyear following his plea of guilty to an offence of corruption on 19 April 2004 at the Crown Court at Doncaster before Judge Jack.

[3] In reality, the appeal raises important questions about the continuing applicability of the practice promulgated in *R v Turner* [1970] 2 All ER 281, [1970] 2 QB 321, as underlined and applied in subsequent cases, which, save in the most exceptional circumstances, effectively prohibited the judge from giving any indication of sentence in advance of a guilty plea by the defendant. Accordingly, following the procedure adopted in *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025, [2004] 1 WLR 2111 and *R v Simpson* [2004] EWCA Crim 1499, [2003] 3 All ER 531, [2004] QB 118, a five-judge court, presided over by the Lord Chief Justice, was convened to consider whether what we shall compendiously summarise as the *R v Turner* rule of practice may now properly be modified, and if so, to what extent.

THE PROCEEDINGS

[4] Before the trial began, a meeting took place in the judge's chambers between the judge and counsel for the appellant and counsel for two co-defendants, and counsel for the prosecution. The fourth defendant, Stones, had already pleaded guilty. The discussion culminated in the judge saying to counsel for the appellant 'I do take the view, by contradistinction to the case of Mr Stones who was a public servant and may be in a rather different position, but I do take the view that this is not a custody case'.

[5] Counsel returned to court. Goodyear was re-arraigned: so were the remaining two defendants. In the result all three defendants pleaded guilty. Sentence was adjourned for the preparation of pre-sentence reports.

[6] By 24 June, a pre-sentence report had been prepared for the appellant. It concluded that neither a custodial sentence nor a community rehabilitation order would be appropriate. A financial penalty was recommended. No reports for Daniels and Green were available. When the issue was raised before the judge he then indicated that he was considering suspended sentences on these three defendants. After an adjournment for instructions to be taken, counsel for both Daniels and Green indicated that their clients were content to be sentenced without the benefit of pre-sentence reports. Counsel for the appellant submitted that given the earlier indication by the judge on 19 April, it would be wrong in principle for a suspended sentence of imprisonment to be imposed.

[7] The antecedent histories showed that the appellant was 40 years old, without relevant previous convictions. Stones was 63. Apart from the conviction for driving with excess alcohol which led to his earlier disqualification, he was a man of good character. Daniels was 62 and Green 66. Both were of previous good character.

[8] The appellant was sentenced to six months' imprisonment suspended for two years, and ordered to pay a fine of £1,000 within 12 months. Stones was sentenced to nine months' imprisonment, suspended for two years. Green and Daniels were sentenced to three months' imprisonment, also suspended for two years.

THE FACTS

[9] These can be briefly summarised. In the mid-1990s Doncaster Metropolitan Council turned its attention to the renovation and improvement of an area known as the Stainforth estate. Some of the property on this estate was council-owned, and some privately-owned, usually former council houses

purchased under the well-known 'Right to Buy' provisions. The privately-owned houses were eligible for grant aid.

[10] Stones was responsible for allocating work between various contractors, who were already appointed to undertake grant-aided work on private houses. He was also responsible for checking that the work was done to an appropriate standard, and for authorising payment. He was aptly described by counsel for the prosecution opening the facts before the judge, as someone who was 'in a position to smile upon the building contractors, or to make life difficult for them ... he was in a position to be awkward, and he could, from time to time, in fact, be awkward'.

[11] Daniels and Green were partners in a firm working on the estate. Their earnings from this work kept their business afloat between 1992 and 1998. They received just over £750,000 by way of grant aid.

[12] The appellant was a sub-contractor, responsible for external rendering, the only sub-contractor authorised to undertake this kind of work. Between 1992 and 1998 he was paid just over £600,000 for the work done by him on private houses and overseen by Stones.

[13] The relationship between Green and Daniels and Stones, and the appellant and Stones was corrupt. The appellant paid Stones £3,200, and carried out rendering work to Stones's home, without payment. This work was valued at about £2,500. Daniels and Green also worked at Stones's home, making a staircase and working on kitchen worktops. The Crown valued this work at £3,000, the defence contending that it was worth much less. In addition, at a time when Stones was disqualified from driving, Daniels and Green arranged unpaid transport for Stones from the Stainforth estate to his home.

[14] The intention was clear, and again summarised by counsel for the Crown:

> 'This work was done and these payments made to Mr Stones effectively to keep him sweet, to stay in with him, in the hope that he would smile upon them, and would show less of a tendency to be difficult with them ...'

[15] It was accepted by the prosecution that neither the appellant, nor Green nor Daniels, obtained any additional work or contracts as a result of these corrupt transactions. The purpose was to encourage Stones to look kindly on them when exercising his responsibilities for the administration of the contracts. The objective was summarised by one defendant in his interview: 'It was all about "sweetening" Stonesey.'

[16] The four defendants were arrested. When interviewed, Stones said that he could not remember receiving any cheque from the appellant, and claimed that he had paid for the rendering work done by him. In later interviews he made no comment about payments from him. The appellant on the other hand accepted that he had made payments to Stones, claiming that it was part of an arrangement described by him as 'business consultancy'. The payments were given for business advice and some quantity surveying work, and the rendering was set off against consultancy fees.

[17] Daniels and Green accepted that they had made the stairs for Stones and helped with the kitchen worktops as a favour. They never asked Stones for payment, and they did the work in order to remain in his favour.

GROUNDS OF APPEAL

[18] The essential ground of appeal arises from the fact that the judge did not abide by his indication, given on 19 April, that a custodial sentence would not be imposed on Goodyear. It is submitted that in the light of his indication, at that date at any rate, he could not have been satisfied that the offence was so serious that only a custodial sentence could be justified (see s 79(2)(a) of the Powers of Criminal Courts (Sentencing) Act 2000). Moreover, a suspended sentence was inappropriate because there was nothing exceptional about the circumstances (see s 118(4) of the 2000 Act). Between 19 April and 24 June, the date when the appellant was sentenced, no additional or further factors relevant to the sentencing decision had emerged, save and except that the pre-sentence report supported the original view expressed by the judge that a custodial sentence was inappropriate. Accordingly a sentence of imprisonment, even if suspended, should not have been passed, and in the light of the indication given by the judge, was wrong in principle.

PROCEEDINGS ON 19 APRIL

[19] A complete record was rightly made of the discussion in the judge's chambers on 19 April. As counsel for the Crown put it, the meeting did not take place at his behest. As Stones had already pleaded guilty, and was awaiting sentence, his counsel was not present.

[20] In the discussion which took place counsel for Goodyear explained various background matters, and eventually said:

> 'Mr Goodyear is very eager not to have a trial, and is very eager to avoid, if it were possible, the possibility of a custodial sentence, and on my behalf I wonder whether your Honour would be in a position to give any indication?'

The judge responded:

> 'Well, certainly not at this stage, because I haven't considered the question of sentence at this point ... and in any event I don't think I would be in a position to give an indication ... I am sorry for that.'

[21] Counsel for Daniels then addressed the judge. His observations ended:

> '... I will make submissions ... that the custody threshold would not be passed, and I simply wondered whether your Honour is in a position to assist in that regard, both I anticipate on behalf of myself and my learned friend ... [counsel for Green].'

The judge replied:

> '... as things stand and on the prosecution case at it is put, it seems to me that I cannot assist, although I can obviously say that your client's good character would stand him in good stead, and a guilty plea would stand him in good stead. But it does seem to me at the moment the issue as to the value of the benefits is significant.'

[22] Counsel for the appellant then raised what he described as 'one important matter' which had arisen in discussion between counsel before they saw the judge. He pointed out that the Crown was not suggesting that the three defendants whose cases were then under consideration would not have received the work anyway. In other words, no specific or positive gain had been achieved.

[23] The judge sought assistance from counsel for the Crown who commented:

> 'There is no suggestion by the Crown that the defendants got anything they wouldn't otherwise have got. This is simply an allegation that they are keeping him sweet, as it were ... I hope I don't oversimplify matters in putting it in that way, but that is the way in which I propose to open it to the jury.'

Counsel confirmed the judge's understanding of what he had just said, that it was not suggested that the defendants had obtained additional work as a result of providing benefits for Mr Stones. He went on that there was no evidence to suggest that these defendants had benefited over and above any other contractors.

[24] The judge told counsel for the appellant:

> 'Yes, in those circumstances I can revise what I said earlier. I do take the view, by contradistinction to the case of Mr Stones, who was a public servant and may be in a rather different position, but I do take the view that this is not a custody case.'

This was the critical sentence indication.

[25] With that, counsel left the judge's chambers. He allowed them time to see their clients and take instructions. Later that day, on re-arraignment, the three defendants pleaded guilty.

PROCEEDINGS ON 24 JUNE

[26] We have already recorded the concerns expressed by counsel for the appellant at the proposal that a suspended sentence of imprisonment should be imposed on his client, and summarised the Crown's case. No further repetition is needed.

[27] In his sentencing remarks the judge reflected on the seriousness of offences of corruption, commenting that they were so serious that normally 'only an immediate prison sentence can be justified'. He reflected on the appellant's involvement, taking the view that it was more serious than that of Daniels and Green.

[28] He said:

> '... that this is a case in which a prison sentence is justified. I indicated on an earlier occasion that I did not think that this was a custody case. I hoped that that was not misunderstood. I certainly did not intend to indicate that this was a case where the custody threshold had not been crossed. I was intending to indicate, for the benefit of the defendants, that they need not worry about having to serve an immediate prison sentence. I take the view that this is a case in which there are, however, exceptional circumstances, where the prison sentence which I have to pass can be suspended.'

ADVANCE INDICATION OF SENTENCE

[29] In the light of the issues raised in this appeal, we have re-examined the principles which govern an indication of sentence given by the trial judge to a defendant.

[30] The starting point is fundamental. The defendant is personally and exclusively responsible for his plea. When he enters it, it must be entered

voluntarily, without improper pressure. There is to be no bargaining with or by the judge. These principles are derived from *R v Turner* [1970] 2 All ER 281, [1970] 2 QB 321 itself.

[31] Prior to *R v Turner*, it was not unusual for counsel to be seen (often separately from their solicitors) by the trial judge in his chambers, and for the judge to tell counsel his view of the sentence which would follow an immediate guilty plea. *Archbold's Criminal Pleading, Evidence and Practice* (37th edn, 1969) says nothing at all, and certainly nothing critical about this practice. It was *R v Turner* that brought the 'vexed question of so-called "plea-bargaining"' into the open (see [1970] 2 All ER 281 at 285, [1970] 2 QB 321 at 326). We must briefly summarise the facts.

[32] The defendant, a man with many previous convictions, pleaded not guilty to theft. During an adjournment in the trial, counsel indicated that he wished to have a discussion with the judge, and went and did so. After he had spoken to the judge, and following that discussion, he advised Turner that in his (counsel's) opinion, if he pleaded guilty, the outcome might well be a non-custodial sentence, but that if the case proceeded and he was convicted by the jury, he ran the risk of going to prison.

[33] The defendant received the impression that the views expressed to him by counsel represented the views the judge had communicated to counsel. This court decided that this represented improper pressure on the defendant to plead guilty, and that in the circumstances, the appropriate course would be to treat the guilty plea as a nullity.

[34] It was immediately acknowledged that it was counsel's duty to give the accused the best advice he could, and 'if need be advice in strong terms'. This advice would normally convey the potential value as a mitigating factor of a guilty plea. We pause to note that, inevitably, robust advice from counsel creates a degree of pressure on his client, and, what is more, the situation in which the defendant is placed itself constitutes a further source of pressure. Neither of these is improper. *R v Turner* emphasised that as far as possible justice should be administered in open court. Nevertheless for a variety of reasons, freedom of access between counsel and the judge was not prohibited. The problem arose from any discussion between them about sentence. This created the danger of pressure, or the appearance of pressure on the defendant to plead guilty. Such pressure, coming from the court, was unacceptable.

[35] In essence, *R v Turner* decided that whereas counsel may give advice, which includes advice about the likely sentence on a guilty plea, such information coming from the court itself was impermissible:

> 'The judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that, on a plea of guilty, he would impose one sentence but that, on a conviction following a plea of not guilty, he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential.' (See [1970] 2 All ER 281 at 285, [1970] 2 QB 321 at 327.)

The court referred to occasions when the judge would tell counsel that on the basis of the information before him, the sentence which would follow a guilty plea would be non-custodial, without saying anything about what would happen if the case proceeded to trial and conviction:

'Even so, the accused may well get the impression that the judge is intimating that, in that event, a severer sentence, maybe a custodial sentence, would result, so that again he may feel under pressure. This accordingly must also not be done.' .(See [1970] 2 All ER 281 at 285, [1970] 2 QB 321 at 327.)

The only exception to the rule that an indication of sentence should not be given is—

'that it should be permissible for a judge to say, if it be the case, that, whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e g a probation order or a fine, or a custodial sentence.' (See [1970] 2 All ER 281 at 285, [1970] 2 QB 321 at 327.)

[36] The principles in *R v Turner* have been consistently applied. The authorities are summarised in *Archbold* (57th edn, 2005) pp 358–59 (paras 4-78 to 4-81) and in *Blackstone's Criminal Practice* (16th edn, 2005) pp 1446–1449 (paras D 11.53, D 11.54). The principles were consolidated in the Consolidated Criminal Practice Direction [2002] 3 All ER 904 at 935–36, [2002] 1 WLR 2870 at 2903 (para IV.45), and the Attorney General issued guidance to counsel for the prosecution on the acceptance of pleas, with observations about the duty of the advocate for the Crown when discussions leading to a sentence indication arose (*Attorney-General's Guidelines on the Acceptance of Pleas* [2001] 1 Cr App R 425). We have considered all this material.

[37] There have been earlier suggestions that the principle in *R v Turner*, at any rate in its full ambit, merits re-examination. In the Report of the Royal Commission on Criminal Justice (Chairman: Viscount Runciman of Doxford CBE FBA) (1993) (Cm 2263) ch 7, pp 110–14 (paras 41–58), it was noted that—

'a significant number of those who now plead guilty at the last minute would be more ready to declare their hand at an earlier stage if they were given a reliable early indication of the maximum sentence that they would face if found guilty.' (See p 112 (para 48).)

[38] The report analysed the implications of the judgment in *R v Turner*, noting that the Crown Court study conducted for the commission showed overwhelming support among both judges and barristers for a change. It recommended that:

'... at the request of defence counsel on instructions from the defendant, judges should be able to indicate the highest sentence that they would impose at that point on the basis of the facts as put to them ... We envisage that the procedure which we recommend would be initiated solely by, and for the benefit of, defendants who wish to exercise a right to be told the consequences of a decision which is theirs alone.' (See p 113 (paras 50–51).)

The commission implied that the single question which the judge would have a discretion to answer would be: 'What would be the maximum sentence if my client were to plead guilty at this stage?'

[39] The report then addressed the management and structure of the process, if the constraints in *R v Turner* were to be relaxed.

[40] In Sir Robin Auld's Review of the Criminal Courts of England and Wales, October 2001, the Advance Indication of Sentence was discussed at pp 434–44 (paras 91–114).

[41] After examining the evidence, Sir Robin concluded (p 443) that subject to a number of specified safeguards—

> 'on the request of a defendant, through his advocate, the judge should be entitled, formally to indicate the maximum sentence in the event of a plea of guilty at that stage and the possible sentence on conviction following a trial.'

[42] He believed that the ability of the judge to give an indication to a defendant who wished to know the maximum sentence he would receive in the event of a plea of guilty would 'enable the guilty defendant and those advising him to evaluate the judge's indication and assess the advantage or otherwise of proceeding with a plea' (p 442, para 113). He believed that a comparison between the sentence on a plea of guilty and a possible sentence on conviction was justified, explaining:

> 'That comparison is precisely what a defendant considering admitting his guilt wants to know. He knows and will, in any event, be advised by his lawyer that a plea of guilty can attract a lesser sentence and broadly what the possible outcomes are, depending on his plea. So what possible additional pressure, unacceptable or otherwise, can there be in the judge, whom he has requested to tell him where he stands, indicating more precisely the alternatives?' (See p 442, para 112.)

[43] Like the Royal Commission, Sir Robin then explained his views about the structure and management of any post-*R v Turner* procedure.

[44] In the White Paper entitled 'Justice for All' (Cm 5563), prepared after and in response to Sir Robin's Review, there appeared to be a general welcome to a system for an advance indication of sentence made in response to a formal request initiated by the defendant (paras 4.42–4.43).

[45] Some departure from the principles in *R v Turner* is now permitted by statute. In Sch 3 to the Criminal Justice Act 2003, dealing with the allocation of cases triable either way, and sending cases to the Crown Court, para 6, substituting s 20 of the Magistrates' Court Act 1980, addresses the procedure where summary trial appears more suitable. The accused is entitled to request an indication of sentence, whether 'a custodial sentence or non-custodial sentence would be more likely to be imposed if he were to be tried summarily ... and to plead guilty'. The court is entitled, but not obliged, to respond to such a request. In short, there is no longer any absolute prohibition against an advance indication of sentence.

[46] With effect from 4 April this year the Criminal Procedure Rules 2005, SI 2005/384, and, by amendment to the Consolidated Criminal Practice Direction, the practice direction on criminal case management (see [2005] 3 All ER 91) came into force. The plea and case management hearing in the Crown Court now specifically requires the judge to seek and be given information on the following matters. First, following the guidance published by the Sentencing Guidelines Council in December 2004, on the 'Reduction in Sentence for a Guilty Plea', whether the defendant has in fact been advised about the credit to be

obtained for a guilty plea, and second, what steps had been taken to see whether the case might be resolved without a trial.

[47] These matters sufficiently demonstrate a very different culture to that which obtained when *R v Turner* was decided. In all these circumstances the time has therefore come for this court to reconsider it.

[48] *R v Turner* emphasised that the defendant was entitled to receive advice from his counsel about the sentence possibilities, so as properly to inform himself whether to plead guilty or not. That was deemed not to involve the risk of pressure on him. However *R v Turner* did not directly address the situation which would apply if the defendant personally was seeking an indication of sentence from the judge. After *R v Turner*, it became the practice to assume that he was not entitled to do so. Therefore, a somewhat strange situation developed that although the defendant's decision about his plea could properly be informed by the views of counsel about the sentence the judge would be likely to pass (provided always that he, counsel, had not participated in any discussions with the judge) it had simultaneously to be made ignorant of the judge's own views, even if the defendant wanted to know them. That position requires examination. In any event, the further question remains whether it continues to be appropriate to proceed on the basis that clear, and if necessary strong, but inevitably incompletely informed advice from counsel, about the advantages which would accrue from and the consequences which would follow an early guilty plea is permissible; while an intimation of these matters initiated by the judge should always, without more, be deemed to constitute improper pressure on the defendant, and therefore prohibited.

[49] In our judgment, there is a significant distinction between a sentence indication given to a defendant who has deliberately chosen to seek it from the judge, and an unsolicited indication directed at him from the judge, and conveyed to him by his counsel. We do not see why a judicial response to a request for information from the defendant should automatically be deemed to constitute improper pressure on him. The judge is simply acceding to the defendant's wish to be fully informed before making his own decision whether to plead guilty or not guilty, by having the judge's views about sentence available to him rather than the advice counsel may give him about what counsel believes the judge's views would be likely to be.

[50] We cannot, and do not seek to water down the essential principle that the defendant's plea must always be made voluntarily and free from any improper pressure. On closer analysis, however, we cannot discern any clash between this principle, and a process by which the defendant personally may instruct his counsel to seek an indication from the judge of his current view of the maximum sentence which would be imposed on the defendant. In effect, this simply substitutes the defendant's legitimate reliance on counsel's assessment of the likely sentence with the more accurate indication provided by the judge himself. In such circumstances, the prohibition against the judge giving an unsolicited sentence indication would not be contravened, and any subsequent plea, whether guilty or not guilty, would be voluntary. Accordingly it would not constitute inappropriate judicial pressure on the defendant for the judge to respond to such a request if one were made.

[51] We have further reflected whether there should continue to be an absolute prohibition against the judge making any observations at all which may trigger this process. The judge is expected to check whether the defendant has

been advised about the advantages which would follow an early guilty plea. Equally he is required to ascertain whether appropriate steps have been taken by both sides to enable the case to be disposed of without a trial. Following this present judgment he will know that counsel is entitled to advise the defendant that an advance indication of sentence may be sought from him. In these circumstances, we do not believe that it would be logical, and it would run contrary to the modern views of the judge's obligation to manage the case from the outset, to maintain as a matter of absolute prohibition that the judge is always and invariably precluded from reminding counsel in open court, in the presence of the defendant, of the defendant's entitlement to seek an advance indication of sentence. The judge would no doubt approach any observations to this effect with caution, first, to avoid creating pressure or the perception of pressure on the defendant to plead guilty and, second, bearing in mind the risk of conveying to the defendant that he has already made up his own mind on the issue of guilt, or indeed that for some reason he does not wish to try the case. If notwithstanding any observations by the judge, the defendant does not seek an indication of sentence, then, at any rate for the time being, it would not be appropriate for the judge to give or insist on giving an indication of sentence, unless in any event he would be prepared to give the indication permitted by *R v Turner* (see [35], above) that the sentence will or will not take a particular form.

[52] To that extent therefore, and subject to the guidance which follows, the practice in *R v Turner* and the subsequent authorities which applied it, need no longer be followed.

GUIDELINES

[53] The objective of these guidelines is to ensure common process and continuing safeguards against the creation or appearance of judicial pressure on the defendant. The potential advantages include, first and foremost, that the defendant himself would make a better informed decision whether to plead, or not. Experience tends to suggest that this would result in an increased number of early guilty pleas, which a consequent reduction in the number of trials, and the number of cases which are listed for trial, and then, to use current language, 'crack' at the last minute, usually at considerable inconvenience to those involved in the intended trial, and in particular, victims and witnesses. Properly applied, too, there may be a reduced number of sentences to be considered by the Attorney General, and where appropriate, referred to this court as unduly lenient. In short, an increase in the efficient administration of justice will not impinge on the defendant's entitlement to tender a voluntary plea.

[54] In our judgment, any advance indication of sentence to be given by the judge should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought. In essence we accept the recommendation of the report of the Royal Commission that the judge should treat the request for a sentence indication, in whatever form it reaches him, as if he were being asked to indicate the maximum sentence on the defendant at that stage. For the process to go further, and the judge to indicate his view of the maximum possible level of sentence following conviction by the jury, as well as its level after a plea of guilty, would have two specific disadvantages. First, by definition, the judge could not be sufficiently informed of the likely impact of the trial on him (or the trial judge) in the sentencing context. It would be unwise for him to bind himself to any indication of the

sentence after a trial in advance of it, in effect on a hypothetical basis. If he were to do so, to cover all eventualities he would probably have to indicate a very substantial possible maximum sentence. This would lead to a second problem, arising from the comparison between the two alternatives available to the defendant, that is the maximum level after a trial, and the maximum level following an immediate plea. With some defendants at any rate, the very process of comparing the two alternatives create pressure to tender a guilty plea.

THE JUDGE

[55] The judge should not give an advance indication of sentence unless one has been sought by the defendant.

[56] He remains entitled, if he sees fit, to exercise the power recognised in *R v Turner* to indicate, that the sentence, or type of sentence, on the defendant would be the same, whether the case proceeded as a plea of guilty or went to trial, with a resulting conviction. Nowadays, given the guidance published by the Sentencing Guidelines Council on the credit to be given for a guilty plea, this would be unusual. He is also entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence.

[57] In whatever circumstances an advance indication of sentence is sought, the judge retains an unfettered discretion to refuse to give one. It may indeed be inappropriate for him to give any indication at all. For example, he may consider that for a variety of reasons the defendant is already under pressure (perhaps from a co-accused), or vulnerable, and that to give the requested indication, even in answer to a request, may create additional pressure. Similarly, he may be troubled that the particular defendant may not fully have appreciated that he should not plead guilty unless in fact he is guilty. Again, the judge may believe that if he were to give a sentence indication at the stage when it is sought, he would not properly be able to judge the true culpability of the defendant, or the differing levels of responsibility between defendants. In a case involving a number of defendants, he may be concerned that an indication given to one defendant who seeks it, may itself create pressure on another defendant. Yet again, the judge may consider that the application is no less than a 'try on' by a defendant who intends or would be likely to plead guilty in any event, seeking to take a tactical advantage of the changed process envisaged in this judgment. If so, he would probably refuse to say anything at all, and indeed, a guilty plea tendered after such tactical manoeuvrings may strike the judge as a plea tendered later than the first reasonable opportunity for doing so, with a consequent reduction in the discount for the guilty plea.

[58] Just as the judge may refuse to give an indication, he may reserve his position until such time as he feels able to give one, for example, until a pre-sentence report is available. There will be occasions when experience will remind him that in some cases the psychiatric or other reports may provide valuable insight into the level of risk posed by the defendant, and if so, he may justifiably feel disinclined to give an indication at the stage when it is sought. Another problem may simply be that the judge is not sufficiently familiar with the case to give an informed indication, and if so, he may defer doing so until he is.

[59] In short, the judge may refuse altogether to give an indication, or may postpone doing so. He may or may not give reasons. In many cases involving an outright refusal, he would probably conclude that it would be inappropriate to

give his reasons. If he has in mind to defer an indication, the probability is that he would explain his reasons, and further indicate the circumstances in which, and when, he would be prepared to respond to a request for a sentence indication.

[60] If at any stage the judge refuses to give an indication (as opposed to deferring it) it remains open to the defendant to seek a further indication at a later stage. However once the judge has refused to give an indication, he should not normally initiate the process, except, where it arises, to indicate that the circumstances had changed sufficiently for him to be prepared to consider a renewed application for an indication.

[61] Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. In principle, the judge who has given an indication should, where possible, deal with the case immediately, and if that is not possible, any subsequent hearings should be listed before him. This cannot always apply. We recognise that a new judge has his own sentencing responsibilities, but judicial comity as well as the expectation aroused in a defendant that he will not receive a sentence in excess of whatever the first judge indicated, requires that a later sentencing judge should not exceed the earlier indication. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect. In straightforward cases, once an indication has been sought and given, we do not anticipate an adjournment for the plea to be taken on another day.

[62] Later in this judgment we will deal with the obligations of the defence and the prosecution, and to the extent that they may be relevant to the judge's decision, they should be applied. For example, an indication should not be sought on a basis of hypothetical facts. Where appropriate, there must be an agreed, written basis of plea. Unless there is, the judge should refuse to give an indication: otherwise he may become inappropriately involved in negotiations about the acceptance of pleas, and any agreed basis of plea.

THE DEFENCE

[63] Subject to the judge's power to give an appropriate reminder to the advocate for the defendant (see [56], above) the process of seeking a sentence indication should normally be started by the defendant.

[64] Whether or not the judge has given an appropriate reminder, the defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client wishes to seek an indication.

[65] The advocate is personally responsible for ensuring that his client fully appreciates that: (a) he should not plead guilty unless he is guilty; (b) any sentence indication given by the judge remains subject to the entitlement of the Attorney General (where it arises) to refer an unduly lenient sentence to the Court of Appeal; (c) any indication given by the judge reflects the situation at the time when it is given, and that if a 'guilty plea' is not tendered in the light of that indication the indication ceases to have effect; (d) any indication which may be given relates only to the matters about which an indication is sought. Thus, certain steps, like confiscation proceedings, follow automatically, and the judge cannot dispense with them, nor, by giving an indication of sentence, create an expectation that they will be dispensed with.

[66] An indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea or pleas to the

indictment, or any factual basis relating to the plea. Any agreed basis should be reduced into writing before an indication is sought. Where there is a dispute about a particular fact which counsel for the defendant believes to be effectively immaterial to the sentencing decision, the difference should be recorded, so that the judge can make up his own mind.

[67] The judge should never be invited to give an indication on the basis of what would be, or what would appear to be a 'plea bargain'. He should not be asked or become involved in discussions linking the acceptability to the prosecution of a plea or basis of plea, and the sentence which may be imposed. He is not conducting nor involving himself in any plea bargaining. In short, he is not to be asked to indicate levels of sentence which he may have in mind depending on possible different pleas. Thus, for example, he should refuse to give an indication based on the possibility that the defendant might plead guilty to s 18, alternatively s 20, alternatively s 47.

[68] In the unusual event that the defendant is unrepresented, he would be entitled to seek a sentence indication of his own initiative. There would be difficulties in either the judge or prosecuting counsel taking any initiative, and informing an unrepresented defendant of this right. That might too readily be interpreted as or subsequently argued to have been improper pressure.

THE PROSECUTION

[69] As the request for indication comes from the defence, the prosecution is obliged to react, rather than initiate the process. This presented no problem in the days before *R v Turner* [1970] 2 All ER 281, [1970] 2 QB 321, when the common understanding, universally applied, was that the prosecution did not, indeed was obliged not to involve itself in or appeal against a sentencing decision. None of that continues to apply.

[70] We must expressly identify a number of specific matters for which the advocate for the prosecution is responsible.

(a) If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of this guidance, that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a *Newton* hearing (see *R v Newton* (1982) 77 Cr App R 13).

(b) If an indication is sought, the prosecution should normally inquire whether the judge is in possession of or has had access to all the evidence relied on by the prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant.

(c) If the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, first, draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and second, where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected.

(d) In any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.

SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

[71] We have reflected on the possible impact of these changes on the exercise by the Attorney General of his responsibilities to refer unduly lenient sentences to this court, in the light of further submissions received in writing from counsel for the prosecution after the conclusion of the hearing. We do not envisage a process by which the judge should give some kind of preliminary indication, leading to comments on it by counsel for the Crown, with the judge then reconsidering his indication, and perhaps raising it to a higher level, with counsel for the defendant then making further submissions to persuade the judge, after all, to reduce his indication. If nothing else, such a process would smack of precisely the kind of bargaining process which should be avoided. In our judgment, if counsel for the prosecution has addressed his responsibilities in accordance with the previous paragraph, the discretion of the Attorney General to refer a sentence would be wholly unaffected by the advance sentence indication process. Of course, if a sentence indication has been given in accordance with these guidelines, before referring the eventual sentencing decision to this court, the Attorney General's decision would no doubt reflect that the defendant had indeed pleaded guilty in response to the sentence indication, properly sought from and given by the judge. As we have explained, we do not anticipate that counsel for the Crown will have said or done anything which may indicate or convey support for or approval of the sentence indication. If however he has done so, the question whether the sentence should nevertheless be referred to this court as unduly lenient, and the decision of the court whether to interfere with and increase it, will be examined on a case by case basis, in the light of everything said and done by counsel for the Crown.

APPEAL AGAINST SENTENCE

[72] We have expressly dealt with the position of the Attorney General if, in the event, an unduly lenient sentence is imposed. The defendant's entitlement to apply for leave to appeal against sentence if, for example, insufficient allowance has been made for matters of genuine mitigation, is similarly unaffected.

PROCESS

[73] We anticipate that any sentence indication would normally be sought at the plea and case management hearing. In cases 'sent' to the Crown Court under s 51 of the Crime and Disorder Act 1998, or transferred under s 4 of the Criminal Justice Act 1987 or s 53 of the Criminal Justice Act 1991, this is usually the first opportunity for the defendant to plead guilty and therefore the moment when the maximum discount for the guilty plea will be available to the defendant. For victims and witnesses, too, there is a huge advantage in the earliest possible conclusion to the case. That said, as the judgment makes clear, we do not rule out the entitlement of a defendant to seek an indication at a later stage, or even, in what we know would be a rare case, during the course of the trial itself.

[74] The judge is most unlikely to be able to give an indication, even if it is sought, in complicated or difficult cases, unless issues between the prosecution and the defence have been addressed and resolved. Therefore in such cases, no less than seven days' notice of an intention to seek an indication should normally

be given in writing to the prosecution, and the court. If an application is made without notice when it should have been given, the judge may conclude that any inevitable adjournment should have been avoided and that the discount for the guilty plea should be reduced accordingly. It may be that in due course the Criminal Procedure Rules Committee will wish to consider the question of notice, and its length, and indeed whether either of the relevant case progression forms should be amended.

[75] The hearing should normally take place in open court, with a full recording of the entire proceedings, and both sides represented, in the defendant's presence.

[76] As already indicated, in cases of any complexity or difficulty, proper notice should be given to the Crown that a sentence indication will be sought. The fact that notice has been given, and any reference to a request for a sentence indication, or the circumstances in which it was sought, would be inadmissible in any subsequent trial.

[77] If the process we envisage is properly followed, there should be very little need for the judge to involve himself in the discussions with the advocates, although obviously he may wish to seek better information on any aspect of the case which is troubling him. We do not anticipate an opening by the Crown, or a mitigation plea by the defence. That must be postponed until after the defendant has pleaded guilty. Generally speaking, we assume that the process will be very short, the judge bearing in mind that the defendant and the public are present, and that he (the judge) may be the trial judge, and that he is simply deciding whether to respond, and if so how, to a request that he give an indication of the maximum sentence he would pass if the defendant pleaded guilty at that stage. The fact that the case may yet proceed as a trial, and that if it does so, no reference may be made to the request for a sentence indication, leads to the conclusion that reporting restrictions should normally be imposed, to be lifted if and when the defendant pleads or is found guilty.

MAGISTRATES' COURT

[78] In our judgment it would be impracticable for these new arrangements to be extended to proceedings in the magistrates' court. We are not at present satisfied that an advance sentence indication can readily be applied to and processed there. We believe that it would be better for the new arrangements in the Crown Court to settle in for some time before considering whether and, if so how, similar arrangements can be made in the context of summary trials. Accordingly, for the time being, the magistrates should confine themselves to the statutory arrangements in Sch 3 to the Criminal Justice Act 2003.

THE DECISION IN THIS CASE

[79] In our judgment the judge should have abided by the sentencing indication he gave on 19 April. This was one of those rare cases in which a non-custodial sentence for an offence of corruption may have been appropriate. The appellant gained nothing positive from his corrupt activities. They had taken place in the fairly distant past. He did not gain any advantage over his business competitors. He possessed useful skills which might well have been deployed to the benefit of the community on an unpaid basis under a community punishment order. He pleaded guilty. An additional punitive element would have been provided by a larger fine. In summary, without attempting to lay down any sort

of guideline, the decision not to impose a custodial sentence might in the particular circumstances of this case have been justified, and a community punishment order and enhanced fine may, arguably, have met the justice of the case. a

[80] In our judgment it would not now be appropriate either to increase the fine, or to substitute the suspended sentence of imprisonment with a community punishment order. We shall therefore simply quash the suspended sentence of imprisonment. b

Order accordingly.

Stephen Leake Barrister.

Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd

[2005] EWCA Civ 134

COURT OF APPEAL, CIVIL DIVISION

JACOB, HOOPER LJJ

8, 17 FEBRUARY 2005

Practice – Parties – Substitution – Substitution after expiry of limitation period – Party named in claim form in mistake for new party – Correct approach – CPR 19.5.

In 1998 company A, an engineering contractor, used pipe sections purchased from the defendant in an engineering project. Shortly before the expiry of the limitation period the claimant (company B) issued proceedings against the defendant alleging that the pipes were defective and that accordingly the defendant was liable for breach of contract. The claim form correctly stated the former name of company B (a name very similar to the name of company A), but it wrongly stated that the original pipe supply contract had been between company B and the defendant, and that it was company B which had suffered consequential loss and damage from defective pipes. In its defence the defendant, inter alia, took the point that the original contractor had been company A, stating that it had never been in a contractual relationship with company B. Company B applied to join company A and another party, company C, as claimants, explaining that company A was the original contractor and purchaser of pipes from the defendant, that it had assigned its cause of action to company B—which had then changed its name—and later had assigned the cause of action to company C. CPR 19.5[a] implemented s 35[b] of the Limitation Act 1980 in wording virtually identical to that of the statute, which provided, inter alia, that the addition or substitution of a new party 'shall not be regarded ... as necessary ... unless ... the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name'. CPR 19.5 applied to a change of parties after the end of a limitation period and under the rule the court could add or substitute a party if the addition or substitution was necessary. Under CPR 19.5(3) addition or substitution was necessary only if the court was satisfied that '(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party ... (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party'. Before the judge the principal argument was whether or not the case fell within the test originating in pre-CPR authority which laid down that if it were a case of right description/wrong name there could be amendment, but not if it were a case of wrong description/wrong name. The judge permitted the amendments and the defendant appealed. The court considered whether the right description/wrong name test set out the ambit of CPR 19.5.

a CPR 19.5 is set out at [9], below

b Section 35 is set out at [10], below

Held – The right approach to a change of parties after the end of a limitation period was to apply the words of CPR 19.5, without regard to the right description/wrong name test, but with regard to the overriding objective of the CPR, bearing in mind that the limit of CPR 19.5 was the limit set by s 35 of the 1980 Act. The right description/wrong name test had been devised for a wholly different rule and had not been devised for s 35. Under CPR 19.5(3)(a), the court had to be satisfied that the new party was to be substituted for a party who had been named in the claim form in mistake for the new party, but there was no reason to construe 'in mistake' restrictively. In the instant case, there had clearly been a mistake about naming company B. The form of the particulars of claim suggested that it was company A that had been intended to be named. That clear mistake could be put right by substituting company A for company B. There was no prejudice to the defendants, who were merely deprived of an unmeritorious defence arising solely from a blunder by the other side. Accordingly, the substitution of company B by company A would be allowed. Company C was the current beneficial owner of the right to sue and could and ought to be joined pursuant to CPR 19.5(3)(c). Accordingly, the appeal would be dismissed (see [35], [37], [39]–[42], [45], [48], [49], below).

Gregson v Channel Four Television Corp [2000] All ER (D) 956 applied.

The Sardinia Sulcis and Al Tawwab [1991] 1 Lloyd's Rep 201 considered.

Horne-Roberts v SmithKline Beecham (2001) 65 BMLR 79, *Parsons v George* [2004] 3 All ER 633 and *Kesslar v Moore & Tibbits (a firm)* [2004] All ER (D) 53 (Nov) disapproved.

Notes

For adding or substituting parties after the end of a relevant limitation period, see 37 *Halsbury's Laws* (4th edn reissue) para 259.

Cases referred to in judgments

Crook v Aaron Dale Construction and Roofing Ltd [1997] PIQR P 36, CA.

Evans Construction Co Ltd v Charrington & Co Ltd [1983] 1 All ER 310, [1983] QB 810, [1983] 2 WLR 117, CA.

Gregson v Channel Four Television Corp [2000] All ER (D) 956, (2000) Times, 11 August, CA.

International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India, International Bulk Shipping and Services Ltd v President of India, Himoff Maritime Enterprises Ltd v President of India [1996] 1 All ER 1017, CA.

Katzenstein Adler Industries (1975) Ltd v Borchard Lines Ltd, The Joanna Borchard [1988] 2 Lloyd's Rep 274.

Kesslar v Moore & Tibbits (a firm) [2004] EWCA (Civ) 1551, [2004] All ER (D) 53 (Nov).

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] AC 749, [1997] 2 WLR 945, HL.

Mitchell v Harris Engineering Co Ltd [1967] 2 All ER 682, [1967] 2 QB 703, [1967] 3 WLR 447, CA.

Parsons v George [2004] EWCA Civ 912, [2004] 3 All ER 633, [2004] 1 WLR 3264.

Rodriguez v Parker [1966] 2 All ER 349, [1967] 1 QB 116, [1966] 3 WLR 546.

Sardinia Sulcis and Al Tawwab, The [1991] 1 Lloyd's Rep 201, CA.

Signet Group plc v Hammerson UK Properties plc (1998) 75 P & CR D33, CA.

Horne-Roberts v SmithKline Beecham [2001] EWCA Civ 2006, (2001) 65 BMLR 79, [2002] 1 WLR 1662.
Thistle Hotels v McAlpine (1989) Times, 11 April, CA.
Three Rivers DC v Bank of England [1995] 4 All ER 312, [1996] QB 292, [1995] 3 WLR 650, HL.

Cases referred to in skeleton arguments
Central Insurance Co Ltd v Seacalf Shipping Corp, The Aiolos [1983] 2 Lloyd's Rep 25, CA.
Goode v Martin [2001] EWCA Civ 1899, [2002] 1 All ER 620, [2002] 1 WLR 1828.
Pontin v Wood [1962] 1 All ER 294, [1962] 1 QB 594, [1962] 2 WLR 258, CA.
Ramsey v Leonard Curtis (a firm) [2001] BPIR 389, CA.
Weddell v JA Pearce & Major (a firm) [1987] 3 All ER 624, [1988] Ch 26, [1987] 3 WLR 592.

Appeal
The defendants, Hanson Concrete Products Ltd, appealed with permission of Judge Havery QC, sitting in the Technology and Construction Court, from his decision on 22 July 2004 ([2004] EWHC 1778 (TCC), [2004] All ER (D) 381 (Jul)) permitting, pursuant to CPR 19.5, an amendment of the proceedings brought against the defendants by the claimant, Morgan Est (Scotland) Ltd, so as to add Miller Civil Engineering Ltd and Morgan Est plc as claimants, and consequential amendments. The facts are set out in the judgment of Jacob LJ.

William Norris QC and *Benjamin Pilling* (instructed by *Vizards Wyeth*, Dartford) for the defendants.
Andrew Bartlett QC and *Paul Reed* (instructed by *Kennedys*) for the claimant.

Cur adv vult

17 February 2005. The following judgments were delivered.

JACOB LJ.

[1] This is an appeal from a judgment of Judge Havery QC given on 22 July 2004 ([2004] EWHC 1778 (TCC), [2004] All ER (D) 381 (Jul)). It is with his permission.

[2] The judge permitted an amendment of the proceedings so that two new claimants could be added to the sole original claimant and for consequential amendments. The defendants say he had no power to do that or that if he did he ought to have refused permission on the grounds of discretion.

THE FACTS

[3] In 1998 an engineering contractor, Miller Civil Engineering Ltd (company A) built a large tunnel as part of a waste water treatment plant. It involved the use of pipe sections made by the defendants. Some parts of the pipe were damaged during a jacking process. As a result a significant number of pipe sections had to be removed and replaced. This took time and caused additional cost.

[4] The pipe sections were bought from the defendants. It is said that the damage which occurred to them was due to defective manufacture or design and

that accordingly the defendants are liable for breach of contract in the sum of about £0·5m. The defendants say that the pipes were perfectly good. In addition, however the defendants say they have a technical defence. This appeal is only about the latter and specifically about whether or not it can be overcome by the joinder of parties.

[5] The points arise in this way. Shortly before the expiry of the limitation period the original sole claimant ('company B', then called Morgan Est (Scotland) Ltd) issued the proceedings. The claim form, correctly, asserted that company B was formerly called Miller Civil Engineering Services Ltd. But it went on to assert, wrongly, that the original pipe supply contract was between B and the defendants and that it, B, was the company which had the trouble with the defective pipes and that it was it which suffered the consequential loss and damage.

[6] By their defence the defendants took inter alia the point that the original contractor was company A called Miller Civil Engineering Ltd and not B. They said they were never in contractual relationship with B. They added denials that they were in breach of the contract they did have with A and that any claim by A would now be statute barred.

[7] The response was the application the subject of this appeal. It was to add two claimants, namely company A and a company called Morgan Est plc (company C). This was accompanied by an explanation of the position. This was as follows: (i) company A was the original contractor and purchaser of the pipes from the defendants. This was the company which had in fact suffered the damage and which accordingly originally owned the cause of action against the defendants; (ii) by a first assignment, company A's cause of action was assigned to company B, then called Miller Civil Engineering Services Ltd; (iii) company B then changed its name to Morgan Est (Scotland) Ltd (iv) company B then assigned the cause of action to a further company Morgan Est plc (company C); (v) thus in law the position was that the legal title to the cause of action remained in A but the benefit of that cause of action was now vested in C.

[8] So there were two distinct blunders: (a) the particulars of claim asserted, wrongly, that company B was the contracting party and made no mention of any assignment; (b) the solicitors were not aware of the second assignment to company C.

THE RULES AND LEGISLATION

[9] The application to join companies A and C and make appropriate amendments to the pleadings were made pursuant to CPR 17.4 or 19.5. The relevant rules read as follows:

> '**17.4** ... (1) This rule applies where—(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under—(i) the Limitation Act 1980; or (ii) the Foreign Limitation Periods Act 1984 or; (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

(3) The court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question …

19.5 … (1) This rule applies to a change of parties after the end of a period of limitation under—(a) the Limitation Act 1980; (b) the Foreign Limitation Periods Act 1984; or (c) any other enactment which allows such a change, or under which such a change is allowed.

(2) The court may add or substitute a party only if—(a) the relevant limitation period was current when the proceedings were started; and (b) the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that—(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party; (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party.'

[**10**] Rule 19.5 (note not r 17.4) implements s 35 of the Limitation Act 1980. This reads as follows:

'*New claims in pending actions: rules of court.*—(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—(a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and (b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—(a) the addition or substitution of a new clause of action; or (b) the addition or substitution of a new party; and "third party proceedings" means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

(3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim …

(4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following—(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and (b) in the case of a claim involving a new party, if the addition or

substitution of the new party is necessary for the determination of the original action. a

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or (b) any claim already made in the original action b cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.'

[11] It may be noted that r 19.5 virtually adopts s 35—and indeed neither side contended that the slight difference in wording made any difference to the c meaning. It may further be noted that no 'further restrictions' were imposed by the rules.

[12] Prior to the 1980 Act there was no provision corresponding to its s 35. Limitation was governed by the Limitation Act 1939. The general rule for actions founded on simple contract or tort was that they 'shall not be brought after the d expiration of six years from the date on which the cause of action accrued ...' (s 2(1)).

[13] Not infrequently the apparent black and white, unforgiving, nature of that provision caused injustice. So, for instance, where a defendant was wrongly named in error. In 1965 that injustice was partly alleviated. But of course this could only be done within the constraints of the Limitation Act itself. e RSC Ord 20, r 5(3) provided:

'An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the f mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the party intending to sue or, as the case may be, intended to be sued.'

[14] The inwardness of this rule was that it allowed amendment of the name g of a party even if that apparently meant that a new party was being named, if in reality you could see who was really meant. It can in retrospect be seen as an application of the *Mannai Investments* principle (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] AC 749). A graphic everyday example is when you accidentally use the dog's name when talking to h your wife about your son—she knows who you really mean. The rule did not fall foul of the Limitation Act because you were not in substance bringing in a new party.

[15] The rule was made pursuant to the powers contained in s 99(1)(a) of the Supreme Court of Judicature (Consolidation) Act 1925. The rule survived an j early attack on its vires made in *Mitchell v Harris Engineering Co Ltd* [1967] 2 All ER 682, [1967] 2 QB 703 where the earlier cases of injustice are discussed by Lord Denning MR.

[16] Rules were indeed made to implement s 35 of the 1980 Act after it came into force. But these were by way of amendment of RSC Ord 15, r 6. It is not necessary to set these out for present purposes.

THE PRE-CPR CASES ON RSC ORD 20, r 5—THE *SARDINIA SULCIS* TEST

[17] The courts considered RSC Ord 20, r 5 in a number of cases, the effective culmination of which was *The Sardinia Sulcis and Al Tawwab* [1991] 1 Lloyd's Rep 201. Lloyd LJ in giving the leading judgment said (at 205–206) after quoting the rule:

> 'The first point to notice is that there is power to amend under the rule even though the limitation period has expired: see O.20, r. 5(2). The second point is that there is power to amend, even though it is alleged that the effect of the amendment is to add a new party after the expiration of the limitation period. But the Court must be satisfied (1) that there was a genuine mistake, (2) that the mistake was not misleading, (3) that the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue, and (4) that it would be just to allow the amendment.'

[18] Later he said (at 207):

> 'It is thus established by three or more decisions of the Court of Appeal that a name may be "corrected" within the meaning of O. 20, r. 5(3), even though it involves substituting a different name altogether, and the name of a separate legal entity, and even though it is objected (see per Lord Justice Donaldson in *Evans v. Charrington & Co* ([1983] 1 All ER 310 at 317–318, [1983] QB 810 at 822) that the effect of substituting the new name will be to substitute a new party. But the amendment will not be allowed where there is reasonable doubt as to the identity of the person intending to sue or intended to be sued.'

He was here of course using the very words of the rule.

[19] He then grappled with the words *'identity of the person intending to sue ...'* (my emphasis) (this being a 'wrong plaintiff' case). He did so, however, by considering mainly 'wrong defendant' situations. He said (at 207):

> 'In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In *Mitchell v. Harris Engineering* ([1967] 2 All ER 682, [1967] 2 QB 703) the identity of the person intended to be sued was the plaintiff's employers. In *Evans v. Charrington* it was the current landlord. In *Thistle Hotels v. McAlpine* ((1989) Times, 11 April) the identity of the person intending to sue was the proprietor of the hotel. In [*Katzenstein Adler Industries (1975) Ltd v Borchard Lines Ltd, The Joanna Borchard* [1988] 2 Lloyd's Rep 274] it was the cargo-owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise. The point can be illustrated by the facts of *Rodriguez v RJ Parker* ([1966] 2 All ER 349, [1967] 1 QB 116). In that case the identity of the

intended defendant was the driver of a particular car. It was held that there was a mistake as to name. But if the plaintiffs had sued the driver of a different car, there would have been a mistake as to identity. He would have got the wrong description.'

[20] Lloyd LJ's distinction between cases of right description/wrong name and a wrong description/wrong name served as the basis for the further application of RSC Ord 20, r 5. The courts did not find it particularly easy to apply. Even in the *Sardinia Sulcis* itself it was applied liberally in favour of allowing amendment. What had happened was the vessel had been damaged in a collision with another vessel. The charterers had paid for the repairs. The charterers then started proceedings in the name of the owners against the owners of the other vessel. But the name was wrong: the original owner had merged with another company and ceased to exist. By Italian law it was that other company which was the owner of the vessel and of the right to sue. It was alleged against the solicitors that the claim was by a non-existent company and they were sued for breach of warranty of authority. An application to amend to put matters right was made. When Lloyd LJ came to apply his test he said (at 207):

'Returning to the facts of the present case, there could be no reasonable doubt as to the identity of the person intending to sue, namely, the person in whom the rights of ownership were vested at the date when the writ was issued. That was, as Mr. Connoley [a partner in Richards Butler] says in his affidavit, the whole point of the exercise on which Messrs. Richards Butler had embarked, as the defendants well knew. The description of the intending plaintiffs was clear enough. It follows that Mr. Pertwee's mistake was a mistake as to name, and not a mistake as to identity. I would hold that condition (3) has been satisfied.'

This is very close to saying that the description amounted to the person who had the right to sue.

[21] The *Sardinia Sulcis* interpretation of RSC Ord 20, r 5 was further explained by Evans LJ in *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India, International Bulk Shipping and Services Ltd v President of India, Himoff Maritime Enterprises Ltd v President of India* [1996] 1 All ER 1017 at 1027:

'The rule envisages that the writ was issued with the intention that a specific person should be the plaintiff. That person can often but not invariably be identified by reference to a relevant description. The choice of identity is made by the persons who bring the proceedings. If having made that choice they use the wrong name, even though the name they use may be that of a different legal entity, then their mistake as to the name can be corrected. But they cannot reverse their original identification of the party who is to sue. This interpretation of the rule derives not only from the phrase "correct the name of a party" but also from the requirement that the mistake must not have been such as to cause any reasonable doubt as to the identity of the person intending to sue.'

It will be seen that Evans LJ, quite understandably, indeed necessarily, focussed on the language of the rule itself.

THE POST-CPR CASES

[22] The first of these was *Gregson v Channel Four Television Corp* [2000] All ER (D) 956, (2000) Times, 11 August. The claimant had sued for an alleged libel which had been broadcast and put on the internet. The company sued was dormant but had a very similar name to the company responsible for the broadcast and internet site. Amendment was allowed under CPR 17.4(3). The defendant argued that rule did not apply and the case could only come within r 19.5. The point of this was that he could (or thought he could) then argue that the proceedings had not been served in time. May LJ said:

> '16. There were provisions in the former RSC providing for cases where an application was made to correct a mistake in the name of a party or to substitute a new party for one who had been joined by mistake. The CPR are a new procedural code and there is, in my view, no basis for supposing that these new rules were intended to replicate, or for that matter not to replicate, the former provisions. It is not generally appropriate to refer to authorities decided under the former rules to determine what the new rules mean or how they should be applied.'

[23] Peter Gibson LJ was to the same effect:

> '33. I do not find assistance from a comparison between the new rules and the RSC and the cases decided thereunder. We can and should decide this case on the new rules, interpreting both r 17.4 and r 19.5 having regard to the overriding objective. The judge, in my view, dealt with the case justly under r 17.4(3) by correcting the erroneous name. For these as well as the reasons given by May LJ I would dismiss this appeal.'

[24] One might have thought that from then on the *Sardinia Sulcis* would have been considered as sunk. But it has, as will be seen, resurfaced or at least its ghost has.

[25] May LJ went on in *Gregson*'s case to note the difference between r 17.4 and r 19.5. He said:

> '29. The second set of circumstances is that addressed by r 19.5(3). (Although at the end of r 17.4 it is stated "(Rule 19.4 specifies the circumstances in which the court may allow a new party to be added or substituted after the end of a relevant limitation period)", the reference to r 19.4 would appear to be in error for r 19.5). The circumstances are that a party has been named in the claim form in mistake for another person. Nothing more is said about the mistake, but it is clear from the rule as a whole that the relevant mistake is one necessitating a change of parties. By comparison and contrast with r 17.4(3) that mistake is not a mere mistake as to a name such as causes no reasonable doubt as to the identity of the party in question but is something more fundamental which can only be cured if a new party is substituted.'
>
> '20. Mr Tugendhat [counsel for the defendant] submits that there are three possible kinds of mistake in naming a party to litigation. Firstly, there may be a mistake as to identity. A wrong party is named and it is necessary to

substitute the right party. He concedes that there was no mistake as to identity in this case. Secondly, there may be a mistake as to the name where the name is not the correct name of the intended defendant, nor is the name of any other person. Thirdly, there may be a mistake as to the name where the mistaken name is the name of some other person. He submits that the present case is an example of the third of these, not the second, since Channel Four Television Co Ltd is the name of a company, although a dormant one. Mr Tugendhat then submits that, since a wrong person was originally named in the claim form, it is necessary to substitute the correct person and r 19.5 applies. I accept that it is possible in the abstract to identify the three kinds of mistake to which Mr Tugendhat refers. But I do not accept that every case in Mr Tugendhat's third category comes within r 19.5 to the exclusion of r 17.4(3).'

[26] It was in the next case that the *Sardinia Sulcis* reappeared. This was *SmithKline Beecham v Horne-Roberts* [2001] EWCA Civ 2006, (2001) 65 BMLR 79, [2002] 1 WLR 1662. The claimant alleged that he had been damaged by a vaccine. He sued Merck but, after the limitation period, discovered that the vaccine had been made by SmithKline. So he applied to substitute them for Merck and was allowed to do so pursuant to the r 19.5 power. Keene LJ said:

'[31] Reliance is placed on two decisions. The first is *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] 1 All ER 310, [1983] QB 810. This was a Court of Appeal decision concerned largely with the former RSC Ord 20, r 5, but that rule, in so far as it dealt with the substitution of a new party, was intended to reflect the provisions of s 35(6)(a) of the 1980 Act. In dealing with amendments to writs or pleadings to correct the name of a party after the expiry of a limitation period, Ord 20, r 5(3) provided that such an amendment might be allowed even though the effect would be to substitute a new party ...'

And:

'[40] Not surprisingly the approach to be adopted to the construction of s 35(6)(a) is not free from authority, even though the cases often concentrate more on the wording of the rules of court implementing that provision than on the wording of the provision itself. A helpful analysis of the authorities as they then stood was provided by the Court of Appeal in *The Sardinia Sulcis and Al Tawwab* [1991] 1 Lloyd's Rep 201 ...'

And:

'[43] *The Sardinia Sulcis* has been followed in *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corpn of India* [1996] 1 All ER 1017 and in *Crook v Aaron Dale Construction and Roofing Ltd* [1997] PIQR P36 where it was regarded as enough that the plaintiff had intended to sue his employer. No authority has been cited which appears to conflict with the approach set out by Lloyd and Stocker LJJ in *The Sardinia Sulcis* ...'

[27] Mr Andrew Bartlett QC, for the respondents, submits that the Court of Appeal here proceeded on an erroneous assumption. The previous

RSC Ord 20, r 5 was not intended to implement s 35 of the 1980 Act at all. It predates the Act and was intended to allow party substitution subject to what could be permitted by the Limitation Act 1939. The *Sardinia Sulcis* cannot be regarded as an authority on s 35. Hence it cannot be regarded as an authority on CPR 19.5 which implements s 35. Mr William Norris QC for the appellants found no answer to this. To the consequences of this I shall return.

[28] Before passing from *Horne-Roberts*'s case I should mention two other points. First that it shows the width of the *Sardinia Sulcis* test itself—to allow a complete stranger to be sued outside the limitation period is a very strong thing. The other is that the court saw the backstop as being the discretion under s 35 (see (2001) 65 BMLR 79 at [44], per Keene LJ).

[29] The next case referring to the *Sardinia Sulcis* was *Parsons v George* [2004] EWCA Civ 912 at [41], [2004] 3 All ER 633 at [41], [2004] 1 WLR 3264. Here the claim was by a tenant against his landlord. The landlord was wrongly named in the claim form. The tenant was allowed pursuant to CPR 19.5 to substitute the correct landlord who had not in any way been misled. Dyson LJ said:

> '[25] It would be surprising if the effect of the CPR were to deny to the court jurisdiction to allow the addition or substitution of parties after the expiry of a relevant limitation period in circumstances where the court had previously enjoyed such jurisdiction ...
>
> [41] ... The meaning of s 35(6)(a) of the 1980 Act and of CPR 19.5(3)(a) was considered by this court in *Horne-Roberts v SmithKline Beecham plc* (2001) 65 BMLR 79, [2002] 1 WLR 1662. As appears from the judgment of Keene LJ (at [40]–[45]), the court adopted the test suggested by Lloyd LJ in *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201 at 207 that the power to change a party after the expiry of a limitation period can be exercised where a party has been wrongly identified, but "it was possible to identify the intending claimant or intended defendant by reference to a description which was more or less specific to the particular case". Thus, for example, if it is clear that the claimant intended to sue his employer or the competent landlord, but by mistake named the wrong person, an application to substitute the person who in fact answers the description of employer or competent landlord would come within CPR 19.5(3)(a).
>
> [42] In other words, the court rejected the argument that CPR 19.5(3)(a) is directed only at cases of misnomer in the strict sense, and adopted a more liberal approach such as that applied in *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] 1 All ER 310, [1983] QB 810 and *Signet Group plc v Hammerson UK Properties plc* ((1998) 75 P & CR D33).'

[30] Finally there is *Kesslar v Moore & Tibbits (a firm)* [2004] EWCA (Civ) 1551, [2004] All ER (D) 53 (Nov). The claimant wished to sue her former solicitors for negligence. By the time she sued, the firm, called Kundert and Co, had ceased to exist. The former partners worked for a firm which called itself Moore and Tibbits (incorporating Kundert and Co). She used that name in her claim form. Amendment to substitute the names of the former partners was allowed pursuant to r 19.5. Buxton LJ applied the *Sardinia Sulcis* right description/wrong name test. He said (at [16]):

'[Keene LJ in *Horne-Roberts*'s case] then referred to a number of previous authorities upon Ord 20, r 5 which however, like our rule, depended on s 35 of the Limitation Act. He said that he found helpful the case of *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201 ...'

This repeats the error about the basis of RSC Ord 20, r 5. But it was not necessary to his decision.

[31] Of more relevance to the present case is this sentence (at [23]): 'The best source for what the claimant actually intended is to be found in the points of claim.'

[32] Sedley LJ agreed. He further had regard to the overriding objective. His concluding sentence is important. He said (at [30]): 'I would want to leave for future consideration whether there is in this field of law a material dichotomy of identity and capacity or of nomenclature and liability.'

[33] Latham LJ agreed with both judgments. I take this as leaving it open whether the *Sardinia Sulcis* test sets out the ambit of r 19.5.

THE ARGUMENTS IN THIS CASE

[34] Before the judge the principal argument was whether or not the case fell within the *Sardinia Sulcis* principle as embodying the limits of r 19.5. Before us, by his respondents' notice, Mr Bartlett widened the debate—as to whether that principle truly embodied the limits of r 19.5. In the alternative he submits that this case falls within the principle, supporting the judge's reasoning.

[35] I have come to the clear conclusion that the *Sardinia Sulcis* right description/wrong name test does not set the limits of r 19.5. It was devised for a wholly different rule and not for s 35 of the 1980 Act under which r 19.5 was made. If anything it is more relevant to r 17.4 with its requirement that the mistake be 'not one which would cause reasonable doubt as to the identity of the party in question'. It is those words which echo the former RSC Ord 20, r 5 'not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued'.

[36] In so holding I have of course considered whether I am bound by the use of the *Sardinia Sulcis* test in the trinity of post-CPR cases: *Horne-Roberts*'s case (2001) 65 BMLR 79, [2002] 1 WLR 1662, *Parsons v George* [2004] 3 All ER 633, [2004] 1 WLR 3264 and *Kesslar*'s case [2004] All ER (D) 53 (Nov). I do not think I am for the following reasons: (i) They each make the fundamentally wrong assumption that the *Sardinia Sulcis* test was framed to apply a rule implementing s 35 of the 1980 Act; it was not. (ii) In fact the use of that test made no difference, the words of the rule are at least wide enough to include it; (iii) no member of any of the courts held explicitly that the limits of the rule were embodied by the test; (iv) in the last of the cases, *Kesslar*'s case, two members of the court reserved the position; (v) the first of the post-CPR cases, *Gregson v Channel Four Television Corp* [2000] All ER (D) 956, (2000) Times, 11 August, made it clear that decisions under either r 17.4 or r 19.5 should turn on the new rules and not older authorities; (vi) the *Sardinia Sulcis* test does not take into account the overriding objective.

[37] I conclude that the right approach is to apply the words of r 19.5 without regard to the *Sardinia Sulcis* but with regard to the overriding objective, bearing in mind however that the limit of the rule must be the limit set by the empowering section, s 35. Much the better approach is that set out in *Gregson*'s

case. Citation of old authorities under different rules simply obscures the debate. The *Sardinia Sulcis* should be allowed to sink back to the ocean bottom. It muddies the waters.

[38] The same goes for the application of r 17.4—though the wording here is much closer to the old rule. And it should be remembered that there may be overlap between the two rules (see *Gregson*'s case). It does not matter if there is, save possibly on some point of discretion or service, neither of which arise here.

[39] With that I turn to see whether r 19.5 applies to this case. One goes through a series of steps: (a) Has the limitation period expired (19.5(1))? Answer, yes. (b) Is the addition of A or C 'necessary' (19.5(2)(a))? (c) That depends on whether the court is satisfied that 'the new party is to be substituted for a party who was named in the claim form in mistake for the new party'. (d) So was company B named 'in mistake' for A or C?

[40] There is no reason to construe 'in mistake' restrictively. On the contrary it is important to remember that the source of the rule was the 1980 Act which had the obvious intention of liberalising the position from that under the 1939 Act. Likewise the overriding objective of doing justice is likely to be undermined if one gets finicky about different sorts of mistake. The jurisdiction is for putting things right.

[41] In the present case there was clearly a mistake about naming B. The very form of the particulars of claim suggest that it was A that was intended to be named (see Buxton LJ in *Kesslar*'s case). The rather meagre, muddled and second-hand evidence in support of the application by a Mr Sayers does say this much:

> 'It was the intention throughout to bring the claim in the name of the party holding the right to bring the claim ... At the date the proceedings were issued it was believed the correct claimant was B.'

[42] Assuming that was so it is a little difficult to see why the assignment to B was not pleaded. A more logical view is that it was intended to name A But I do not think it matters—there was a clear mistake one way or another. Things can and should be put right by substituting A for B. There is no prejudice to the defendants. They are deprived of an unmeritorious defence arising solely from a blunder by the other side—that does not count as prejudice.

[43] Mr Norris objected that if one says 'I intended the claim to be by the party holding the right to the claim' one is using the wide test expressly eschewed by Lloyd LJ in *The Sardinia Sulcis*. That may be so, but why does that matter if no-one is prejudiced?

[44] Actually, however, I would, if necessary, hold that the case does fall within *The Sardinia Sulcis*. I need say no more than that I think the learned judge was right when he said ([2004] All ER (D) 381 (Jul) at [17]):

> 'There can be no doubt that the claimant and Kennedys [the solicitors] intended that the claimant should be that person [ie the person holding the right to sue] One can describe that person in three ways: as the contracting party (an erroneous description), as the assignee of the contracting party, or as the person holding the right to sue the defendant under the contract. In *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] 1 All ER 310, [1983] QB 810 and *Parsons v George* [2004] 3 All ER 633, [2004] 1 WLR 3264, tenants

were allowed to amend who had intended to sue particular persons who had been the relevant landlords in the erroneous belief that they were the relevant landlords. In my judgment, those actual decisions justify adopting the wider description of the intending claimant as the person holding the right to sue the defendant under the contract, as opposed to the narrower description as the contracting party or the assignee of the contracting party.'

[45] Accordingly I would allow the substitution of B by A. As to C, the current beneficial owner of the right to sue, it can and ought to be joined pursuant to the provisions of r 19.5(3)(c). As beneficial owner it ought to be present so that it will be bound by the result (see *Three Rivers DC v Bank of England* [1995] 4 All ER 312 at 331, [1996] QB 292 at 313, per Peter Gibson LJ). I did not understand Mr Norris to object to such joinder if A is joined.

[46] Mr Norris had a second point—that in respect of a case said to be within r 19(3)(a) only substitution of a party can be permitted. It falls away if B is taken out as a party, as Mr Bartlett was happy should happen. So there is no need to rule on the point.

[47] Finally Mr Norris had two points on discretion. First that the evidence in support and by way of explanation of the mistake was, as I have already said, unsatisfactory and second that the blunder was of the claimants' own making. The judge considered both points and none the less allowed the amendment. I can see no error of principle here—indeed the second error (own making) will generally be the case where someone is trying to put something right.

[48] Subject, therefore, to B being removed from the case, I would dismiss the appeal and allow the case to go forward in the names of A and C.

HOOPER LJ.

[49] I agree.

Appeal dismissed.

Dilys Tausz Barrister.

Attorney General's Reference (No 2 of 2003)

[2004] EWCA Crim 785

COURT OF APPEAL, CRIMINAL DIVISION

JUDGE LJ, ELIAS AND STANLEY BURNTON JJ

25 MARCH, 1 APRIL 2004

Medical treatment – Human fertilisation – Licence – Keeping embryos – 'Person responsible' securing proper arrangements made for keeping embryos – Whether 'person responsible' person keeping embryos – Human Fertilisation and Embryology Act 1990, ss 3(1)(b), 17(1), 41(2).

The defendant was a consultant obstetrician and gynaecologist who practised from two clinics which were both licensed for the purposes of the Human Fertilisation and Embryology Act 1990. Under s 17[a] of the 1990 Act it was the duty of the individual under whose supervision the activities authorised by a licence were carried on (the 'person responsible') to secure, inter alia, that the other persons to whom the licence applied were suitable persons to participate in the authorised activities, that proper arrangements were made for the keeping of embryos and the disposal of those that had been allowed to perish, and that the conditions of the licence were complied with. The defendant was the 'person responsible'. Section 3(1)(b)[b] of the 1990 Act provided that no person should keep or use an embryo except in pursuance of a licence and under s 41(2)(a)[c] of the 1990 Act a person who, inter alia, contravened s 3(1) was guilty of an offence. The sole embryologist at both clinics kept frozen embryos when he should not have done so, although the defendant was not aware of this. The defendant was charged with six counts of keeping an embryo except in pursuance of a licence, contrary to ss 3(1)(b) and 41(2)(a). At trial the judge ruled that there was no case to answer, holding as a matter of law that the offender was not a 'keeper' of the embryos. He directed the jury to return verdicts of not guilty. The Attorney General referred that question of law to the Court of Appeal.

Held – The 'person responsible', as defined by the 1990 Act, was not a person who as a matter of law was a keeper of embryos at the assisted conception unit at which he was named in the licence as being the 'person responsible'. Criminal liability for keeping an embryo otherwise than authorised by the licence did not extend to an individual who, notwithstanding his statutory responsibilities, did not in fact keep the embryo at all. Sections 3, 17, and 41 of the 1990 Act did not even suggest criminal liability in the 'person responsible' solely by virtue of his appointment. He was not deemed to be the keeper of an embryo. Rather, he had to ensure that proper arrangements were available both for keeping and disposing of the embryos and failure to do so might attract the operation of the regulatory mechanism (see [20], [21], [23], below).

a Section 17, so far as material, is set out at [12], below
b Section 3, so far as material, is set out at [16], below
c Section 41, so far as material, is set out at [16], below

Notes

For human fertilisation and embryology: prohibitions, and for grant of licences, see 30(1) *Halsbury's Laws* (4th edn reissue) paras 278, 286.

For the Human Fertilisation and Embryology Act 1990, ss 3, 17, 41, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 291, 301, 323.

Reference

Pursuant to s 36 of the Criminal Justice Act 1972, the Attorney General referred to the Court of Appeal for its opinion a point of law arising on the acquittal of a defendant in the Crown Court at Southampton on an indictment alleging six counts of keeping an embryo except in pursuance of a licence, contrary to ss 3(1)(b) and 41(2)(a) of the Human Fertilisation and Embryology Act 1990. The question referred is set out at [9], below. Certain interested parties appeared. The facts are set out in the judgment of the court.

Aftab Jafferjee (instructed by the *Treasury Solicitor*) for the Attorney General.
Alan Jenkins (instructed by *Clyde & Co*) for the acquitted person.
Kristina Stern (instructed by *Bevan Ashford*) for the interested parties.

Cur adv vult

1 April 2004. The following judgment of the court was delivered.

JUDGE LJ.

[1] This reference by the Attorney General under s 36 of the Criminal Justice Act 1972 concerns the delicate and sensitive issue of human fertilisation and embryology.

[2] The defendant at trial was a consultant obstetrician and gynaecologist, a specialist in assisted conception, practising in and from two clinics in the south west of the country, both of which were licensed for the purposes of the Human Fertilisation and Embryology Act 1990.

[3] The relevant facts can be briefly summarised. The defendant was the 'person responsible' for the supervision of the activities authorised by licences granted to and carried out at the clinics. At the relevant time, the sole embryologist at both clinics was a man of apparently high reputation and skill. Unfortunately he was dishonest. He was convicted of making false claims for the cost of thawing frozen embryos, procedures which, contrary to the instructions of the patients, he had not carried out. In effect, he had kept these embryos when he should not have done so. He was further convicted of assaulting and occasioning actual bodily harm to female patients who, contrary to their expectations, did not have their own embryos implanted.

[4] It was never suggested that the defendant even remotely participated in any of these criminal activities, nor that he knew of them. His offences were said to arise from the terms of the 1990 Act which imposed criminal liability on him for the criminal activities of a professional colleague at the clinic for whom, at most, he had no more than supervisory responsibility, and whose professional function and authority at the clinic might well equal his own. His alleged offences therefore arose from a rare form of vicarious criminal liability.

[5] The indictment against the defendant alleged six counts of keeping an embryo except in pursuance of a licence, contrary to ss 3(1)(b) and 41(2)(a) of the

1990 Act. The particulars of each offence were in identical terms. It is unnecessary to identify the relevant patients, nor the dates of the alleged offences. The relevant words in the particulars of offence alleged that the defendant 'kept an embryo ... otherwise than in pursuance of a licence issued under the provisions of the Human Fertilisation and Embryology Act 1990'.

[6] The trial judge at Southampton Crown Court (Judge Boggis QC) ruled that there was no case to answer. He held that as a matter of law the defendant was not a 'keeper' of the embryos. He directed the jury to return verdicts of 'not guilty' on each count, which they did.

[7] The judge's decision was based on two conclusions. He held, first, that the defendant—

> 'cannot be criminally responsible by virtue of his status as the person responsible. The remedy for failure by the person responsible to fulfil his supervisory responsibility is revocation or variation of the licence as provided by s 18. If a person responsible is to be criminally liable for failing in his supervisory obligations, I would expect the 1990 Act to say so. In my judgment [the defendant] can only be criminally responsible under s 3 if as a matter of fact he was the person keeping the embryos ...'

[8] He further ruled that:

> 'In this context "keeping" connotes care and control. The defendant had neither. The embryos were under the care and control of the embryologist physically in dewars in his laboratory and kept in conditions [with] which [the defendant] was unqualified to interfere. A visitor to the clinic asking to speak to the keeper of the embryos would be directed to the embryologist ... It is noteworthy that notice of withdrawal of consent to retain the embryos was never seen by [the defendant]. If he had seen the notice and was told by the embryologist to ignore it, the position might be different if [it could be] said then that there was an element of exercising control.'

[9] The question for the opinion of this court is:

> 'Is the "person responsible" as defined by the Human Fertilisation and Embryology Act 1990 a person who as a matter of law "keeps" the embryos at the assisted conception unit at which he is named in the licence as being the "person responsible"?'

[10] The judge's analysis of the relevant statutory provisions is criticised. It is submitted that for the purposes of the 1990 Act, the person responsible also 'keeps' the embryos. Accordingly we are invited to give an affirmative answer to the question.

[11] Our decision depends exclusively on the proper construction of the 1990 Act. Its essential structure is readily understood. None of the relevant activities can be carried out without a licence granted by the authority. The licence in the present case authorised 'the following activities to be carried out under the supervision of the individual who has been designated as the person responsible'. The particular activities are then specified. The licence is issued to the clinics themselves, not to the person responsible, and is subject to a series of conditions which are attached to the licence in the form of an annex. It is unnecessary to recite the numerous conditions attached to this particular licence. All licences are in any event granted subject to the provisions in Sch 3. Schedule 3 arises under s 12, which is concerned with the general conditions of the licence,

which naturally enough must address the important issue of consent, and does so in carefully structured provisions by which, if consent is to be withdrawn or varied, notice must be given to the person 'keeping' the relevant embryos.

[12] The person responsible is identified in the licence, and his duties are also specified. They follow the precise wording of s 17(1) of the 1990 Act, which defines the duty of every person responsible including the defendant as the person under whose supervision the activities authorised by a licence are carried on. Echoing the language of s 17(1) the defendant was required to secure:

> '(a) that the other persons to whom the licence applies are of such character, and are so qualified by training and experience, as to be suitable persons to participate in the activities authorised by the licence, (b) that proper equipment is used, (c) that proper arrangements are made for the keeping of gametes and embryos and for the disposal of gametes and embryos that have been allowed to perish, (d) that suitable practices are used in the course of the activities, and (e) that the conditions of the licence are complied with.'

In addition to these duties, as part of the conditions attached to the licence and as the person responsible, the defendant expressly agreed to pay the appropriate fees.

[13] Non-compliance with the conditions of the licence, or any failure by the person responsible properly to discharge his supervisory duty over the activities authorised by a licence would, where appropriate, result in the revocation of the licence, or variation of its terms (s 18). This regulatory mechanism, and the obligations of the person responsible, and the potential consequences of non-compliance, are clearly defined. They represent one strand of the control mechanism available to the authority.

[14] The second strand is the identification of prohibited activity, enforced by criminal rather than regulatory sanctions. The criminal offences created by the 1990 Act are specified in s 41, in descending order of gravity. We immediately recognise that regulatory mechanisms and criminal sanctions are not mutually exclusive. Criminal activity may bring the regulatory mechanisms into operation. Equally however, it does not follow that activity which infringes the licence conditions, and may trigger the regulatory mechanisms, necessarily attracts the sanctions of the criminal law. It was suggested that perhaps the regulatory mechanism is less efficacious, or an inconvenient means of enforcement of compliance with licence conditions. We are unable to accept that the proper exercise of the authority's functions is somehow impeded by deficiencies in the regulatory mechanism. In any event, even if such deficiencies were demonstrated, it would hardly be appropriate to make them good by adopting an artificial construction of the provisions which create criminal sanctions.

[15] The most serious group of offences absolutely prohibits the placing of an embryo or any live gamete other than a human embryo or human gamete into a woman (s 3(2)) or the use of female germ cells taken or derived from an embryo or a foetus created by using such cells (s 3A). The mixing of human with live animal gametes, and other activities defined in s 4(1) except pursuant to a licence, are also prohibited.

[16] The next most serious group of offences includes a contravention of s 3(1), which provides: 'No person shall—(a) bring about the creation of an embryo, or (b) keep or use an embryo, except in pursuance of a licence.' The offence is created by s 41(2) which provides:

'A person who—(a) contravenes section 3(1) of this Act, otherwise than by doing something which, by virtue of section 3(3) of this Act, cannot be authorised by a licence, (b) keeps or uses any gametes in contravention of section 4(1)(a) or (b) of this Act, (c) contravenes section 4(3) of this Act, or (d) fails to comply with any directions given by virtue of section 24(7)(a) of this Act, is guilty of an offence.'

These sections, and ss 3(1)(b) and 41(2)(a) in particular, form the basis of this prosecution. We need not address the remaining paragraphs of s 41(2).

[17] Further offences are created to prevent the provision of false or misleading information to obtain a licence, or to disclosing confidential information, and to ensure co-operation with the authority to enable it to perform its functions. Again these need no further analysis.

[18] A distinct offence to prevent the unauthorised giving or receipt of money or other benefit in respect of any supply of gametes or embryos is created. This offence is confined to persons 'to whom a licence applies' or who is 'the nominal licensee'. By s 17(2) this includes the person responsible for supervising the activities authorised by the licence. No provision creates a general offence arising simply from non-compliance or failure to achieve compliance with the licence conditions, unless such contraventions already fall within the ambit of the offences expressly proscribed in the remaining subsections of s 41.

[19] The remaining provisions of s 41 create defences. Section 41(10) creates a distinct statutory defence in relation to offences which contravene ss 3(1) and 4(1). Section 41(11) is more general in its application. It extends to any offence under the 1990 Act, but is then confined to those persons 'to whom a licence applied or to whom directions had been given'. It therefore extends to anyone falling within the broad ambit of s 17(2) and, by operation of s 2(1), s 23 as well. In argument, s 41(11) was described as the 'superior's' defence and contrasted with s 41(10) described as the 'subordinate's' defence. Whatever the attractions of the forensic shorthand in the context of the 'subordinate's' defence, the description 'superior's' defence is liable to mislead if it is thought to be available only to the person responsible. These provisions are perfectly clear and understandable. They provide defences. They are not triggered until the ingredients of the alleged offences are established. In particular they are not adequate to create criminal liability in the person responsible if the remaining provisions of the 1990 Act do not.

[20] We must therefore consider s 3(1)(b). In the context in which it is used, although expressly concerned with keeping an embryo 'outside the human body' (s 1(3)) and extending to storage (s 2(2)), 'keep', like 'use' in the same paragraph, is undefined. It is a perfectly ordinary English word. In summary, anyone lacking an appropriate licence, or acting outside the ambit or in breach of the terms of a licence, is prohibited from keeping or using an embryo. If he does so, he commits an offence contrary to s 41(2)(a). The offence, however, is committed by the person who contravenes s 3(1). The language is simple. It is difficult to see how it extends to create criminal liability for keeping an embryo otherwise than authorised by the licence to an individual who, notwithstanding his statutory responsibilities, does not in fact keep the embryo at all.

[21] The person responsible may, of course, personally keep or use an embryo in circumstances not covered by the licence, or he may participate in such activities by someone else. If so, he would be liable to prosecution. However neither s 3 itself, nor s 17, nor s 41, suggest, let alone provide for, criminal liability in the person responsible solely by virtue of his appointment. He is not 'deemed'

to be the keeper of an embryo. Rather he must ensure that proper arrangements are available at the clinic both for keeping and disposing of the embryos. Failure to do so may attract the operation of the regulatory mechanism. If it had been intended that the person responsible should, as a matter of law, have been criminally liable for any contravention of s 3(2) by anyone else, or for administrative failures within the clinic in relation to the keeping and use of embryos, this could have been achieved, if Parliament had so intended, by clear language. Such language is not used.

[22] In this context it is perhaps significant that s 41(8) creates the specific criminal offence which applies to persons falling within s 17(2), including the person responsible. An offence could equally readily have been created to criminalise inadequate supervision, or failures by the person responsible either to secure the performance of his own duties, or compliance with some or all of the conditions of the licence. That was not done, perhaps because it would positively discourage anyone accepting appointment as the person responsible, so damaging a programme of considerable public importance. In effect, we are invited to conclude that although this potential criminal liability is not expressed in clear and unequivocal terms, it none the less exists. We are not so persuaded.

[23] Accordingly, the answer to the question in the reference, which is exclusively concerned with a proposition of law, not one of fact, is 'No'.

Opinion accordingly.

Sanchia Pereira Barrister.

Re Guardian Newspapers Ltd

[2004] EWHC 3092 (Ch)

CHANCERY DIVISION

PARK J

6–8 DECEMBER 2004

Practice – Application to search for, inspect and copy documents – Documents for which the court's permission required - Application to inspect and copy documents in court record – Case having ended – Whether court capable of giving permission – CPR 5.4(5)(b).

During the trial of certain proceedings witnesses for the defendant gave evidence. Their evidence-in-chief was taken in the form of their confirming their witness statements. The last such witness completed his evidence on a Thursday and the case was adjourned until the following Monday when a final witness of fact would be available. On the Friday the parties notified the judge that they had reached agreement and on the Monday the judge made an order reciting that they had agreed confidential terms of settlement and staying further proceedings except for the purpose of carrying the terms into effect. On one day during the trial a reporter from the applicant newspaper had been present and had obtained a copy of the claimant's skeleton argument. The newspaper considered that certain matters mentioned in the skeleton were potentially newsworthy and a reporter attended court on the Monday expecting to hear the evidence of the last remaining witness. After it discovered that the dispute had been settled the newspaper requested that the court make available the witness statements in the case. It was referred to the parties for their agreement to that action and discovered that the defendant opposed its request although the claimant was neutral. Under CPR 5.4(5)(b)[a] a person who was not a party to proceedings could, if the court gave permission, obtain from the records of the court, inter alia, a copy of documents filed by a party. The newspaper applied under that rule for, inter alia, copies of certain pleadings and specified defence witness statements. The defendant contended, inter alia, (i) that the court had no jurisdiction under r 5.4(5)(b) as, the case being over, 'the court' which could give permission under the rule had ceased to exist; and (ii) that the principle of open justice did not apply in that the newspaper did not want to see the documents in order to place or keep the judicial system under scrutiny nor in order to publish a fair and accurate report of the of the case between the claimant and the defendant down to the time that it had been settled.

Held – The meaning of 'the court' which could give permission under r 5.4(5)(b) was not restricted to the court seised of the underlying case. The case between the claimant and defendant had been in the High Court, and although the case itself was over, the High Court still existed and was, in the instant context, 'the court' referred to in r 5.4. The general tenor of authority was in favour of

a CPR 5.4, so far as material, is set out at [16], below

disclosure to the public of materials which, in proceedings in open court, had entered into the public domain. Pleadings, and witness statements which had been confirmed in general terms by their makers and stood as evidence-in-chief, were to be regarded as documents which had been read in open court. There was no evidence from the defendant that it would suffer damage if the newspaper obtained the documents sought and the newspaper had an entirely legitimate interest in inspecting them which was related to the core of its business and the purpose of its existence. Accordingly, the application would be allowed (see [28], [30]–[34], [42], [46], below).

Dian AO v Davis Frankel & Mead (a firm) [2005] 1 All ER 1074 and *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] All ER (D) 165 (Oct) applied.

SmithKline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498, *Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910, *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] 1 All ER 842, and *Gio Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984 considered.

Notes

For supply of documents from court records, see 37 *Halsbury's Laws* (4th edn reissue) para 138.

Cases referred to in judgment

Barings plc (in liq) v Coopers & Lybrand [2000] 3 All ER 910, [2000] 1 WLR 2353, CA.

Dian AO v Davis Frankel & Mead (a firm) [2004] EWHC 2662 (Comm), [2005] 1 All ER 1074.

Gio Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd [1999] 1 WLR 984, CA.

Home Office v Harman [1982] 1 All ER 532, [1983] 1 AC 280, [1982] 2 WLR 338, HL.

Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co [2003] EWHC 2297 (Comm), [2003] All ER (D) 165 (Oct).

Lilly Icos Ltd v Pfizer Ltd (No 2) [2002] EWCA Civ 2, [2002] 1 All ER 842, [2002] 1 WLR 2253.

Scott (ors Morgan) v Scott [1913] AC 417, [1911–13] All ER Rep 1, HL.

SmithKline Beecham Biologicals SA v Connaught Laboratories Inc [1999] 4 All ER 498, CA.

Cases referred to in skeleton arguments

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.

A-G v Leveller Magazine Ltd [1979] 1 All ER 745, [1979] AC 440, [1979] 2 WLR 247, HL.

Craig v Harney (1947) 331 US 367, US SC.

Diennet v France (1995) 21 EHRR 554, [1995] ECHR 18160/91, ECt HR.

Dobson v Hastings [1992] 2 All ER 94, [1992] Ch 394, [1992] 2 WLR 414.

Fressoz v France (1999) 5 BHRC 654, ECt HR.

Handyside v UK (1976) 1 EHRR 737, [1976] ECHR 5493/72, ECt HR.

Observer v UK (1991) 14 EHRR 153, [1991] ECHR 13585/88, ECt HR.

Prager v Austria (1995) 21 EHRR 1, [1995] ECHR 15974/90, ECt HR.

Preston Banking Co v William Allsup & Sons [1895] 1 Ch 141, [1891–4] All ER Rep 688, CA.

Pretto v Italy (1984) 6 EHRR 182, [1983] ECHR 33071/96, ECt HR.

R v Felixstowe Justices, ex p Leigh [1987] 1 All ER 551, [1987] QB 582, [1987] 2 WLR 380, DC.

R v Legal Aid Board, ex p Kaim Todner (a firm) [1998] 3 All ER 541, [1999] QB 966, [1998] 3 WLR 925, CA.

R v Secretary of State for Health, ex p Wagstaff, R v Secretary of State for Health, ex p Associated Newspapers Ltd [2001] 1 WLR 292, [2000] All ER (D) 1021.

S (a child) (identification: restriction on publication), Re [2004] UKHL 47, [2004] 4 All ER 683, [2004] 3 WLR 1129.

Sunday Times Ltd v UK (No 2) (1991) 14 EHRR 229, ECt HR.

Application

Guardian Newspapers Ltd applied for an order to inspect and copy the particulars of claim, defence, reply, request and replies to request for further information, witness statements of six identified witnesses, and referenced exhibits in the claim of *Chan U Seek v Alvis Vehicles Ltd*. The facts are set out in the judgment.

Anthony Hudson (instructed by *Nuala Cosgrove*) for The Guardian.

Stuart Ritchie (instructed by *Addleshaw Goddard*) for Alvis.

Mr Chan did not appear.

Cur adv vult

8 December 2004. The following judgment was delivered.

PARK J.

OVERVIEW

[1] The case of *Chan U Seek v Alvis Vehicles Ltd* was being heard before me six weeks or so ago when, after eight days of hearing, there was an adjournment for a few days. In that period the case settled. The parties thought that it was all over, but The Guardian newspaper had taken an interest in it, and believed that one matter which was mentioned in Mr Chan's skeleton argument (of which The Guardian had a copy) could give rise to a significant journalistic story.

[2] The Guardian now applies to me under provisions of the Civil Procedure Rules (which I will identify later) to be supplied with copies of certain documents from the court file. Mr Chan is neutral and has taken no part, but Alvis has opposed The Guardian's application. The question is not easy but I have decided that I am going to accede to the application. In the judgment which follows I describe the background, I review the law, and I explain my reasons for deciding as I do.

THE BACKGROUND FACTS

[3] Mr Chan is a Singapore businessman. Alvis Vehicles Ltd (Alvis) is a manufacturer of military vehicles. The underlying case of *Chan U Seek v Alvis Vehicles Ltd* arose out of certain sales of military vehicles which Alvis made to an

overseas government in the 1990s. Mr Chan claimed that he was entitled to a commission. Alvis contended that he was not. The trial began before me on 19 October of this year, a Tuesday. I had spent the previous day reading my way into the documents and the witness statements in the case.

[4] The trial continued for the next week-and-a-half, and in the course of those days a number of witnesses gave evidence, including several witnesses for Alvis. Their evidence-in-chief was taken in the form of their confirming their witness statements, which therefore stood as the evidence-in-chief. The last such witness completed his evidence on Thursday, 28 October. Alvis had one witness of fact left, but he would not be available until the following Monday, so the case was adjourned until then. At some time on Friday, 29 October I received a message that the parties believed that they had settled the case. On Monday, 1 November I went into court and made a Tomlin order. It recited that the parties had agreed confidential terms of settlement, and in the usual way it stayed all further proceedings except for the purpose of carrying the terms into effect. I believed at the time that that was the end of the case as far as I was concerned, but it has turned out not to be so.

[5] On 9 November my clerk received a telephone call and then an e-mail from Mr Rob Evans, a reporter at The Guardian. Mr Evans requested that the court make available the witness statements in the case. My reaction was that the parties to the case would have to be consulted to find out whether they agreed. The Guardian contacted the parties. Mr Chan was neutral but Alvis was opposed to The Guardian's request. In the circumstances I indicated, through my clerk, that The Guardian should serve an application notice seeking an order for the production to it of the witness statements, and that if Alvis continued to oppose the application there would have to be a hearing. A hearing did take place on 6 and 7 December, and I now give judgment on it.

[6] I will read the relevant parts of The Guardian's application notice and then I will say a little more about how The Guardian's interest arose. The notice states that The Guardian intends—

> 'to apply for an order that GNL [Guardian Newspapers Ltd] be permitted to inspect and copy various witness statements and documents in the claim of Chan U Seek v. Alvis Vehicles Ltd. [and a reference is then given to the case] because GNL wish to prepare a fair and accurate report of the proceedings and I am entitled to do so pursuant to (a) CPR 32.13; (b) CPR 5.4(2)(c); and/or (c) the court's inherent jurisdiction.'

[7] The notice specified the documents more specifically in a paragraph of Pt C as follows:

> '(a) Particulars of Claim; (b) Defence; (c) Reply; (d) Request and Replies to Request for further information; (e) witness statements of [six identified witnesses, all of whom were witnesses for Alvis]; (f) exhibits referenced [a number of references are then given].'

[8] The Guardian's interest had arisen, as I understand, as follows. The newspaper did not have a reporter present at all times in the trial, or indeed for much of the time. However, it must have heard about the trial and thought that it might be of interest because a reporter had been in the court on a day which fell

a a few days after the start of the trial. He obtained a copy of the skeleton argument of Mr Chan's counsel. I assume that he had spoken to Mr Chan or to his legal team, or to both, and was given a copy of the skeleton. I knew nothing about that at the time and there is no reason why I should have done.

[9] I was told that a Guardian reporter turned up at court on Monday, 1 November expecting to hear the evidence of Alvis's one remaining witness. It b was then that he learned that the case had settled. On the next day (2 November) Mr Evans, The Guardian reporter, wrote to the Head of News at Alvis's parent company, which is now BAE Systems. He said that The Guardian was considering publishing an article about a particular factual matter which he described but which I will not describe here. He said that evidence of the matter had emerged during the case between Mr Chan and Alvis. Did BAE Systems wish c to comment? The Head of News replied late the same day. He said that by reason of the terms of settlement he was prevented from discussing the matter any further. A week later there occurred Mr Evans's telephone call and e-mail to my clerk which I mentioned earlier.

d [10] It is apparent that reporters at The Guardian had read the skeleton argument of Mr Chan's counsel, and obviously they identified in it some facts which Mr Chan was asserting or which may have been in the evidence of Alvis's witnesses or in some of the numerous documents in the case, and which they thought were likely to be newsworthy. I am not going to say here what they were, though they were splashed all over the front page of The Guardian of e 7 December 2004 in a report of the first half-day's proceedings on the present application. I will say that the facts occupied about one page of a 53-page skeleton. I would agree with The Guardian journalists that they were potentially newsworthy, but they were of no real significance to the issues in the case. At the trial (before it was settled), these particular facts were hardly referred to, and no f significant points were made about them. However, The Guardian journalists (not having been present for most of the trial) would not have known whether the particular facts attracted any attention or not.

[11] The Guardian still pursues its application for the documents identified in the application notice, or more exactly (as I will explain) for most of them, although it seems to me, looking at the newspaper of 7 December, that g The Guardian, basing itself on the items contained in Mr Chan's skeleton argument, has in essence already published its story. Personally I doubt that the documents which it still wants will add much, but it is nevertheless my duty to consider and to rule upon the application.

h SOME OBSERVATIONS ON THE DETAILED CONTENT OF THE APPLICATION NOTICE

[12] I have points to make both about the legal grounds asserted in the application notice as justifications for the order sought, and about the particular documents, inspection and copying of which are requested. As respects the legal grounds, The Guardian claimed in the application notice that it was entitled to j what it applies for on three different bases: (a) under CPR 32.13; (b) under r 5.4(5)(b); (c) under the court's inherent jurisdiction. I interpolate a point here. The notice specifically referred to r 5.4(2)(c). In fact, that particular paragraph has very recently been replaced and the paragraph presently in point is r 5.4(5)(b). That explains why the paragraph to which I have just referred is not in fact the same as the one in the application notice.

[13] Thus in the notice The Guardian was advancing three different alleged entitlements. However, in the course of the hearing before me Mr Hudson (for The Guardian) said that, while not conceding that The Guardian did not have the entitlements which it identified in (a) and (c), he was content to rely solely on (b), that is on r 5.4(5)(b). I do nevertheless wish to refer briefly to (a) and (c).

[14] As regards (a) r 32.13(1) provides as follows: 'A witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs.'

[15] The witness statements which The Guardian wants to inspect and copy did stand as evidence-in-chief, but the obvious point is that under r 32.13(1) they are only open to inspection during the course of the trial. The trial is now over. It is worth mentioning in this context that for a short time r 32.13(1) was worded differently and read: 'A witness statement which stands as evidence in chief is open to inspection unless the court otherwise directs during the course of the trial.' That wording, of course, would suggest that what had to happen during the course of the trial was the direction of the court. The present wording seems to me clearly to indicate that what has to happen during the course of the trial is the inspection of the witness statement. Mr Hudson says that The Guardian does not concede that the present r 32.13(1) cannot authorise inspection of a witness statement after the trial, but I do not see how that can be a tenable reading of the paragraph. It is true that there is a sentence in *Civil Procedure* (2005), vol 1, para 32.13.1 (the White Book) which reads: 'Presumably, on the application of an interested person, the court would have the power to direct that statements should be open to inspection beyond the end of the trial.' All that I can say is that, if the editors who wrote the note considered that what they had written there is a tenable reading of r 32.13(1), I cannot agree. They may, however, have in mind something to the effect that, although r 32.13(1) does not empower the court to direct that witness statements should be open to inspection beyond the end of the trial, there may be other powers under which the court may give such a direction. I would certainly not disagree with that, and, indeed, the decision to which I am going to come is an instance of precisely what I have just said.

[16] As regards the court's inherent jurisdiction, Mr Hudson, if I understood correctly, said that it was hard to see the inherent jurisdiction taking the matter any further than r 5.4, so he was content to rely solely on r 5.4. I accept that the court has an inherent jurisdiction but I think that my feeling about it is similar to Mr Hudson's. Where there are two specific provisions identifying circumstances in which the court can order disclosure of documents but neither applies in a particular case, I find it very hard to imagine myself nevertheless invoking an inherent jurisdiction (the limits of which are nowhere set out with precision) in order to direct disclosure after all. The application is therefore based solely on r 5.4, and in particular on sub-para (5)(b) of r 5.4. I will read the paragraph. In order for the ambit of sub-para (5)(b) to be clear, I need also to read the whole of r 5.4(5) including sub-para (a) as well as sub-para (b), but I will omit words which are irrelevant in this case.

> '5.4(4) A party to proceedings may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party or communication between the court and a party or another person.
>
> (5) Any other person [ie any person other than a party to proceedings] may—(a) unless the court orders otherwise, obtain from the records of the

court a copy of—(i) a claim form ... (ii) a judgment or order ... (b) if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.'

[17] In this case The Guardian is not a party to the proceedings, so r 5.4(4) does not apply. As respects r 5.4(5), none of the documents which The Guardian wants comes within sub-para (a): The Guardian has not applied to inspect the claim form or any judgment or order. Therefore the documents have to come within sub-para (b), or they cannot be inspected under r 5.4(5). Not all of them come within sub-para (b). To be within that sub-paragraph they have to be documents which can be obtained 'from the records of the court'. In this case that means in practice that they have to be in the court file of the *Chan U Seek v Alvis Vehicles Ltd* case.

[18] Documents (a), (b) and (c) listed in the application notice are within the records of the court. They are the particulars of claim, the defence and the reply. The documents at (d) in the application notice are not within the records of the court. They are 'Request and Replies to Requests for further information'. The documents within (e) of the application notice are within the records of the court. They are the witness statements of six named witnesses. The documents within (f) are not. Although they are described as exhibits, the documents identified in para (f) are in fact numbered pages in one of the many files of documents which were used in the trial. Those files were removed by the parties when the case settled. Thus they are not part of the records of the court.

[19] The practical effect of the foregoing is as follows. The Guardian's application is that, pursuant to r 5.4(5)(b), I should give permission for it to obtain from the records of the court copies of Mr Chan's particulars of claim; of Alvis's defence; of Mr Chan's reply; and of the witness statements of six named Alvis witnesses. There is an issue of whether I have jurisdiction to give permission at all, and, if I have, there is a further issue of whether or not I should exercise the discretion and give the permission. I will discuss the specific arguments later, but first I wish to set out some general principles.

OPEN JUSTICE: ACCESS OF THE PUBLIC AND THE PRESS TO DOCUMENTS USED IN COURT, AND THE PARTICULAR ROLE OF THE PRESS

[20] Open justice has long been a fundamental principle of English law. There is a strong presumption that cases should be heard in public and that decisions should be given in public. There is also a strong presumption that there should be as few impediments as possible to the reporting of cases, not just by specialist law reporters but also by the national and local press. All of this has been affirmed in cases of the highest authority, among which one constantly cited is the celebrated decision of the House of Lords in *Scott (otherwise Morgan) v Scott* [1913] AC 417, [1911–13] All ER Rep 1.

[21] In the Civil Procedure Rules, r 39.2(1) provides that the general rule is that a hearing is to be in public. As regards court documents the rules do not lay down a general rule that the public have full access to court documents, but there are the provisions of rr 5.4 and 32.13 (to which I have already referred). Further, the practice direction to Pt 39 provides in para 6.1 that the proceedings at any hearing of civil proceedings, either in the High Court or in a county court, will be

tape recorded unless the judge directs otherwise; and para 6.3 of the practice direction provides that any party or person may require a transcript on payment of the authorised charges of the transcriber. The words 'any person' mean that the right is not limited to parties in the case. I add that the right to a transcript which para 6.3 gives is an absolute one, so a judge's consent is not needed.

[22] In general my impression, which I have not researched in depth, is that the Civil Procedure Rules (and the Rules of the Supreme Court before them) do not, and did not, specifically distinguish between the public generally and the press. In terms of the rules the press are just part of the public. However, in many cases the courts have recognised the reality that the press have a vital role to play in making the value of open justice real and significant. It is an excellent thing that any member of the public can walk into any courtroom, watch the proceedings and listen to what is said. But for the public as a whole to be informed about important or interesting matters which are going on in the courts the press is crucial. It is through the press identifying the newsworthy cases, keeping itself well informed about them and distilling them into stories or articles in the newspapers that the generality of the public secure the effects and, I trust, the benefits of open justice. I am not suggesting that everything is always peace and light between the judges and the press, but the judges know, and have often said, that the press is critically important to public awareness and scrutiny of the way in which justice is administered. Mr Hudson in his skeleton cited a number of judicial observations to that effect. I will not repeat them here but I am very conscious of them. All of the foregoing has long been accepted in our courts. More recently it has been underlined by articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the jurisprudence arising from the convention.

THE RELEVANCE OF INCREASED USE OF WRITTEN MATERIALS IN COURT PROCEEDINGS

[23] A particular development in our system of civil trials, which has had to be considered in the context of open justice and of informed publicity for court proceedings, is the trend for a lot of material which the judge considers to be placed before him in written form, for him to read it all and take it all into account, but for much of it not to be read out aloud in court. So far as the present case is concerned, this applies with particular force to witness statements which stand as evidence-in-chief. The six witness statements which The Guardian wishes to see were not read out in court, but I read them. In the usual way the witnesses who gave their evidence in person confirmed that the contents of their statements were true. Two of the witness statements were tendered under the Civil Evidence Act 1995 so the witnesses did not attend in person. Nevertheless the contents of their statements were evidence in the case and I read them.

[24] Several of the recent cases which have considered issues similar to the issues in this case have made the point that members of the public should not, by reason of the modern practice, lose the ability to know the contents of a witness's evidence-in-chief, which they would have known under the earlier practice when the evidence-in-chief was given orally (see Lord Bingham of Cornhill CJ in *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 at 511–512, and Lord Woolf MR in *Barings plc (in liq) v Coopers & Lybrand* [2000] 3

All ER 910 at 919–20, [2000] 1 WLR 2353 at 2364–5). I quote one paragraph from the latter case:

> '43. As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings.'

AUTHORITIES GENERALLY

[25] I was referred to several other cases which were similar to, or had affinities to, this case. I will not review them all here though I will refer to some of them on particular issues as this judgment progresses. Some of them arose under the former Rules of the Supreme Court, whereas of course this case arises under the Civil Procedure Rules. Some of the cases (like this one) are applications by non-parties to a case to have access to some of the documents in it. Some arise against the background that documents produced by a party on disclosure are confidential until they are read in court, but, once they are read in court, in general they enter the public domain and lose their confidentiality unless the court directs otherwise. See CPR r 31.22, substantially reproducing the effect of the former RSC Ord 24, r 14A.

[26] The detailed issues which have arisen in the cases have varied, but there are some underlying values which tend to be relevant in all of them. It is worth noting that in virtually all of the cases the final decision has been that the material concerned, whether witness statements, pleadings, skeleton arguments, disclosed documents or other similar items, should be disclosed to the person seeking access to it. An exception has been the Court of Appeal decision in *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] EWCA Civ 2, [2002] 1 All ER 842, [2002] 1 WLR 2253, but that was a patent case where strong considerations of commercial confidentiality applied. Buxton LJ specifically said that particular considerations applied in patents cases (see [2002] 1 All ER 842 at [26]).

[27] It is however instructive to note a number of general principles which Buxton LJ set out ([2002] 1 All ER 842 at [25]), from which I will quote some extracts:

> 'The court should start from the principle that very good reasons are required for departing from the normal rule of publicity ... The court should start from the assumption that all documents in the case are necessary and relevant for that purpose, and should not accede to general arguments that it would be possible, or substantially possible, to understand the trial and judge the judge without access to a particular document ... Simple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document.'

DISCUSSION AND ANALYSIS

[28] A threshold question is whether I have jurisdiction at all to make an order for disclosure under r 5.4 now that the *Chan U Seek v Alvis Vehicles Ltd* case is over.

Rule 5.4(5)(b) only applies if the court gives permission. Mr Ritchie submits that 'the court' must mean only the court seised of the underlying case. That is, so far as this application is concerned, the court seised of the case between Mr Chan and Alvis. But he points out that that case is over. Therefore he says that, for the purposes of The Guardian's application made now, 'the court' does not exist, and it is impossible for permission to be given. I do not agree. The case of *Chan U Seek v Alvis Vehicles Ltd* was in the High Court and, although the case itself is over, the High Court still exists and in my view is 'the court' referred to in the rule. The rule is about obtaining documents from 'the records of the court'. The High Court still has the records of *Chan U Seek v Alvis Vehicles Ltd* in the form of the court file. In my judgment an application can still be made.

[29] I note that in two High Court cases orders have been made for the disclosure under r 5.4 of documents on the court files of cases which had come to an end. No suggestion was made that no jurisdiction to make such orders existed (see *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] EWHC 2297 (Comm), [2003] All ER (D) 165 (Oct) and *Dian AO v Davis Frankel & Mead (a firm)* [2004] EWHC 2662 (Comm), [2005] 1 All ER 1074).

[30] Accordingly, on the basis that I have jurisdiction to give the permission requested, the question is whether I should exercise the power and give it. I have concluded that I should. A number of factors have influenced me. The general tenor of the cases is in favour of disclosure to the public of materials which, in proceedings in open court, have (as it is sometimes put) 'entered into the public domain'. The public includes the press and in many respects is effectively represented by the press, even if judges have on occasions become restive about some of the things which newspapers do. As to 'the public domain', see eg observations of Lord Woolf MR in *Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910 at 922, [2000] 1 WLR 2353 at 2367 (para 52).

[31] On the more general principle that the courts favour disclosure rather than the withholding of materials if the materials have featured in proceedings in open court, I refer again to Buxton LJ in *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] 1 All ER 842, [2002] 1 WLR 2253. I will not repeat the first two passages which I quoted earlier but they are highly pertinent. I also refer to the judgment of Potter LJ in *Gio Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984, and especially to this sentence (at 993):

> 'Thus, while the parties to an action have free access to affidavits and other documents filed in the action, a member of the public requires leave to obtain such access which, no doubt, will be readily given if the affidavit or other document has been read in open court.'

[32] The reference to documents which have been read in open court must, in my view, be regarded as covering the pleadings, and also witness statements which were confirmed in general terms by their makers and which stood as evidence-in-chief. In *Chan U Seek v Alvis Vehicles Ltd* I had read all those documents and it should not make any difference that, following modern practice, I did so privately rather than having them laboriously read out to me verbatim in the courtroom. Potter LJ's sentence was specifically prompted by a provision in the former Rules of the Supreme Court which has not been exactly reproduced in the Civil Procedure Rules. However, the principle and policy

behind what Potter LJ said seems to me to be equally applicable to the present r 5.4.

[33] If I may return briefly to Buxton LJ in *Lilly Icos Ltd v Pfizer Ltd (No 2)*, the third passage which I quoted earlier (at [27], above) was this:

> 'Simple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document.'

[34] In the present case there is no evidence from Alvis that it will suffer any particular damage if The Guardian obtains the documents which it wants to see. I am sure that Alvis, which certainly did not want to be sued by Mr Chan and which has now settled the case, would much prefer it if The Guardian was not taking the interest which it is. Imagining myself in the position of Alvis, I believe that I would be unhappy about this application. However, the proceedings between Alvis and Mr Chan were not a private arbitration. They were proceedings in open court, and unwelcome publicity for a defendant, including a successful defendant, is not uncommonly a consequence of such proceedings. In any case, The Guardian already has Mr Chan's skeleton. In its edition of 7 December it has essentially reproduced the particular material which it saw in the skeleton and which attracted its interest.

[35] A further factor relevant to the witness statements is this. If, instead of my having read them privately, their contents had been put in evidence in extenso by oral question and answer in court, there would have been a transcript. The Guardian would have had an absolute right, upon payment of the authorised charges, to obtain a copy of the transcript (see paras 6.1 and 6.3 of the practice direction to the CPR, referred to earlier in this judgment). Therefore The Guardian would have been able to see the contents of the evidence-in-chief placed before the court whether Alvis liked it or not. It seems to me undesirable in principle that The Guardian should be deprived of that opportunity by the modern practice whereby witness statements are not gone through in extenso but are placed in evidence before the court nevertheless. That seems to me to be a strong reason for me to exercise my discretion in the way that The Guardian requests. Mr Ritchie has referred me to a passage in Potter LJ's judgment in *Gio Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984 at 995 which Mr Ritchie says overcomes this point but I am still influenced by the point notwithstanding that passage.

[36] Mr Ritchie has of course put a number of other arguments to me in opposition to The Guardian's application and I will describe and comment on them. He says, and I agree, that in many cases and in non-judicial writings, the principle of open justice has been supported primarily on the ground that it serves a public interest in that it operates as a form of scrutiny of how the judicial system operates. In a passage from Buxton LJ's judgment in *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] 1 All ER 842 at [25], which I have not quoted yet, he writes:

> '... as Lord Diplock put it in *Home Office v Harman* [1982] 1 All ER 532 at 537, [1983] 1 AC 280 at 303, citing both Jeremy Bentham and Lord Shaw of

Dunfermline in [*Scott (otherwise Morgan) v Scott* [1913] AC 417, [1911–13] All ER Rep 1]:

> "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."'

The cases also refer to the ability of the press to provide fair and accurate reports of court proceedings. That is another important purpose which the principle of open justice is intended to serve.

[37] Mr Ritchie says that in this case The Guardian does not want to see the documents which it requests in order to place the judicial system under scrutiny, or to keep it under scrutiny. Nor does The Guardian want to publish a fair and accurate report of the case between Mr Chan and Alvis down to the time that it was settled. What it wants is to explore the newsworthy story which its reporters perceived from some of the contents of Mr Chan's skeleton: a story which was of little or no relevance to Mr Chan's claim or to Alvis's defence. I repeat the point that Mr Chan was claiming against Alvis that he was entitled to a commission. Mr Ritchie says that The Guardian is manifestly not interested in the ins and outs of whether Mr Chan may or may not have been entitled to his commission.

[38] Factually I agree with what Mr Ritchie says in those respects. I also agree with him that The Guardian over-egged the pudding by saying in its application notice that it wished to inspect and copy the documents 'because GNL wished to prepare a fair and accurate report of the proceedings'. In my judgment that was not the real reason. Mr Evans's e-mail to my clerk indicated what the real reason was. So did his letter a few days earlier to Alvis's parent company. However, I do not think that I should refuse the order simply because the reason which The Guardian expressed in the application notice can be shown not to give an accurate impression.

[39] Moore-Bick J in *Dian AO v Davis Frankel & Mead (a firm)* [2005] 1 All ER 1074 at [31] has noted that doing justice in public can have consequences which go beyond its primary objects:

> 'Although ... one consequence of observing the principle of open justice is that those who are present at a hearing may obtain access to information that they may be able to use to their advantage in other contexts, that is simply a consequence of doing justice in public. It is not one of its primary objects.'

[40] The judge in that passage referred to 'those who are present at a hearing'. However, he plainly had in mind also those who were not present at the hearing but are able to obtain information about what happened at the hearing by taking advantage of the avenues which the law makes available. That is precisely what happened in *Dian AO v Davis Frankel & Mead (a firm)* itself. In that case Moore-Bick J made an order under the then r 5.4(2)—essentially the same as the present r 5.4(5)(b)—for a non-party to a case to be given access to certain of the documents in the court file. The case had been settled some years previously. The non-party did not want the documents out of a desire to scrutinise justice or in order to give a fair and accurate report of the earlier case. It wanted access to them because it was itself involved in current litigation and it thought it possible that the documents from the earlier case, in which it had not been involved, could

be useful to it in the current case, in which it was involved. The judge was of the opinion that the applicant did have 'a legitimate interest in obtaining access to documents on the court record in so far as they contain information that may have a direct bearing on issues that arise in the litigation in the Caribbean'. I note that in expanding on what he says there he adds this (at [56]):

> 'Moreover, I think that in the case of documents that were read by the court as part of the decision-making process, the court ought generally to lean in the favour of allowing access in accordance with the principle of open justice as currently understood ...'

[41] *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] All ER (D) 165 (Oct) was similar, in that the party applying to see documents from an earlier case wanted to inspect them in connection with a current case in which it was involved. Colman J said (at [13]) that the applicant 'has an entirely legitimate interest in inspecting the pleadings'.

[42] In this case why should it not be said that The Guardian has an entirely legitimate interest in inspecting the pleadings and witness statements in *Chan U Seek v Alvis Vehicles Ltd*? The nature of its interest is not related to other legal proceedings in which it is involved, but it is very much related to the core of its business and, as I am sure its editor and reporters would say, the purpose of its existence. The Guardian is a newspaper and a serious newspaper. It publishes stories which it believes to be of interest to its readers and which, in some cases, it believes could raise serious issues of public concern. Its reporters consider that, through Mr Chan's skeleton, they have discovered such a story, and they wish to see whether there is more relevant material in documents which passed into the public domain through proceedings in open court. It is not for me to second-guess the reporters on whether the story really is interesting or whether it really does raise serious issues. If a litigant in current proceedings can see identified documents from an earlier court file because they may bear on his current litigation, then it appears to me that a serious newspaper should be able to see identified documents from an earlier court file because they may bear on a current story or article which it is interested in publishing.

[43] A different point which Mr Ritchie makes is that, by the time that The Guardian's application was made, the *Chan U Seek v Alvis Vehicles Ltd* case was over. If the application had been made under r 32.13, it would have failed on that ground. It is argued, partly by analogy with r 32.13, that the court either cannot or should not exercise its jurisdiction under r 5.4 if the case is already over. I accept that the timing of the application can be relevant to whether the court should exercise its discretion, but in this case considerations of timing do not deflect me from my conclusion. Unless Moore-Bick J was wrong in *Dian AO v Davis Frankel & Mead (a firm)*, which I do not believe, there is no absolute rule that a r 5.4 application to inspect documents in a case's court file must be made while the case is still in progress. Certainly there is nothing in the wording of r 5.4 to suggest that that is so.

[44] If it becomes a matter of whether the discretion is to be exercised under the rule, I can see that, if an application was made by a newspaper to inspect the court file of an old and stale case, the court might be inclined to refuse. But this case is not like that. The Guardian was taking an interest in *Chan U Seek v Alvis Vehicles Ltd* while the case was in progress. A reporter attended on 1 November

expecting to hear the evidence of an important Alvis witness. It was only then that The Guardian learned that the case had been settled. The next day Mr Evans wrote to Alvis's parent company, and only a week after he received a reply he was in contact with my clerk. I do not think that The Guardian can be accused of any form of unreasonable delay in getting this application on foot.

[45] Mr Ritchie has made the point that The Guardian did not have a reporter attending the trial throughout. That is true, but in my view it would be unreasonable for me to refuse to give to The Guardian the order which it seeks on that account. There are a great many courts sitting every day in the Royal Courts of Justice alone, and there are vastly more around the country. A newspaper cannot realistically be expected to have reporters present at all times in all cases in which it is taking an interest. In any case, even if The Guardian had had a reporter present throughout *Chan U Seek v Alvis Vehicles Ltd*, it would have made no difference. The reporter would have left court when I rose on Thursday 28 October, and would have come back for the resumption of the trial, as he thought, on Monday, 1 November, only to be told that the case had been settled. The fact that The Guardian did not have a reporter permanently in court does not change my view of the present application. Observations in some cases about how members of the public sitting in court should be able to know what is happening have to be read with realistic qualifications for the particular circumstances of the press.

CONCLUSION

[46] For the foregoing reasons, despite Mr Ritchie's forceful and clearly explained opposition, I will make the order which The Guardian requests in so far as it relates to categories (a), (b), (c) and (e) set out in its application notice.

Application allowed.

Gareth Williams Barrister.

A and others v Secretary of State for the Home Department

X and another v Secretary of State for the Home Department

[2004] UKHL 56

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND AND LORD CARSWELL

4, 5, 6, 7, OCTOBER, 16 DECEMBER 2004

Immigration – Appeal – Deportation – Detention pending deportation – Statutory power to detain non-nationals suspected of terrorism – Whether power constituting lawful derogation from right to liberty – Human Rights Act 1998, Sch 1, Pt I, arts 5, 14 – Anti-terrorism, Crime and Security Act 2001, s 23 – Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644.

Following attacks in the United States on 11 September 2001 by the terrorist group Al-Qa'ida, the United Kingdom government considered that it was necessary to derogate from the right to liberty provided by art 5(1)(f)[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (as set out in Sch 1 to the Human Rights Act 1998). Article 5(1)(f) guaranteed that no one was to be deprived of his liberty save in 'the lawful arrest or detention of a person ... against whom action is being taken with a view to deportation or extradition'. Derogation was permitted by art 15[b] of the convention where there was a 'public emergency threatening the life of the nation'. Accordingly, the Human Rights Act 1998 (Designated Derogation) Order 2001 was made and the Anti-terrorism, Crime and Security Act 2001 enacted. Section 23[c] of the 2001 Act provided that a suspected international terrorist could be detained under specified provisions of the Immigration Act 1971 despite the fact that his removal or departure from the United Kingdom was prevented, whether temporarily or indefinitely, by a point of law which wholly or partly related to an international agreement, or a practical consideration. The appellants were all non-United Kingdom nationals who faced the prospect of torture or inhuman treatment if returned to their own countries, who could not be deported to any third countries, and were not charged with any crime and so, without the derogation from art 5(1)(f) of the convention could not have been detained. All had been certified by the Secretary of State as suspected international terrorists and detained under s 23 of the 2001 Act. They appealed to the

a Article 5, so far as material, is set out at [8], below
b Article 15, so far as material, is set out at [10], below
c Section 23, so far as material, is set out at [14], below

Special Immigration Appeals Commission (the SIAC) contending, inter alia, that s 23 of the 2001 Act and the 2001 order violated the prohibition on discrimination under art 14[d] of the convention as they allowed only suspected terrorists who were non-United Kingdom nationals to be detained when there were British nationals, equally dangerous, who could not be so detained. The SIAC decided that there was a public emergency threatening the life of the nation, so that the government had been entitled to derogate from art 5 of the convention, but allowed the appeals, quashed the 2001 order and granted a declaration of incompatibility in relation to s 23 of the 2001 Act. The Court of Appeal allowed the Secretary of State's appeal and dismissed the appellants' cross appeals. The appellants appealed to the House of Lords.

Held – (1) (Lord Hoffmann dissenting) The SIAC had not misdirected itself in law as to the threshold criterion for a public emergency threatening the life of the nation, and the view which it had accepted as to whether there had been a such an emergency was one it could have reached on the open evidence in the case. The approach of the European Court of Human Rights to such a question was unintrusive. Great weight should be given to the judgment of the Secretary of State, his colleagues, and Parliament on that question because they had been called upon to exercise a pre-eminently political judgment. Accordingly, the appellants had shown no ground strong enough to displace the Secretary of State's decision that there had been such a public emergency (see [26]–[29], [85], [98], [116], [118], [119], [140], [153], [154], [165], [166], [208], [219], [226], [240], below).

(2) (Per Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Carswell) The convention regime for the international protection of human rights required national authorities, including national courts, to exercise their authority to afford effective protection. The courts were not effectively precluded by any doctrine of deference from scrutinising the issues raised. Matters of the kind in issue did not fall solely within the discretionary area of judgment belonging to the democratic organs of the state. Any restriction of the right to personal liberty had to be closely scrutinised by the national court. The public emergency on which the United Kingdom had relied to derogate from art 5 of the convention was the threat to security presented by Al-Qa'ida terrorists and their supporters. While the threat to the security of the United Kingdom derived from foreign nationals, some of whom could not be deported, the threat did not derive solely from such foreign nationals. Section 23 of the 2001 Act did not rationally address the threat presented by Al-Qa'ida terrorists and their supporters because it did not address the threat presented by United Kingdom nationals; it permitted suspected foreign nationals to pursue their activities abroad; and permitted the detention of persons who were not suspected of presenting any threat to the security of the United Kingdom as Al-Qa'ida terrorists or supporters. The choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-United Kingdom suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if

d Article 14 is set out at [46], below

reasonably suspected of having links with Al-Qa'ida might harbour no hostile intentions towards the United Kingdom. Section 23, being discriminatory, could not be strictly required within art 15 and so was disproportionate. In providing for the detention of suspected international terrorists who were not United Kingdom nationals but not for the detention of suspected international terrorists who were United Kingdom nationals, s 23 unlawfully discriminated in breach of art 14 of the convention against the enjoyment of liberty under art 5. Foreign nationality of the appellants did not preclude them from claiming the protection of their convention rights. Suspected international terrorists who were United Kingdom nationals (unremovable from the United Kingdom) were the relevantly analogous comparators. The aim of s 23 was to protect the United Kingdom against the risk of Al-Qa'ida terrorism. The risk was thought to be presented by both non-United Kingdom and United Kingdom nationals. The effect of s 23 was to permit the former to be deprived of their liberty, but not the latter. The appellants had been treated differently because of their nationality or immigration status. The decision to detain one group of suspected international terrorists defined by nationality or immigration status and not another could not be justified and was a violation of art 15 and inconsistent with the United Kingdom's other obligations under international law (see [30]–[33], [35]–[37], [42]–[48], [51], [53], [54], [68], [72], [85], [98], [132], [133], [138], [140], [171], [176], [189], [219], [228], [231], [232], [238], [240], below).

(3) (Lord Walker of Gestingthorpe dissenting) The appeals would be allowed, the 2001 order would be quashed, and a declaration of incompatibility with arts 5, 14 of the convention made in relation to s 23 of the 2001 Act (see [73], [85], [97], [139], [190], [239], [240], below).

Decision of the Court of Appeal [2003] 1 All ER 816 reversed.

Notes

For the convention right to liberty and the prohibition on discrimination, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 127–133, 164.

For the Anti-terrorism, Crime and Security Act 2001, s 23, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 2369.

For the Human Rights Act 1998, Sch 1, Pt I, arts 5, 14, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 705, 708.

Cases referred to in opinions

Agee v UK (1976) 7 DR 164, ECt HR.

Aksoy v Turkey (1996) 1 BHRC 625, ECt HR.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Belgian Linguistics Case (No 2) (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR.

Brannigan v UK (1993) 17 EHRR 539, [1993] ECHR 14553/89, ECt HR.

Brogan v UK (1988) 11 EHRR 117, [1988] ECHR 11209/84, ECt HR.

Chae Chan Ping v US (1889) 130 US 581, US SC.

Chahal v UK (1996) 1 BHRC 405, ECt HR.

Chassagnou v France (1999) 7 BHRC 151, ECt HR.

Conka v Belgium (2002) 11 BHRC 555, ECt HR.

D v UK (1997) 2 BHRC 273, ECt HR.
De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.
European Roma Rights Centre v Immigration Officer at Prague Airport [2004] UKHL 55, [2005] 1 All ER 527, [2005] 2 WLR 1.
Fernandez v Wilkinson (1980) 505 F Supp 787, US DC.
Fox v UK (1990) 13 EHRR 157, [1990] ECHR 12244/86, ECt HR.
Fretté v France [2003] 2 FCR 39, ECt HR.
G v Secretary of State for the Home Department (20 May 2004, unreported), SIAC.
Garcia Alva v Germany (2001) 37 EHRR 335, [2001] ECHR 23541/94, ECt HR.
Gaygusuz v Austria (1997) 23 EHRR 364, [1996] ECHR 17371/90, ECt HR.
Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557, [2004] 3 WLR 113.
Greek Case (1969) 12 YB 1, ECom HR.
Handyside v UK (1976) 1 EHRR 737, [1976] ECHR 5493/72, ECt HR.
Hatton v UK (2003) 15 BHRC 259, ECJ.
International Transport Roth GmbH v Secretary of State for the Home Dept [2002] EWCA Civ 158, [2003] QB 728, [2002] 3 WLR 344.
Ireland v UK (1978) 2 EHRR 25, [1978] ECHR 5310/71, ECt HR.
Khawaja v Secretary of State for the Home Dept [1983] 1 All ER 765, [1984] AC 74, [1983] 2 WLR 321, HL.
Korematsu v US (1944) 323 US 214, US SC.
Korematsu v US (1984) 584 F Supp 1406, US DC (ND Cal).
Kurt v Turkey (1998) 5 BHRC 1, ECt HR.
Lawless v Ireland (No 3) (1961) 1 EHRR 15, [1961] ECHR 332/57, ECt HR.
Leander v Sweden (1987) 9 EHRR 433, [1987] ECHR 9248/81, ECt HR.
Libman v A-G of Quebec (1997) 3 BHRC 269, Can SC.
Lynch v Cannatella (1987) 810 F 2d 1363, US Ct of Apps (5th Cir).
Maaouia v France (2000) 9 BHRC 205, ECt HR.
Mahmod (Wasfi Suleman), Re [1995] Imm AR 311.
Marshall v UK App no 41571/98 (10 July 2001, unreported), ECt HR.
Matadeen v Pointu [1998] 3 LRC 542, [1999] 1 AC 98, [1998] 3 WLR 18, PC.
Moustaquim v Belgium (1991) 13 EHRR 802, [1991] ECHR 12313/86, ECt HR.
Murray v UK (1994) 19 EHRR 193, [1994] ECHR 14310/88, ECt HR.
Nishimura Ekiu v US (1892) 142 US 651, US SC.
Padfield v Minister of Agriculture Fisheries and Food [1968] 1 All ER 694, [1968] AC 997, [1968] 2 WLR 924, HL.
R (on the application of Carson) v Secretary of State for Work and Pensions [2002] EWHC 978 (Admin), [2002] 3 All ER 994; *affd* [2003] EWCA Civ 797, [2003] 3 All ER 577; *affd* [2005] UKHL 37, [2005] 2 WLR 1369.
R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
R (on the application of ProLife Alliance) v British Broadcasting Corp [2003] UKHL 23, [2003] 2 All ER 977, [2004] 1 AC 185, [2003] 2 WLR 1403.
R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196.
R v A [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45, [2001] 2 WLR 1546.

R v DPP, ex p Kebilene, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
R v Governor of Durham Prison, ex p Singh [1984] 1 All ER 983, [1984] 1 WLR 704.
R v Oakes [1986] 1 SCR 103, Can SC.
Railway Express Agency Inc v New York (1949) 336 US 106, US SC.
RJR-MacDonald Inc v A-G of Canada [1995] 3 LRC 653, Can SC.
S-C (Mental Patient: Habeas Corpus), Re [1996] 1 All ER 532, [1996] QB 599, [1996] 2 WLR 146, CA.
Secretary of State for the Home Dept v Rehman [2001] UKHL 47, [2002] 1 All ER 122, [2003] 1 AC 153, [2001] 3 WLR 877.
Shaughnessy v US, ex rel Mezei (1953) 345 US 206, US SC.
Smith v UK (1999) 29 EHRR 493, [1999] ECHR 33985/96, ECt HR.
Sommersett's Case (1772) 20 State Tr 1.
Stubbings v UK [1997] 3 FCR 157, ECt HR.
Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1996] 4 All ER 256, [1997] AC 97, [1996] 2 WLR 863, PC.
Wandsworth London BC v Michalak [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 FCR 713, [2003] 1 WLR 617.
West Virginia State Board of Education v Barnette (1943) 319 US 624, US SC.
Zadvydas v Davis (2001) 533 US 678, US SC.

Cases referred to in list of authorities

15 Foreign Students v UK (1977) 9 DR 185, ECom HR.
A v Secretary of State for the Home Dept [2004] EWCA Civ 1123, [2005] 1 WLR 414.
Abdulaziz v UK (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR.
Adam v Czech Republic (1996) 1 BHRC 451, UN HRC.
Adoui v Belgian State Joined cases 115/81 and 116/81 [1982] ECR 1667, ECJ.
Aerts v Belgium (1998) 5 BHRC 382, ECt HR.
Ajouaou v Secretary of State (20 March 2002, unreported), SIAC.
Al-Adsani v UK (2001) 12 BHRC 88, ECt HR.
Al-Nashif v Bulgaria (2002) 36 EHRR 37, [2002] ECHR 50963/99, ECt HR.
Althammer v Austria (8 August 2003, unreported), UN HRC.
Amuur v France (1996) 22 EHRR 533, [1996] ECHR 19776/92, ECt HR.
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2001] EWCA Civ 713, [2001] 3 All ER 393, [2002] Ch 51, [2001] 3 WLR 1323.
Aumeeruddy-Cziffra v Mauritius (9 April 1981, unreported), UN HRC.
Austria v Italy (1963) YB 740, ECom HR.
Aydin v Turkey (1997) 3 BHRC 300, ECt HR.
Aygun v Sweden (1989) 63 DR 195, ECom HR.
Bankovic v Belgium (2001) 11 BHRC 435, ECt HR.
Barberà v Spain (1988) 11 EHRR 360, [1988] ECHR 10588/83, ECt HR.
Beit Sourik Village Council v Government of Israel (30 June 2004, unreported), Israel SC.
Belgian Linguistics Case (No 1) (1967) 1 EHRR 241, [1967] ECHR 1474/62, ECt HR.
Benham v UK (1996) 22 EHRR 293, [1996] ECHR 19380/92, ECt HR.

Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, [1994] 1 AC 42, [1993] 3 WLR 90, HL.
Botta v Italy (1998) 4 BHRC 81, ECt HR.
Boultif v Switzerland [2001] 2 FLR 1228, ECt HR.
Brind v UK (1994) 18 EHRR CD 76, ECom HR.
Brown v Stott [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.
Chan Wei-Keung v R [1967] 1 All ER 948, [1967] 2 AC 160, [1967] 2 WLR 552, PC.
Chrysostomos v Turkey (1991) 68 DR 216, ECom HR.
Corigliano v Italy (1983) 5 EHRR 409, [1982] ECHR 8304/78, ECt HR.
De Wilde v Belgium (1972) 1 EHRR 373, [1972] ECHR 2832/66, ECt HR.
Demir v Turkey (2001) 33 EHRR 43, ECt HR.
Doorson v Netherlands (1996) 22 EHRR 330, [1996] ECHR 20524/92, ECt HR.
DPP v Ping Lin [1975] 3 All ER 175, [1976] AC 574, [1975] 3 WLR 419, HL.
Dudgeon v UK (1981) 4 EHRR 149, [1981] ECHR 7525/76, ECt HR.
Eckle v Germany (1983) 5 EHRR 1, [1983] ECHR 8130/78, ECt HR.
Edwards v UK (2002) 12 BHRC 190, ECt HR.
Engel v Netherlands (1976) 1 EHRR 647, [1976] ECHR 5100/71, ECt HR.
Erdem v Germany (2002) 35 EHRR 15, ECt HR.
Ezeh v UK (2003) 15 BHRC 145, ECt HR.
Fayed v UK (1994) 18 EHRR 393, [[1994] ECHR 17101/90, ECt HR.
Ferrantelli v Italy (1996) 23 EHRR 288, [1996] ECHR 19874/92, ECt HR.
Fitt v UK (2000) 30 EHRR 480, [2000] ECHR 29777/96, ECt HR.
Foti v Italy (1983) 5 EHRR 313, [1982] ECHR 7604/76, ECt HR.
Fredin v Sweden (1991) 13 EHRR 784, [1991] ECHR 12033/86, ECt HR.
G v Secretary of State for the Home Dept [2004] EWCA Civ 265, [2005] 2 All ER 882, [2004] 1 WLR 1349.
GK v Switzerland (12 May 2003, unreported) [2003] UNCAT 1, UN CAT.
Golder v UK (1975) 1 EHRR 524, [1975] ECHR 4451/70, ECt HR.
Griffin v Spain (4 April 1995, unreported), UN HRC.
Helmers v Sweden (1991) 15 EHRR 285, [1991] ECHR 11826/85, ECt HR.
Ibrahim v R [1914] AC 599, [1914–15] All ER Rep 874, PC.
Ilic v Croatia (App No 42389/98, 19 September 2000), ECom HR.
James v UK (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECt HR.
Jasper v UK (2000) 30 EHRR 441, [2000] ECHR 27052/95, ECt HR.
Jecius v Lithuania (2002) 35 EHRR 16, [2000] ECHR 34578/97, ECt HR
Johnson v Eisentrager (1950) 339 US 763, US SC.
Johnston v Ireland (1986) 9 EHRR 203, [1986] ECHR 9697/82, ECt HR.
Karakurt v Austria [2002] 9 IHRR 996, UN HRC.
Kjeldsen v Denmark (1976) 1 EHRR 711, [1976] ECHR 5095/71, ECt HR.
Klass v Germany (1978) 2 EHRR 214, [1978] ECHR 5029/71, ECt HR.
Kudla v Poland (2000) 10 BHRC 269, ECt HR.
Lauko v Slovakia (2001) 33 EHRR 40, [1998] 26138/95, ECt HR.
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) [1971] ICJ Rep 16, ICJ.
Lithgow v UK (1986) 8 EHRR 329, [1986] ECHR 9006/80, ECt HR.
Liversidge v Anderson [1941] 3 All ER 338, [1942] AC 206, HL.
London Borough of Ealing v Race Relations Board [1972] 1 All ER 105, [1972] AC 342, [1972] 2 WLR 71, HL.
Lucà v Italy (2003) 36 EHRR 46, ECt HR.

Lutz v Germany (1987) 10 EHRR 182, [1987] ECHR 9912/82, ECt HR.
M v Secretary of State for the Home Dept [2004] EWCA Civ 324, [2004] 2 All ER 863.
Magee v UK (2000) 8 BHRC 646, ECt HR.
Marckx v Belgium (1979) 2 EHRR 330, [1979] ECHR 6833/74, ECt HR.
Matthews v Ministry of Defence [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435.
McIntosh v Lord Advocate [2001] UKPC D1, [2001] 2 All ER 638, [2003] 1 AC 1078, [2001] 3 WLR 107.
Montgomery v HM Advocate, Coulter v HM Advocate [2001] 2 LRC 569, [2003] 1 AC 641, [2001] 2 WLR 779, PC.
National & Provincial Building Society v UK [1997] STC 1466, ECt HR.
National Union of Belgian Police v Belgium (1975) 1 EHRR 578, [1975] ECHR 4464/70, ECt HR.
Neumeister v Austria (No 1) (1968) 1 EHRR 91, [1968] ECHR 1936/63, ECt HR.
O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] 1 All ER 129, [1997] AC 286, [1997] 2 WLR 1, HL.
Ozturk v Germany (1984) 6 EHRR 409, [1984] ECHR 8544/79, ECt HR.
PE v France [2001] 10 IHRR 421, UN CAT.
Petrovic v Austria (2001) 33 EHRR 14, ECt HR.
Powell v UK (1990) 12 EHRR 355, [1990] ECHR 9310/81, ECt HR.
PS v Germany (2003) 36 EHRR 61, [2001] ECHR 33900/96, ECt HR.
Public Committee Against Torture v State of Israel (1999) 7 BHRC 31, Israel SC.
Purcell v Ireland (1991) 70 DR 262, ECom HR.
Quirin, ex p (1942) 317 US 1 US SC.
R (on the application of Abassi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA 1598, [2003] UKHRR 76.
R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.
R (on the application of Clift) v Secretary of State for the Home Dept [2004] EWCA Civ 514, [2004] 3 All ER 338, [2004] 1 WLR 2223.
R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport [2003] EWCA Civ 666, [2003] 4 All ER 247, [2004] QB 811, [2004] 2 WLR 147.
R (on the application of Farrakhan) v Secretary of State for the Home Dept [2002] EWCA Civ 606, [2002] 4 All ER 289, [2002] QB 1391, [2002] 3 WLR 481.
R (on the application of Gillan) v Comr of Police for the Metropolis [2004] EWCA Civ 1067, [2005] 1 All ER 970, [2005] QB 388, [2004] 3 WLR 1144.
R (on the application of McCann) v Crown Court at Manchester [2002] UKHL 39, [2002] 4 All ER 593, [2003] 1 AC 787, [2002] 3 WLR 1313.
R (on the application of Ramda) v Secretary of State for the Home Dept [2002] EWHC 1278 (Admin), [2002] All ER (D) 227 (Jun).
R (on the application of Saadi) v Secretary of State for the Home Dept [2002] UKHL 41, [2002] 4 All ER 785, [2002] 1 WLR 3131.
R (on the application of Smith) v Parole Board (No 2) [2003] EWCA Civ 1269, [2004] 1 WLR 421.
R (on the application of SR) v Nottingham Magistrates' Court [2001] EWHC Admin 802, [2002] All ER (D) 265 (Oct).

R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, [2004] 3 WLR 23.

R (on the application of West) v Parole Board [2002] EWCA 1641, [2003] 1 WLR 705.

R v Bow Street Stipendiary Magistrate, ex Pinochet Ugarte (No 3) [1999] 2 All ER 97, [2000] 1 AC 147, [1999] 2 WLR 827, HL.

R v Governors of Dunraven School, ex p B [2000] LGR 494, CA.

R v H, R v C [2004] UKHL 03, [2004] 1 All ER 1269, [2004] 2 AC 134, [2004] 2 WLR 335.

R v Headteacher of Alperton Community School, ex p B [2001] EWHC 229 (Admin), [2002] LGR 132.

R v Latif, R v Shahzad [1996] 1 All ER 353, [1996] 1 WLR 104, HL.

R v Loosely, A-G's Ref (No 3 of 2000) [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060.

R v Lyons [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, [2002] 3 WLR 1562.

R v Mullen [2000] QB 520, [1999] 3 WLR 777, CA.

R v Sang [1979] 2 All ER 1222, [1980] AC 402, [1979] 3 WLR 263, HL.

R v Secretary of State ex p Hosenball [1977] 3 All ER 452, [1977] 1 WLR 766, CA.

R v Secretary of State for the Home Dept, ex p Launder [1997] 3 All ER 961, [1997] 1 WLR 839, HL.

R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.

R v Shayler [2002] UKHL 11, [2002] 2 All ER 477, [2003] 1 AC 247, [2002] 2 WLR 754.

R v Smith (Joe) [2001] 1 WLR 1031, CA.

Rasmussen v Denmark (1984) 7 EHRR 371, [1984] ECHR 8777/79, ECt HR.

Rasul v Bush (2004) 124 S Ct 2686, US SC.

Roberts v Parole Board [2004] EWCA Civ 1031, [2004] 4 All ER 1136, [2005] QB 410, [2005] 2 WLR 54.

Rowe v UK (2000) 8 BHRC 325, ECt HR.

S v Switzerland (1991) 14 EHRR 670, [1991] ECHR 12629/87, ECt HR.

Sadak v Turkey (2003) 36 EHRR 26, [2002] ECHR 25144/94, ECt HR.

Schmidt v Germany (1994) 18 EHRR 513, [1994] ECHR 13580/88, ECt HR.

Segi v Germany App No 6422/02 (23 May 2002)

Sheffield v UK (1998) 5 BHRC 83, [1998] 2 FLR 928, ECt HR.

Silva v Uruguay (8 April 1981, unreported), UN HRC.

Soering v UK (1989) 11 EHRR 439, [1989] ECHR 14038/88, ECt HR.

Soroa-Gonzales v Civiletti (1981) 515 F Supp 1049, US DC (ND Ga).

South West Africa Cases (Ethiopia v South Africa) (Liberia v South Africa) (second phase) [1966] ICJ Rep 6, ICJ.

Sunday Times Ltd v UK (No 2) (1992) 14 EHRR 229, [1991] ECHR 13166/87, ECt HR.

Sunday Times v UK (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.

Surek v Turkey (1999) 7 BHRC 339, ECt HR.

Thlimmenos v Greece (2000) 9 BHRC 12, ECt HR.

Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2002] 4 All ER 156, [2003] QB 151, [2002] 3 WLR 247.

Tinnelly & Sons Ltd v UK (1998) 4 BHRC 393, ECt HR.

Tre Traktorer Aktiebolag v Sweden (1989) 13 EHRR 309, [1989] ECHR 10873/84, ECt HR.

Tyrer v UK (1978) 2 EHRR 1, [1978] ECHR 5856/72, ECt HR.

US v Awadallah (30 April 2002, unreported), US SC.

V v UK (2000) 30 EHRR 121, [1999] ECHR 24888/94, ECt HR.

Van de Hurk v Netherlands (1994) 18 EHRR 481, [1994] ECHR 16034/90, ECt HR.

Van Mechelen v Netherlands (1997) 2 BHRC 486, ECt HR.

Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871, [2003] IRLR 102.

Vilvarajah v UK (1991) 14 EHRR 248, [[1991] ECHR 13163/87, ECt HR.

Vogt v Germany [1996] ELR 232, ECt HR.

Weeks v UK (1988) 10 EHRR 293, [1988] ECHR 9787/82, ECt HR.

Welch v UK (1995) 20 EHRR 247, [1995] ECHR 17440/90, ECt HR.

Willis v UK [2002] ECHR 36042/97, ECt HR.

Wingrove v UK (1996) 1 BHRC 509, ECt HR.

Wong Kam-Ming v R [1979] 1 All ER 939, [1980] AC 247, [1979] 2 WLR 81, PC.

X v Netherlands (1985) 8 EHRR 235, [1985] ECHR 8978/80, ECt HR.

Young v Ireland (App No 25646/94, 17 January 1996), ECom HR.

Young v UK [1981] IRLR 408, ECt HR.

Appeal

A, X, Y and six others detained under s 23 of the Anti-terrorism, Crime and Security Act 2001 appealed, with permission of the House of Lords Appeal Committee given on 31 July, from the decision of the Court of Appeal (Lord Woolf CJ, Brooke and Chadwick LJJ) on 25 October 2002 ([2002] EWCA Civ 1502, [2003] 1 All ER 816) allowing the appeal of the Secretary of State for the Home Department and dismissing the appellants' cross-appeals from the decision of the Special Immigration Appeals Commission (Collins J (chairman), Kennedy LJ and Mark Ockelton) quashing the Human Rights Act 1998 (Designated Derogation) Order 2001 and granting a declaration under s 4 of the Human Rights Act 1998 that s 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with arts 5, 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 in so far as it permitted detention of suspected international terrorists in a way that discriminated against them on the ground of nationality. Liberty intervened in the proceedings. The facts are set out in the opinion of Lord Bingham of Cornhill.

Ben Emmerson QC, Philippe Sands QC and *Raza Husain* (instructed by *Birnberg Peirce & Partners*) for A and others.

Manjit Gill QC and *Stephanie Harrison* (instructed by *Tyndallwoods*, Birmingham) for X and Y.

Lord Goldsmith QC, A-G, Ian Burnett QC, Philip Sales, Nicholas Moss and *James Eadie* (instructed by the *Treasury Solicitor*) for the Secretary of State.

David Pannick QC, Rabinder Singh QC and *Alex Bailin* (instructed by *Liberty*) for Liberty.

Their Lordships took time for consideration.

16 December 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, the nine appellants before the House challenge a decision of the Court of Appeal (Lord Woolf CJ, Brooke and Chadwick LJJ) made on 25 October 2002 ([2002] EWCA Civ 1502, [2003] 1 All ER 816, [2004] QB 335). The Court of Appeal allowed the Home Secretary's appeal against the decision of the Special Immigration Appeals Commission (SIAC) (Collins J, Kennedy LJ and Mr Ockelton) dated 30 July 2002 ([2002] HRLR 1274) and dismissed the appellants' cross-appeals against that decision.

[2] Eight of the appellants were certified by the Home Secretary under s 21 of the Anti-terrorism, Crime and Security Act 2001 on 17 or 18 December 2001 and were detained under s 23 of that Act on 19 December 2001. The ninth was certified on 5 February 2002 and detained on 8 February 2002. Two of the eight December detainees exercised their right to leave the United Kingdom: one went to Morocco on 22 December 2001, the other (a French as well as an Algerian citizen) went to France on 13 March 2002. One of the December detainees was transferred to Broadmoor Hospital on grounds of mental illness in July 2002. Another was released on bail, on strict conditions, in April 2004. The Home Secretary revoked his certification of another in September 2004, and he has been released without conditions.

[3] The appellants share certain common characteristics which are central to their appeals. All are foreign (non-United Kingdom) nationals. None has been the subject of any criminal charge. In none of their cases is a criminal trial in prospect. All challenge the lawfulness of their detention. More specifically, they all contend that such detention was inconsistent with obligations binding on the United Kingdom under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), given domestic effect by the Human Rights Act 1998; that the United Kingdom was not legally entitled to derogate from those obligations; that, if it was, its derogation was none the less inconsistent with the convention and so ineffectual to justify the detention; and that the statutory provisions under which they have been detained are incompatible with the convention. The duty of the House, and the only duty of the House in its judicial capacity, is to decide whether the appellants' legal challenge is soundly based.

[4] In argument before the House, Liberty made written and oral submissions in support of the appellants, as it did in the courts below. Amnesty International made written submissions, also in support of the appellants. Special advocates were instructed by the Treasury Solicitor, but were not in the event called upon.

THE BACKGROUND

[5] In July 2000 Parliament enacted the Terrorism Act 2000. This was a substantial measure, with 131 sections and 16 schedules, intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism. Relevantly for present purposes, the 2000 Act defined 'terrorism' in s 1, which reads:

'1. *Terrorism: interpretation.*—(1) In this Act "terrorism" means the use or threat of action where—(a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it—(a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—(a) "action" includes action outside the United Kingdom, (b) a reference to any person or to property is a reference to any person, or to property, wherever situated, (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and (d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.'

[6] On 11 September 2001 terrorists launched concerted attacks in New York, Washington DC and Pennsylvania. The main facts surrounding those attacks are too well known to call for recapitulation here. It is enough to record that they were atrocities on an unprecedented scale, causing many deaths and destroying property of immense value. They were intended to disable the governmental and commercial power of the United States. The attacks were the product of detailed planning. They were committed by terrorists fired by ideological hatred of the United States and willing to sacrifice their own lives in order to injure the leading nation of the western world. The mounting of such attacks against such targets in such a country inevitably caused acute concerns about their own security in other western countries, particularly those which, like the United Kingdom, were particularly prominent in their support for the United States and its military response to Al-Qa'ida, the organisation quickly identified as responsible for the attacks. Before and after 11 September Usama bin Laden, the moving spirit of Al-Qa'ida, made threats specifically directed against the United Kingdom and its people.

[7] Her Majesty's government reacted to the events of 11 September in two ways directly relevant to these appeals. First, it introduced (and Parliament, subject to amendment, very swiftly enacted) what became Pt 4 of the Anti-terrorism, Crime and Security Act 2001. Second, it made the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644 (the derogation order). Before summarising the effect of these measures it is important to understand their underlying legal rationale.

[8] First, it was provided by para 2(2) of Sch 3 to the Immigration Act 1971 that the Secretary of State might detain a non-British national pending the making of a deportation order against him. Paragraph 2(3) of the same schedule authorised the Secretary of State to detain a person against whom a deportation order had been made 'pending his removal or departure from the United Kingdom'. In *R v Governor of Durham Prison, ex p Singh* [1984] 1 All ER 983, [1984] 1 WLR 704 it was held, in a decision which has never been questioned (and which was followed by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1996] 4 All ER 256, [1997] AC 97), that such detention was permissible only for such time as was reasonably necessary for the process of deportation to be carried out. Thus there was no warrant for the long-term or indefinite detention of a non-United Kingdom national whom the Home Secretary wished to remove. This ruling was wholly consistent with the obligations undertaken by the United Kingdom in the convention, the core articles of which were given domestic effect by the 1998 Act. Among these articles is art 5(1) which guarantees the fundamental human right of personal freedom: 'Everyone has the right to liberty and security of person.' This must be read in the context of art 1, by which contracting states undertake to secure the convention rights and freedoms to 'everyone within their jurisdiction'. But the right of personal freedom, fundamental though it is, cannot be absolute and art 5(1) of the convention goes on to prescribe certain exceptions. One exception is crucial to these appeals:

> '(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... (f) the lawful arrest or detention of ... a person against whom action is being taken with a view to deportation ...'

Thus there is, again, no warrant for the long-term or indefinite detention of a non-United Kingdom national whom the Home Secretary wishes to remove. Such a person may be detained only during the process of deportation. Otherwise, the convention is breached and the convention rights of the detainee are violated.

[9] Second, reference must be made to the important decision of the European Court of Human Rights in *Chahal v UK* (1996) 1 BHRC 405. Mr Chahal was an Indian citizen who had been granted indefinite leave to remain in this country but whose activities as a Sikh separatist brought him to the notice of the authorities both in India and here. The Home Secretary of the day decided that he should be deported from this country because his continued presence here was not conducive to the public good for reasons of a political nature, namely the international fight against terrorism. He resisted deportation on the ground (among others) that, if returned to India, he faced a real risk of death, or of torture in custody contrary to art 3 of the convention which provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Before the European Court the United Kingdom contended that the effect of art 3 should be qualified in a case where a state sought to deport a non-national on grounds of national security. This was an argument which the court, affirming a unanimous decision of the European Commission of Human Rights, rejected. It said (at 422):

'79. Article 3 enshrines one of the most fundamental values of democratic society ... The Court is well aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the convention and of Protocols Nos 1 and 4, art 3 makes no provision for exceptions and no derogation from it is permissible under art 15 even in the event of a public emergency threatening the life of the nation ...

80. The prohibition provided by art 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to art 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion ... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by art 3 is thus wider than that provided by arts 32 and 33 of the [United Nations Convention on the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmnd 9171)].'

The court went on to consider whether Mr Chahal's detention, which had lasted for a number of years, had exceeded the period permissible under art 5(1)(f). On this question the court, differing from the unanimous decision of the commission, held that it had not. But it reasserted (at 430 (para 113)) that 'any deprivation of liberty under art 5(1)(f) will be justified only for as long as deportation proceedings are in progress'. In a case like Mr Chahal's, where deportation proceedings are precluded by art 3, art 5(1)(f) would not sanction detention because the non-national would not be 'a person against whom action is being taken with a view to deportation'. A person who commits a serious crime under the criminal law of this country may of course, whether a national or a non-national, be charged, tried and, if convicted, imprisoned. But a non-national who faces the prospect of torture or inhuman treatment if returned to his own country, and who cannot be deported to any third country and is not charged with any crime, may not under art 5(1)(f) of the convention and Sch 3 to the 1971 Act be detained here even if judged to be a threat to national security.

[10] The convention gives member states a limited right to derogate from some articles of the convention (including art 5, although not art 3). The governing provision is art 15, which so far as relevant provides:

'Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

A member state availing itself of the right of derogation must inform the Secretary General of the Council of Europe of the measures it has taken and the reasons for them. It must also tell the Secretary General when the measures

have ceased to operate and the provisions of the convention are again being fully executed. Article 15 of the convention is not one of the articles expressly incorporated by the 1998 Act, but s 14 of that Act makes provision for prospective derogations by the United Kingdom to be designated for the purposes of the Act in an order made by the Secretary of State. It was in exercise of his power under that section that the Home Secretary, on 11 November 2001, made the derogation order, which came into force two days later, although relating to what was at that stage a proposed derogation.

THE DEROGATION ORDER

[11] The derogation related to art 5(1), in reality art 5(1)(f), of the convention. The proposed notification by the United Kingdom was set out in a schedule to the order. The first section of this, entitled 'Public emergency in the United Kingdom', referred to the attacks of 11 September and to United Nations Security Council resolutions recognising those attacks as a threat to international peace and security and requiring all states to take measures to prevent the commission of terrorist attacks, 'including by denying safe haven to those who finance, plan, support or commit terrorist attacks'. It was stated in the schedule:

> 'There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.'

The next section summarised the effect of what was to become the 2001 Act. A brief account was then given of the power to detain under the 1971 Act and reference was made to the decision in *R v Governor of Durham Prison, ex p Singh* [1984] 1 All ER 983, [1984] 1 WLR 704. In a section entitled 'Article 5(1)(f) of the Convention' the effect of the court's decision in *Chahal v UK* was summarised. In the next section it was recognised that the extended power in the new legislation to detain a person against whom no action was being taken with a view to deportation might be inconsistent with art 5(1)(f). Hence the need for derogation. Formal notice of derogation was given to the Secretary General on 18 December 2001. Corresponding steps were taken to derogate from art 9 of the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmnd 6702) (ICCPR), which is similar in effect to art 5, although not (like art 5) incorporated into domestic law.

THE 2001 ACT

[12] The 2001 Act is a long and comprehensive statute. Only Pt 4 ('Immigration and Asylum') has featured in argument in these appeals, because only Pt 4 contains the power to detain indefinitely on reasonable suspicion without charge or trial of which the appellants complain, and only Pt 4 is the subject of the United Kingdom derogation. Section 21 provides for certification of a person by the Secretary of State:

'**21.** *Suspected international terrorist: certification.*—(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably—(a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist.

(2) In subsection (1)(b) "terrorist" means a person who—(a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism, (b) is a member of or belongs to an international terrorist group, or (c) has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if—(a) it is subject to the control or influence of persons outside the United Kingdom, and (b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part—"terrorism" has the meaning given by section 1 of the Terrorism Act 2000 [see [5], above], and "suspected international terrorist" means a person certified under subsection (1).'

[13] Section 22(1) of the Act provides:

'**22.** *Deportation, removal, &c.*—(1) An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of—(a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.'

The actions specified in sub-s (2) include the making of a deportation order. It is clear that sub-s (1)(a) is directed to arts 3 and 5(1)(f) of the convention and the decision in *Chahal v UK*. Subsection (1)(b) is directed primarily to the case where a non-national cannot for convention reasons be returned to his home country and there is no other country to which he may be removed.

[14] Section 23(1) is the provision most directly challenged in these appeals. It provides:

'**23.** *Detention.*—(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by—(a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.'

For present purposes the relevant provision specified in sub-s (2) is para 2 of Sch 3 to the 1971 Act, the effect of which I have outlined at [8], above.

[15] The 2001 Act makes provision in s 24 for the grant of bail by the SIAC, in s 25 for appeal to the SIAC against certification by a certified suspected international terrorist, in s 26 for periodic reviews of certification by the SIAC, in s 28 for periodic reviews of the operation of ss 21–23, in s 29 for the expiry (subject to periodic renewal) of ss 21–23 and for the final expiry of those sections, unless renewed, on 10 November 2006. By s 21(8), legal challenges to

certification are reserved to the SIAC. Section 30 gives the SIAC exclusive jurisdiction in derogation matters, which are defined to mean:

> '(1) ... (a) a derogation by the United Kingdom from Article 5(1) of the Convention on Human Rights which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or (b) the designation under section 14(1) of the Human Rights Act 1998 (c. 42) of a derogation within paragraph (a) above.'

The appellants' challenge in these proceedings was brought under this section. Section 122, in Pt 14 of the 2001 Act, provided for appointment by the Secretary of State of a committee of not fewer than seven Privy Councillors to review the whole of the Act within two years. Part 4 of the 2001 Act came into force on 14 December 2001, the date on which the Act received the Royal Assent.

PUBLIC EMERGENCY

[16] The appellants repeated before the House a contention rejected by both the SIAC and the Court of Appeal, that there neither was nor is a 'public emergency threatening the life of the nation' within the meaning of art 15(1). Thus, they contended, the threshold test for reliance on art 15 has not been satisfied.

[17] The European Court of Human Rights considered the meaning of this provision in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, a case concerned with very low-level Irish Republican Army (IRA) terrorist activity in Ireland and Northern Ireland between 1954 and 1957. The Irish government derogated from art 5 in July 1957 in order to permit detention without charge or trial and the applicant was detained between July and December 1957. He could have obtained his release by undertaking to observe the law and refrain from activities contrary to the Offences against the State (Amendment) Act 1940, but instead challenged the lawfulness of the Irish derogation. He failed. In para 22 of its judgment (at 30) the court held that it was for it to determine whether the conditions laid down in art 15 for the exercise of the exceptional right of derogation had been made out. It ruled (at 31–32):

> '28. In the general context of Article 15 of the Convention, the natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear; they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed. Having thus established the natural and customary meaning of this conception, the Court must determine whether the facts and circumstances which led the Irish Government to make their Proclamation of 5 July 1957 come within this conception. The Court, after an examination, finds this to be the case; the existence at the time of a "public emergency threatening the life of the nation" was reasonably deduced by the Irish Government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.

29. Despite the gravity of the situation, the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally, but the homicidal ambush on the night of 3 to 4 July 1957 in the territory of Northern Ireland near the border had brought to light, just before 12 July—a date, which, for historical reasons, is particularly critical for the preservation of public peace and order—the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland.'

[18] In the *Greek Case* (1969) 12 YB 1 the government of Greece failed to persuade the commission that there had been a public emergency threatening the life of the nation such as would justify derogation. In para 153 of its opinion (at 72) the commission described the features of such an emergency:

'Such a public emergency may then be seen to have, in particular, the following characteristics: (1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.'

In *Ireland v UK* (1978) 2 EHRR 25 the parties were agreed, as were the commission and the court, that the art 15 test was satisfied. This was unsurprising, since the IRA had for a number of years represented 'a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants' (see 93 (para 212)). The art 15 test was accordingly not discussed, but the court made valuable observations about its role where the application of the article is challenged (see 91–92):

'(a) *The rôle of the Court*

207. The limits on the Court's powers of review are particularly apparent where Article 15 is concerned.

It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.

Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Art. 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision.'

The court repeated this account of its role in *Brannigan v UK* (1993) 17 EHRR 539, adding (at 569–570 (para 43)) that— *a*

> 'in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.'

The court again accepted that there had been a qualifying emergency when the applicants, following a derogation in December 1988, were detained for periods of six days and four days respectively in January 1989. In *Aksoy v Turkey* (1996) 1 BHRC 625 the court had little difficulty in accepting, and the applicant did not contest, that a qualifying public emergency existed. This was, again, an unsurprising conclusion in the context of Kurdish separatist terrorism which had claimed almost 8,000 lives. The applicant in *Marshall v UK* App no 41571/98 (10 July 2001, unreported) relied on the improved security situation in Northern Ireland to challenge the continuing validity of the United Kingdom's 1988 derogation. Referring to its previous case law, the court rejected the application as inadmissible, while acknowledging (at 11–12) that it must 'address with special vigilance the fact that almost nine years separate the prolonged administrative detention of the applicants Brannigan and McBride from that of the applicant in the case before it.' *b c d*

[19] Article 4(1) of the ICCPR is expressed in terms very similar to those of art 15(1) of the convention, and has led to the promulgation of 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) 7 Hum Rts Q 3 (the Siracusa Principles). In paras 39, 40, under the heading 'Public Emergency which Threatens the Life of the Nation', it is said: *e*

> '39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognised in the Covenant. *f g*
>
> 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.' *h*

[20] The appellants did not seek to play down the catastrophic nature of what had taken place on 11 September 2001 nor the threat posed to western democracies by international terrorism. But they argued that there had been no public emergency threatening the life of the British nation, for three main reasons: if the emergency was not (as in all the decided cases) actual, it must be shown to be imminent, which could not be shown here; the emergency must be of a temporary nature, which again could not be shown here; and the practice of other states, none of which had derogated from the convention, strongly suggested that there was no public emergency calling for derogation. All these points call for some explanation. *j*

[21] The requirement of imminence is not expressed in art 15 of the convention or art 4 of the ICCPR but it has, as already noted, been treated by the European Court of Human Rights as a necessary condition of a valid derogation. It is a view shared by the distinguished academic authors of the Siracusa Principles, who in 1985 formulated the rule (applying to the ICCPR):

> '54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.'

In submitting that the test of imminence was not met, the appellants pointed to ministerial statements in October 2001 and March 2002: 'There is no immediate intelligence pointing to a specific threat to the United Kingdom, but we remain alert, domestically as well as internationally'; and '[I]t would be wrong to say that we have evidence of a particular threat (see 372 HC official Report (6th series) col 925 and HC Paper 348–I (2001)–2002) para 13)'

[22] The requirement of temporariness is again not expressed in art 15 or art 4 unless it be inherent in the meaning of 'emergency'. But the United Nations Human Rights Committee on 24 July 2001, in General Comment No 29 on art 4 of the ICCPR (UN Doc CCPR/C/21/Rev 1/Add 11 (2001)), observed in para 2 that: 'Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.' This view was also taken by the Parliamentary Joint Committee on Human Rights, which in its Eighteenth Report of the Session 2003–2004 (HL paper 158, HC paper 713), p 6 (para 4), observed:

> 'Derogations from human rights obligations are permitted in order to deal with emergencies. They are intended to be temporary. According to the Government and the Security Service, the UK now faces a near-permanent emergency.'

It is indeed true that official spokesmen have declined to suggest when, if ever, the present situation might change.

[23] No state other than the United Kingdom has derogated from art 5. In Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe resolved (para 9) that: 'In their fight against terrorism, Council of Europe member states should not provide for any derogations to the European Convention on Human Rights.' It also called on all member states (para 12.v) to 'refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the rights and liberties guaranteed under its Article 5 (right to liberty and security).' In its General Comment no 29 on art 4 of the ICCPR, the United Nations Human Rights Committee on 24 July 2001 observed (para 3):

> 'On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.'

In Opinion 1/2002 of the Council of Europe Commissioner for Human Rights (Comm DH (2002) 7, 28 August 2002), Mr Alvaro Gil-Robles observed, in para 33:

'Whilst acknowledging the obligation of governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11th 2001 cannot, on their own, be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the present circumstances. Detailed information pointing to a real and imminent danger to public safety in the United Kingdom will, therefore, have to be shown.'

The Committee of Privy Councillors established pursuant to s 122 of the 2001 Act under the chairmanship of Lord Newton of Braintree (the Newton Committee), which reported on 18 December 2003 (*Anti-terrorism, Crime and Security Act 2001 Review*: Report (HC Paper 100 (2003–2004)) attached significance to this point:

'189. *The UK is the only country to have found it necessary to derogate from the European Convention on Human Rights.* We found this puzzling, as it seems clear that other countries face considerable threats from terrorists within their borders.'

It noted that France, Italy and Germany had all been threatened, as well as the United Kingdom.

[24] The appellants submitted that detailed information pointing to a real and imminent danger to public safety in the United Kingdom had not been shown. In making this submission they were able to rely on a series of reports by the Joint Committee on Human Rights. In its Second Report of the Session 2001–2002 (HL Paper 37, HC Paper 372), made on 14 November 2001 when the 2001 Act was a Bill before Parliament, the Joint Committee stated (para 30):

'Having considered the Home Secretary's evidence carefully, we recognise that there may be evidence of the existence of a public emergency threatening the life of the nation, although none was shown by him to this Committee.'

It repeated these doubts in para 4 of its Fifth Report of the Session 2001–2002. In para 20 of its Fifth Report of the Session 2002–2003 (HL Paper 59, HC Paper 462), following the decisions of the SIAC and the Court of Appeal, the Joint Committee noted that the SIAC had had sight of closed as well as open material but suggested that each House might wish to seek further information from the government on the public emergency issue. In its report of 23 February 2004 (Sixth Report of the Session 2003–2004, HL Paper 38, HC Paper 381), the Joint Committee stated (p 16, para 34):

'Insufficient evidence has been presented to Parliament to make it possible for us to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation.'

It adhered to this opinion in its Eighteenth Report of the Session 2003–2004 (HL Paper 158, HC Paper 713) (pp 8–9 (paras 15–19)), drawing attention (p 24 (para 82)) to the fact that the United Kingdom was the only country out of 45 countries in the Council of Europe which had found it necessary to derogate from art 5. The appellants relied on these doubts when contrasting the British derogation with the conduct of other Council of Europe member states which had not derogated, including even Spain which had actually experienced catastrophic violence inflicted by Al-Qa'ida.

[25] The Attorney General, representing the Home Secretary, answered these points. He submitted that an emergency could properly be regarded as imminent if an atrocity was credibly threatened by a body such as Al-Qa'ida which had demonstrated its capacity and will to carry out such a threat, where the atrocity might be committed without warning at any time. The government, responsible as it was and is for the safety of the British people, need not wait for disaster to strike before taking necessary steps to prevent it striking. As to the requirement that the emergency be temporary, the Attorney General did not suggest that an emergency could ever become the normal state of affairs, but he did resist the imposition of any artificial temporal limit to an emergency of the present kind, and pointed out that the emergency which had been held to justify derogation in Northern Ireland in 1988 had been accepted as continuing for a considerable number of years (see *Marshall v UK* App no 41571/98 (10 July 2001, unreported), at [18], above). Little help, it was suggested, could be gained by looking at the practice of other states. It was for each national government, as the guardian of its own people's safety, to make its own judgment on the basis of the facts known to it. In so far as any difference of practice as between the United Kingdom and other Council of Europe members called for justification, it could be found in this country's prominent role as an enemy of Al-Qa'ida and an ally of the United States. The Attorney General also made two more fundamental submissions. First, he submitted that there was no error of law in the SIAC's approach to this issue and accordingly, since an appeal against its decision lay only on a point of law, there was no ground upon which any appellate court was entitled to disturb its conclusion. Second, he submitted that the judgment on this question was pre-eminently one within the discretionary area of judgment reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament.

[26] The appellants have in my opinion raised an important and difficult question, as the continuing anxiety of the Joint Committee on Human Rights, the observations of the Commissioner for Human Rights and the warnings of the United Nations Human Rights Committee make clear. In the result, however, not without misgiving (fortified by reading the opinion of my noble and learned friend Lord Hoffmann), I would resolve this issue against the appellants, for three main reasons.

[27] First, it is not shown that the SIAC or the Court of Appeal misdirected themselves on this issue. The SIAC considered a body of closed material, that is, secret material of a sensitive nature not shown to the parties. The Court of Appeal was not asked to read this material. The Attorney General expressly declined to ask the House to read it. From this I infer that while the closed material no doubt substantiates and strengthens the evidence in the public domain, it does not alter its essential character and effect. But this is in my view

beside the point. It is not shown that the SIAC misdirected itself in law on this issue, and the view which it accepted was one it could reach on the open evidence in the case.

[28] My second reason is a legal one. The European Court of Human Rights decisions in *Ireland v UK* (1978) 2 EHRR 25; *Brannigan v UK* (1993) 17 EHRR 539; *Aksoy v Turkey* (1996) 1 BHRC 625; and *Marshall v UK* seem to me to be, with respect, clearly right. In each case the member state had actually experienced widespread loss of life caused by an armed body dedicated to destroying the territorial integrity of the state. To hold that the art 15 test was not satisfied in such circumstances, if a response beyond that provided by the ordinary course of law was required, would have been perverse. But these features were not, on the facts found, very clearly present in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15. That was a relatively early decision of the European Court of Human Rights, but it has never to my knowledge been disavowed and the House is required by s 2(1) of the 1998 Act to take it into account. The decision may perhaps be explained as showing the breadth of the margin of appreciation accorded by the court to national authorities. It may even have been influenced by the generous opportunity for release given to Mr Lawless and those in his position. If, however, it was open to the Irish government in *Lawless v Ireland (No 3)* to conclude that there was a public emergency threatening the life of the Irish nation, the British government could scarcely be faulted for reaching that conclusion in the much more dangerous situation which arose after 11 September.

[29] Third, I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety. As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called 'relative institutional competence'. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum (see *Secretary of State for the Home Dept v Rehman* [2001] UKHL 47 at [62], [2002] 1 All ER 122 at [62], [2003] 1 AC 153, per Lord Hoffmann). The appellants recognised this by acknowledging that the Home

Secretary's decision on the present question was less readily open to challenge than his decision (as they argued) on some other questions. This reflects the unintrusive approach of the European Court of Human Rights to such a question. I conclude that the appellants have shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question.

PROPORTIONALITY

[30] Article 15 requires that any measures taken by a member state in derogation of its obligations under the convention should not go beyond what is 'strictly required by the exigencies of the situation'. Thus the convention imposes a test of strict necessity or, in convention terminology, proportionality. The appellants founded on the principle adopted by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684. In determining whether a limitation is arbitrary or excessive, the court must ask itself—

> 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

This approach is close to that laid down by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103, and in *Libman v A-G of Quebec* (1997) 3 BHRC 269 at 283 (para 38). To some extent these questions are, or may be, interrelated. But the appellants directed the main thrust of their argument to the second and third questions. They submitted that even if it were accepted that the legislative objective of protecting the British people against the risk of catastrophic Al-Qa'ida terrorism was sufficiently important to justify limiting the fundamental right to personal freedom of those facing no criminal accusation, the 2001 Act was not designed to meet that objective and was not rationally connected to it. Furthermore, the legislative objective could have been achieved by means which did not, or did not so severely, restrict the fundamental right to personal freedom.

[31] The appellants' argument under this head can, I hope fairly, be summarised as involving the following steps:

(1) Part 4 of the 2001 Act reversed the effect of the decisions in *R v Governor of Durham Prison, ex p Singh* [1984] 1 All ER 983, [1984] 1 WLR 704 and *Chahal v UK* (1996) 1 BHRC 405 and was apt to address the problems of immigration control caused to the United Kingdom by art 5(1)(f) of the convention read in the light of those decisions.

(2) The public emergency on which the United Kingdom relied to derogate from the convention right to personal liberty was the threat to the security of the United Kingdom presented by Al-Qa'ida terrorists and their supporters.

(3) While the threat to the security of the United Kingdom derived predominantly and most immediately from foreign nationals, some of whom could not be deported because they would face torture or inhuman or degrading treatment or punishment in their home countries and who could not

be deported to any third country willing to receive them, the threat to the United Kingdom did not derive solely from such foreign nationals.

(4) Sections 21 and 23 did not rationally address the threat to the security of the United Kingdom presented by Al-Qa'ida terrorists and their supporters because (a) it did not address the threat presented by United Kingdom nationals, (b) it permitted foreign nationals suspected of being Al-Qa'ida terrorists or their supporters to pursue their activities abroad if there was any country to which they were able to go, and (c) the sections permitted the certification and detention of persons who were not suspected of presenting any threat to the security of the United Kingdom as Al-Qa'ida terrorists or supporters.

(5) If the threat presented to the security of the United Kingdom by United Kingdom nationals suspected of being Al-Qa'ida terrorists or their supporters could be addressed without infringing their right to personal liberty, it is not shown why similar measures could not adequately address the threat presented by foreign nationals.

(6) Since the right to personal liberty is among the most fundamental of the rights protected by the convention, any restriction of it must be closely scrutinised by the national court and such scrutiny involves no violation of democratic or constitutional principle.

(7) In the light of such scrutiny, neither the derogation order nor ss 21 and 23 of the 2001 Act can be justified.

[32] It is unnecessary to linger on the first two steps of this argument, neither of which is controversial and both of which are clearly correct. The third step calls for closer examination. The evidence before the SIAC was that the Home Secretary considered 'that the serious threats to the nation emanated predominantly (albeit not exclusively) and more immediately from the category of foreign nationals'. The SIAC held ([2002] HRLR 1274 at 1313 (para 95)):

> 'But the evidence before us demonstrates beyond argument that the threat is not so confined [ie is not confined to the alien section of the population]. There are many British nationals already identified—mostly in detention abroad—who fall within the definition of "suspected international terrorists", and it was clear from the submissions made to us that in the opinion of the [Home Secretary] there are others at liberty in the United Kingdom who could be similarly defined.'

This finding has not been challenged, and since the SIAC is the responsible fact-finding tribunal it is unnecessary to examine the basis of it. There was however evidence before the SIAC that 'upwards of a thousand individuals from the UK are estimated on the basis of intelligence to have attended training camps in Afghanistan in the last five years', that some British citizens are said to have planned to return from Afghanistan to the United Kingdom and that 'The backgrounds of those detained show the high level of involvement of British citizens and those otherwise connected with the United Kingdom in the terrorist networks'. It seems plain that the threat to the United Kingdom did not derive solely from foreign nationals or from foreign nationals whom it was unlawful to deport. Later evidence, not before the SIAC or the Court of Appeal, supports that conclusion. The Newton Committee recorded the Home Office argument that the threat from Al-Qa'ida terrorism was

predominantly from foreigners but drew attention (HC Paper 100 (2003–2004) p 54 (para 193)) to—'accumulating evidence that this is not now the case. The British suicide bombers who attacked Tel Aviv in May 2003, Richard Reid ("the Shoe Bomber"), and recent arrests suggest that the threat from UK citizens is real. Almost 30% of Terrorism Act 2000 suspects in the past year have been British. We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals.'

[33] The fourth step in the appellants' argument is of obvious importance to it. It is plain that ss 21 and 23 of the 2001 Act do not address the threat presented by United Kingdom nationals since they do not provide for the certification and detention of United Kingdom nationals. It is beside the point that other sections of the 2001 Act and the 2000 Act do apply to United Kingdom nationals, since they are not the subject of derogation, are not the subject of complaint and apply equally to foreign nationals. Yet the threat from United Kingdom nationals, if quantitatively smaller, is not said to be qualitatively different from that from foreign nationals. It is also plain that ss 21 and 23 do permit a person certified and detained to leave the United Kingdom and go to any other country willing to receive him, as two of the appellants did when they left for Morocco and France respectively (see [2], above). Such freedom to leave is wholly explicable in terms of immigration control: if the British authorities wish to deport a foreign national but cannot deport him to country 'A' because of *Chahal v UK* their purpose is as well served by his voluntary departure for country 'B'. But allowing a suspected international terrorist to leave our shores and depart to another country, perhaps a country as close as France, there to pursue his criminal designs, is hard to reconcile with a belief in his capacity to inflict serious injury to the people and interests of this country. It seems clear from the language of s 21 of the 2001 Act, read with the definition of terrorism in s 1 of the 2000 Act, that s 21 is capable of covering those who have no link at all with Al-Qa'ida (they might, for example, be members of the Basque separatist organisation ETA), or who, although supporting the general aims of Al-Qa'ida, reject its cult of violence. The Attorney General conceded that ss 21 and 23 could not lawfully be invoked in the case of suspected international terrorists other than those thought to be connected with Al-Qa'ida, and undertook that the procedure would not be used in such cases. A restrictive reading of the broad statutory language might in any event be indicated (see *Padfield v Minister of Agriculture Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997). The appellants were content to accept the Attorney General's concession and undertaking. It is not however acceptable that interpretation and application of a statutory provision bearing on the liberty of the subject should be governed by implication, concession and undertaking.

[34] Some of these features of the 2001 Act were the subject of comment by the European Commissioner for Human Rights in his Opinion 1/2002 (Comm DH (2002) 7, 28 August 2002):

> '36. The proportionality of the derogating measures is further brought into question by the definition of international terrorist organisations provided by section 21(3) of the Act. The section would appear to permit the indefinite detention of an individual suspected of

having links with an international terrorist organisation irrespective of its presenting a direct threat to public security in the United Kingdom and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.

37. Another anomaly arises in so far as an individual detained on suspicion of links with international terrorist organisations must be released and deported to a safe receiving country should one become available. If the suspicion is well founded, and the terrorist organisation a genuine threat to UK security, such individuals will remain, subject to possible controls by the receiving state, at liberty to plan and pursue, albeit at some distance from the United Kingdom, activity potentially prejudicial to its public security.

38. It would appear, therefore, that the derogating measures of the Anti-Terrorism, Crime and Security Act allow both for the detention of those presenting no direct threat to the United Kingdom and for the release of those of whom it is alleged that they do. Such a paradoxical conclusion is hard to reconcile with the strict exigencies of the situation.'

The Newton Committee, while expressing no opinion on the legality of Pt 4 of the 2001 Act, echoed the Commissioner's criticisms (HC Paper 100 (2003–2004) pp 52–56):

'185. The Part 4 detention powers present a number of problems that range from fundamental issues of principle to practical procedural difficulties. We are not persuaded that the powers are sufficient to meet the full extent of the threat from international terrorism. Nor are we persuaded that the risks of injustice are necessary or defensible.

186. Some of these problems arise because Part 4 is an adaptation of existing immigration and asylum legislation, rather than being designed expressly for the purpose of meeting the threat from international terrorism ...

192. The Part 4 process *only tackles the threat from foreigners suspected of having links with al Qaeda or its associated networks.* It does not, therefore, address the threat: a. from British nationals with similar links; or from b. anyone in the UK with links to other foreign terrorist causes ...

195. *Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism.* If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it ...

203. We consider the shortcomings described above to be sufficiently serious to **strongly recommend that the Part 4 powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency. New legislation should:**

a. **deal with all terrorism, whatever its origin or the nationality of its suspected perpetrators; and**

b. **not require a derogation from the European Convention on Human Rights.'**

[35] The fifth step in the appellants' argument permits of little elaboration. But it seems reasonable to assume that those suspected international terrorists who are United Kingdom nationals are not simply ignored by the authorities. When G, one of the appellants, was released from prison by SIAC on bail (see *G v Secretary of State for the Home Dept* (20 May, 2004, ureported), it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.

[36] In urging the fundamental importance of the right to personal freedom, as the sixth step in their proportionality argument, the appellants were able to draw on the long libertarian tradition of English law, dating back to Ch 39 of Magna Carta 1215 (9 Hen 3), given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1627 (3 Car 1c1), upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day. Recent statements, not in themselves remarkable, may be found in *Re S-C (Mental Patient: Habeas Corpus)* [1996] 1 All ER 532 at 534, [1996] QB 599 at 603 and *Re Wasfi Suleman Mahmod* [1995] Imm AR 311 at 314. In its treatment of art 5 of the convention, the European Court of Human Rights also has recognised the prime importance of personal freedom. In *Kurt v Turkey* (1998) 5 BHRC 1 at 26 (para 122), it referred to 'the fundamental importance of the guarantees contained in art 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities' and to the need to interpret narrowly any exception to 'a most basic guarantee of individual freedom'. In *Garcia Alva v Germany* (2001) 37 EHRR 335 at 352 (para 39), it referred to 'the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned'. The authors of the Siracusa Principles, although acknowledging that the protection against arbitrary detention (art 9 of the ICCPR) might be limited if strictly required by the exigencies of an emergency situation (art 4), were nonetheless of the opinion that some rights could never be denied in any conceivable emergency and, in particular (para 70(b)), 'no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge'.

[37] While the Attorney General challenged and resisted the third, fourth and fifth steps in the appellants' argument, he directed the weight of his submission to challenging the standard of judicial review for which the appellants contended in this sixth step. He submitted that as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment. Just as the European Court of

Human Rights allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere. The Attorney General drew attention to the dangers identified by Richard Ekins in 'Judicial Supremacy and the Rule of Law' (2003) 119 LQR 127. This is an important submission, properly made, and it calls for careful consideration.

[38] Those conducting the business of democratic government have to make legislative choices which, notably in some fields, are very much a matter for them, particularly when (as is often the case) the interests of one individual or group have to be balanced against those of another individual or group or the interests of the community as a whole. The European Court of Human Rights has recognised this on many occasions: *Chassagnou v France* (1999) 7 BHRC 151 at 184–85 (para 113), and *Hatton v UK* (2003) 15 BHRC 259 at 278 (paras 97–98), may be cited as recent examples. In para 97 of *Hatton v UK*, a case which concerned aircraft noise at Heathrow, the court said:

> 'At the same time, the court reiterates the fundamentally subsidiary role of the convention. The national authorities have direct democratic legitimation and are, as the court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight.'

Where the conduct of government is threatened by serious terrorism, difficult choices have to be made and the terrorist dimension cannot be overlooked. This also the European Commission and Court of Human Rights have recognised in cases such as *Brogan v UK* (1988) 11 EHRR 117 at 156–157 (para 80); *Fox v UK* (1990) 13 EHRR 157 at 167 and 168–169 (paras 32 and 34); and *Murray v UK* (1994) 19 EHRR 193 at 222 (para 47). The same recognition is found in domestic authority (see, for example, *Secretary of State for the Home Dept v Rehman* [2002] 1 All ER 122 at [28] and [62], [2003] 1 AC 153).

[39] While any decision made by a representative democratic body must of course command respect, the degree of respect will be conditioned by the nature of the decision. As the European Court of Human Rights observed in *Fretté v France* [2003] 2 FCR 39 at 57–58 (para 40):

> '... the contracting states enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the contracting states.'

A similar approach is found in domestic authority. In *R v DPP, ex p Kebilene, R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 381, Lord Hope of Craighead said:

> 'It will be easier for such [a discretionary] area of judgment to be recognised where the convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.'

Another area in which the court was held to be qualified to make its own judgment is the requirement of a fair trial (see *R v A* [2001] UKHL 25 at [36], [2001] 3 All ER 1 at [36], [2002] 1 AC 45). The Supreme Court of Canada took a similar view in *Libman v A-G of Quebec* (1997) 3 BHRC 269 at 288–89 (para 59). In his dissenting judgment (cited with approval in *Libman v A-G of Quebec*) in *RJR-MacDonald Inc v A-G of Canada* [1995] 3 LRC 653 at 697, La Forest J, sitting in the same court, said:

> 'Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be.'

See also McLachlin J in the same case (at 729–30). Jackson J, sitting in the Supreme Court of the United States in *West Virginia State Board of Education v Barnette* (1943) 319 US 624 at 638, 640, stated, speaking of course with reference to an entrenched constitution:

> 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts ... We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.'

[40] The convention regime for the international protection of human rights requires national authorities, including national courts, to exercise their authority to afford effective protection. The European Court of Human Rights made this clear in the early case of *Handyside v UK* (1976) 1 EHRR 737 at 753 (para 48):

> 'The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines.'

Thus the European Commissioner for Human Rights had authority for saying (Opinion 1/2002 (Comm DH (2002) 7, 28 August 2002), para 9):

> 'It is, furthermore, precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations. This is, indeed, the essence of the principle of the subsidiarity of the protection of Convention rights.'

In *Smith v UK* (1999) 29 EHRR 493 the traditional *Wednesbury* approach to judicial review was held to afford inadequate protection (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It is now recognised that 'domestic courts must themselves form a judgment whether a Convention right has been breached' and that 'the intensity of review is somewhat greater under the proportionality approach' (see *R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26 at [23] and [27], [2001] 3 All ER 433 at [23] and [27], [2001] 2 AC 532).

[41] Even in a terrorist situation the convention organs have not been willing to relax their residual supervisory role (see *Brogan v UK* (1988) 11 EHRR 117 at 156–157 (para 80); *Fox v UK* (1990) 13 EHRR 157 at 167–169 (paras 32–34)). In *Aksoy v Turkey* (1996) 1 BHRC 625 at 643 (para 76), the court, clearly referring to national courts as well as the convention organs, held:

> 'The Court would stress the importance of art 5 in the convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the state with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in art 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law.'

In *Korematsu v US* (1984) 584 F Supp 1406 at 1420 (para 21), Judge Patel observed that the Supreme Court's earlier decision ((1944) 323 US 214)—

> 'stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.'

Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA Civ 158 at [27], [2003] QB 728 at [27], [2002] 3 WLR 344 observed that 'the court's role under the 1998 Act is as the guardian of human rights. It cannot abdicate this responsibility'. He went on to say at [54]):

> 'But judges nowadays have no alternative but to apply the Human Rights Act 1998. Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.'

[42] It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the derogation order and the compatibility with the convention of s 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out at [29], above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to

insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in s 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a convention right, has required courts (in s 2) to take account of relevant Strasbourg jurisprudence, has (in s 3) required courts, so far as possible, to give effect to convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (s 4(6)) and the remedy lies with the appropriate minister (s 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it: 'The courts are charged by Parliament with delineating the boundaries of a rights-based democracy.' (See 'Judicial Deference: servility, civility or institutional capacity?' [2003] PL 592, p 597.) See also Clayton, 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] PL 33.

[43] The appellants' proportionality challenge to the order and s 23 is, in my opinion, sound, for all the reasons they gave and also for those given by the European Commissioner for Human Rights and the Newton Committee. The Attorney General could give no persuasive answer. In a discussion paper *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* (2004) (Cm 6147) the Secretary of State replied to one of the Newton Committee's criticisms in this way (p 8):

> '32. It can be argued that as suspected international terrorists their departure for another country could amount to exporting terrorism: a point made in the Newton Report at paragraph 195. But that is a natural consequence of the fact that Part 4 powers are immigration powers: detention is permissible only pending deportation and there is no other power available to detain (other than for the purpose of police enquiries) if a foreign national chooses voluntarily to leave the UK. (Detention in those circumstances is limited to 14 days after which the person must be either charged or released.) Deportation has the advantage moreover of disrupting the activities of the suspected terrorist.'

This answer, however, reflects the central complaint made by the appellants: that the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-United Kingdom suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qa'ida, may harbour no hostile intentions towards the United Kingdom. The conclusion that the order and s 23 are, in convention terms, disproportionate is in my opinion irresistible.

[44] Since, under s 7 of the Special Immigration Appeals Commission Act 1997 and s 30(5) of the 2001 Act, an appeal from the SIAC lies only on a point of law, that is not the end of the matter. It is necessary to examine the SIAC's reasons for rejecting this part of the appellants' challenge. They are given in the SIAC's judgment ([2002] HRLR 1274 at 1300 (para 51)), and are fourfold:

(1) that there is an advantage to the United Kingdom in the removal of a potential terrorist from circulation in the United Kingdom because he cannot operate actively in the United Kingdom whilst he is either not in the country or not at liberty; (2) that the removal of potential terrorists from their United Kingdom communities disrupts the organisation of terrorist activities; (3) that the detainee's freedom to leave, far from showing that the measures are irrational, tends to show that they are to this extent properly tailored to the state of emergency; and (4) that it is difficult to see how a power to detain a foreign national who had not been charged with a criminal offence and wished to leave the United Kingdom could readily be defended as tending to prevent him committing acts of terrorism aimed at the United Kingdom. Assuming, as one must, that there is a public emergency threatening the life of the nation, measures which derogate from art 5 are permissible only to the extent strictly required by the exigencies of the situation, and it is for the derogating state to prove that that is so. The reasons given by the SIAC do not warrant its conclusion. The first reason does not explain why the measures are directed only to foreign nationals. The second reason no doubt has some validity, but is subject to the same weakness. The third reason does not explain why a terrorist, if a serious threat to the United Kingdom, ceases to be so on the French side of the English Channel or elsewhere. The fourth reason is intelligible if the foreign national is not really thought to be a serious threat to the United Kingdom, but hard to understand if he is. I do not consider the SIAC's conclusion as one to which it could properly come. In dismissing the appellants' appeal, Lord Woolf CJ broadly considered that it was sensible and appropriate for the Secretary of State to use immigration legislation, that deference was owed to his decisions ([2003] 1 All ER 816 at [40], [2004] QB 335) and that the SIAC's conclusions depended on the evidence before it ([2003] 1 All ER 816 at [43]). Brooke LJ reached a similar conclusion ([2003] 1 All ER 816 at [91]), regarding the SIAC's findings as unappealable findings of fact. Chadwick LJ also regarded the SIAC's finding as one of fact ([2003] 1 All ER 816 at [150]). I cannot accept this analysis as correct. The European Court of Human Rights does not approach questions of proportionality as questions of pure fact (see, for example, *Smith v UK* (1999) 29 EHRR 493). Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review. So would excessive deference, in a field involving indefinite detention without charge or trial, to ministerial decision. In my opinion, the SIAC erred in law and the Court of Appeal erred in failing to correct its error.

DISCRIMINATION

[45] As part of their proportionality argument, the appellants attacked s 23 as discriminatory. They contended that, being discriminatory, the section could not be 'strictly required' within the meaning of art 15 and so was disproportionate. The courts below found it convenient to address this discrimination issue separately, and I shall do the same.

[46] The appellants complained that in providing for the detention of suspected international terrorists who were not United Kingdom nationals but not for the detention of suspected international terrorists who were United

Kingdom nationals, s 23 unlawfully discriminated against them as non-United Kingdom nationals in breach of art 14 of the convention. That article provides:

> *'Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

It is well established that the obligation on the state not to discriminate applies only to rights which it is bound to protect under the convention. The appellants claim that s 23 discriminates against them in their enjoyment of liberty under art 5. Article 14 is of obvious importance. In his influential work, *An International Bill of the Rights of Man* (1945), p 115, Professor Hersch Lauterpacht wrote: 'The claim to equality before the law is in a substantial sense the most fundamental of the rights of man.' Jackson J reflected this belief in his well-known judgment in *Railway Express Agency Inc v New York* (1949) 336 US 106 at 112–113, when he said:

> 'I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.'

More recently, the Privy Council observed (*Matadeen v Pointu* [1998] 3 LRC 542 at 552, [1999] 1 AC 98 at 109, per Lord Hoffman) with reference to the principle of equality:

> 'Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic Constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour.'

[47] The United Kingdom did not derogate from art 14 of the convention (or from art 26 of the ICCPR, which corresponds to it). The Attorney General did not submit that there had been an implied derogation, an argument advanced to the SIAC but not to the Court of Appeal or the House.

[48] The foreign nationality of the appellants does not preclude them from claiming the protection of their convention rights. By art 1 of the convention (which has not been expressly incorporated) the contracting states undertook

to secure the listed convention rights 'to everyone within their jurisdiction'. That includes the appellants. The European Court of Human Rights has recognised the convention rights of non-nationals (see, for a recent example, *Conka v Belgium* (2002) 11 BHRC 555). This accords with domestic authority. In *Khawaja v Secretary of State for the Home Dept* [1983] 1 All ER 765 at 782, [1984] AC 74 at 111–12:

> 'Habeas corpus protection is often expressed as limited to "British subjects". Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic No to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed "the black" in *Sommersett's Case* (1772) 20 State Tr 1 at 20. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed.'

[49] It was pointed out that nationality is not included as a forbidden ground of discrimination in art 14. The Strasbourg court has however treated nationality as such. In *Gaygusuz v Austria* (1997) 23 EHRR 364 at 381 (para 42), it said:

> 'However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.'

The Attorney General accepted that 'or other status' would cover the appellants' immigration status, so nothing turns on this point. Nationality is a forbidden ground of discrimination within s 3(1) of the Race Relations Act 1976 and the Secretary of State is bound by that Act by virtue of s 19B(1). It was not argued that in the present circumstances he was authorised to discriminate by s 19D.

[50] The first important issue between the parties was whether, in the present case, the Secretary of State had discriminated against the appellants on the ground of their nationality or immigration status. The Court of Human Rights gave guidance on the correct approach in the *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252 at 284 (para 10):

> 'In spite of the very general wording of the French version ("*sans distinction aucune*"), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ("without discrimination"). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal

inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.

It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question, the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

The question is whether persons in an analogous or relevantly similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction, and whether and to what extent differences in otherwise similar situations justify a different treatment in law (see *Stubbings v UK* [1997] 3 FCR 157 at 174 (para 70)). The parties were agreed that in domestic law, seeking to give effect to the convention, the correct approach is to pose the questions formulated by Grosz, Beatson and Duffy, *Human Rights: The 1998 Act and the European Convention* (2000), pp 326–327 (para C14-08), substantially adopted by Brooke LJ in *Wandsworth London BC v Michalak* [2002] EWCA Civ 271 at [20], [2002] 4 All ER 1136 at [20], [2003] 1 FCR 713, and refined in the later cases of *R (on the application of Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin) at [52], [2002] 3 All ER 994 at [52], [2003] EWCA Civ 797 at [56]–[61], [2003] 3 All ER 577 at [56]–[61], *Ghaidan v Mendoza* [2004] UKHL 30 at [133]–[134], [2004] 3 All ER 411 at [133]–[134], [2004] 2 AC 557 and *R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196. As expressed in this last case (at [42]) the questions are:

> '(1) Do the facts fall within the ambit of one or more of the convention rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (3) If so, was the difference in treatment on one or more of the proscribed grounds under art 14? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?'

[51] It is plain that the facts fall within the ambit of art 5. That is why the United Kingdom thought it necessary to derogate. The Attorney General reserved the right to argue in another place at another time that it was not necessary to derogate, but he accepted for the purpose of these proceedings that it was. The appellants were treated differently from both suspected international terrorists who were not United Kingdom nationals but could be removed and also from suspected international terrorists who were United Kingdom nationals and could not be removed. There can be no doubt but that

the difference of treatment was on grounds of nationality or immigration status (one of the proscribed grounds under art 14). The problem has been treated as an immigration problem.

[52] The Attorney General submitted that the position of the appellants should be compared with that of non-United Kingdom nationals who represented a threat to the security of the United Kingdom but who could be removed to their own or to safe third countries. The relevant difference between them and the appellants was that the appellants could not be removed. A difference of treatment of the two groups was accordingly justified and it was reasonable and necessary to detain the appellants. By contrast, the appellants' chosen comparators were suspected international terrorists who were United Kingdom nationals. The appellants pointed out that they shared with this group the important characteristics (a) of being suspected international terrorists and (b) of being irremovable from the United Kingdom. Since these were the relevant characteristics for purposes of the comparison, it was unlawfully discriminatory to detain non-United Kingdom nationals while leaving United Kingdom nationals at large.

[53] Were suspected international terrorists who were United Kingdom nationals, the appellants' chosen comparators, in a relevantly analogous situation to the appellants? The question, as posed by Laws LJ in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2003] 3 All ER at [61], is whether the circumstances of X and Y are so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X. The Court of Appeal thought not because ([2003] 1 All ER 816 at [56], [2004] QB 335, per Lord Woolf CJ) 'the nationals have a right of abode in this jurisdiction but the aliens only have a right not to be removed'. This is, however, to accept the correctness of the Secretary of State's choice of immigration control as a means to address the Al-Qa'ida security problem, when the correctness of that choice is the issue to be resolved. In my opinion, the question demands an affirmative answer. Suspected international terrorists who are United Kingdom nationals are in a situation analogous with the appellants because, in the present context, they share the most relevant characteristics of the appellants.

[54] Following the guidance given in the *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252 (see [50], above) it is then necessary to assess the justification of the differential treatment of non-United Kingdom nationals 'in relation to the aim and effects of the measure under consideration'. The undoubted aim of the relevant measure, s 23 of the 2001 Act, was to protect the United Kingdom against the risk of Al-Qa'ida terrorism. As noted above (at [32]) that risk was thought to be presented mainly by non-United Kingdom nationals but also and to a significant extent by United Kingdom nationals. The effect of the measure was to permit the former to be deprived of their liberty but not the latter. The appellants were treated differently because of their nationality or immigration status. The comparison contended for by the Attorney General might be reasonable and justified in an immigration context, but cannot in my opinion be so in a security context, since the threat presented by suspected international terrorists did not depend on their nationality or immigration status. It is noteworthy that in *Ireland v UK* (1978) 2 EHRR 25 the court was considering legislative provisions which were, unlike s 23, neutral in their terms, in that they provided for internment of Loyalist as well as Republican terrorists. Even

so, the court was gravely exercised whether the application of the measures had been even handed as between the two groups of terrorists. It seems very unlikely that the measures could have been successfully defended had they only been capable of application to Republican terrorists, unless it were shown that they alone presented a threat.

[55] The Attorney General also made a more far-reaching submission. He relied on the old-established rule that a sovereign state may control the entry of aliens into its territory and their expulsion from it. He submitted that the convention permits the differential treatment of aliens as compared with nationals. He also submitted that international law sanctions the differential treatment, including detention, of aliens in times of war or public emergency.

[56] In support of the first of these submissions he relied on *Moustaquim v Belgium* (1991) 13 EHRR 802, a case in which a Moroccan national, convicted of serious offences, was ordered to be deported. The court rejected a complaint under art 14, holding (at 816 (para 49)) that the applicant's position could not be compared with that of Belgian juveniles, since they had a right of abode in their own country and could not be expelled from it. It is indeed obvious that in an immigration context some differentiation must almost inevitably be made between nationals and non-nationals since the former have a right of abode and the latter do not. Further examples may be found in *Agee v UK* (1976) 7 DR 164 and *Maaouia v France* (2000) 9 BHRC 205. The convention recognises in art 5(1)(f) that a non-national may be lawfully detained pending deportation, and that is a position in which a national could never find himself. The question is whether and to what extent states may differentiate outside the immigration context.

[57] In Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe held that 'The combat against terrorism must be carried out in compliance with national and international law and respecting human rights' (para 5). The Committee of Ministers of the Council of Europe on 11 July 2002 adopted 'Guidelines on human rights and the fight against terrorism'. These recognised the obligation to take effective measures against terrorism, but continued (p 8):

> 'All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment ...'

Restrictions of human rights must be necessary and proportionate. The Commissioner for Human Rights in Opinion 1/2002 (Comm DH (2002) 7, 28 August 2002, para 40) observed, with reference to the 2001 Act:

> 'In so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals.'

In its General Policy Recommendation published on 8 June 2004 (CRI (2004) 26), the European Commission against Racism and Intolerance, a Council of Europe body, considered it the duty of the state to fight against terrorism; stressed that the response should not itself encroach on the values of freedom, democracy, justice, the rule of law, human rights and humanitarian law; stressed that the fight against terrorism should not become a pretext under

which racial discrimination was allowed to flourish; noted that the fight against terrorism since 11 September 2001 had in some cases resulted in the adoption of discriminatory legislation, notably on grounds of nationality, national or ethnic origin and religion; stressed the responsibility of member states to ensure that the fight against terrorism did not have a negative impact on any minority group; and recommended them—

> 'to review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or groups of persons, notably on grounds of "race", colour, language, religion, nationality or national or ethnic origin, and to abrogate any such discriminatory legislation.'

[58] The Universal Declaration of Human Rights (Paris, 10 December 1948; UN 2 (1949); Cmnd 7662) affirmed, in arts 1 and 2, the general principles of equality and non-discrimination. On 13 December 1985 the General Assembly of the United Nations made a Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (GA res 40/144) (1985)). This declaration recognised (art 2) that states might establish differences between nationals and aliens but required that laws and regulations should not be incompatible with the international legal obligations of the state, including those in the field of human rights. Aliens should enjoy 'in accordance with domestic law and subject to the relevant international obligation of the State in which they are present' the right not to be deprived of liberty except on such grounds and in accordance with such procedures as are established by law and the right to be equal before the courts (art 5).

[59] The Human Rights Committee is the United Nations body charged with interpretation of the ICCPR and adjudication of questions arising under it. In General Comment no 15, adopted in 1986, the committee ruled:

> '1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.
>
> 2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.'

The committee went on to rule, in para 7, that 'Aliens have the full right to liberty and security of the person' and that 'Aliens are entitled to equal protection by the law'.

[60] Article 4 of the ICCPR, which permits derogation, contains two conditions found in art 15 of the convention ('to the extent strictly required by the exigencies of the situation' and 'provided that such measures are not inconsistent with its other obligations under international law') and one that is not expressly found ('and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'). In General Comment no 29 (UN Doc CCPR/C/21/Rev.1/Add.11 (2001)), adopted on 24 July 2001 (and therefore before the events of 11 September) the Human Rights Committee considered arts 4 and 26 (non-discrimination) of the ICCPR. The committee said:

> '8. According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.'

[61] The Security Council of the United Nations, in Resolution 1456 adopted on 20 January 2003, required that:

> '6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.'

The United Nations Commission on Human Rights published on 26 May 2003 a report which quoted General Comment no 15 (see [58], above) and stated:

> 'The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.' (See UN Doc E/CN.4/Sub.2/2003/33 (2003) (para 6).)

[62] The International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966; TS 77 (1969); Cmnd 4108) provided, in art 1 (so far as relevant):

> '1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

This might be understood to remove discriminatory treatment of non-citizens from the scope of the convention. But the committee established under art 8 to supervise and report on the implementation of the convention has made plain that it does not sanction such discrimination. In General Recommendation 11 (UN Doc A/48/18 at 112 (1994)) adopted in 1993 it stated:

'3. The Committee further affirms that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.'

In General Recommendation 14 (UN Doc A/48/18 at 114 (1994)), adopted in the same year, the committee asserted (para 1): 'Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights.' It continued, in para 2:

'The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.'

The committee gave special attention to the United Kingdom, and in its concluding observations on the United Kingdom (10 December 2003, CERD/C/63/CO/11) said:

'17. The Committee is deeply concerned about provisions of the Anti-Terrorism Crime and Security Act which provide for the indefinite

detention without charge or trial, pending deportation, of non-nationals of the United Kingdom who are suspected of terrorism-related activities.

While acknowledging the State party's national security concerns, the Committee recommends that the State party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, the Committee draws the State party's attention to its statement of 8 March 2002 in which it underlines the obligation of States to "ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin."'

The committee returned to this subject at its 64th session in February–March 2004, when it adopted General Recommendation 30, entitled 'Discrimination against non-citizens' (UN Doc CERD/C/64/Misc.11/rev.3 (2004)). The committee there defined the responsibilities of states parties to the convention in these terms:

'1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2, provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;

2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;'

It went on to recommend (paras 10 and 20) that states should:

'10. Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping ...

20. Ensure that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law.'

[63] The materials I have cited are not legally binding on the United Kingdom. But there is no European or other authority to support the Attorney General's submission. On the other hand, the Council of Europe is the body to which the states parties to the convention belong. The Attorney General in his written case accepted that art 14 of the convention and art 26 of the ICCPR are to the same effect. And the United Kingdom has ratified the International Convention on the Elimination of All Forms of Racial Discrimination. These materials are inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency. In 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79 AJIL 1072, p 1074, the International Law Association, considering both art 4 of the ICCPR and art 15 of the convention, concluded:

'2. The power to take derogatory measures as aforesaid is subject to five general conditions ... (b) Such measures must be strictly proportionate to the exigencies of the situation. (c) Such measures must not be inconsistent with the other obligations of the state under international law. (d) Such measures must not involve any discrimination solely on the ground of race, colour, sex, language, religion, nationality or social origin.'

[64] The Newton Committee, in para 194 of its report, observed:

'There are also arguments of principle against having *discriminatory provisions* with which we have a good deal of sympathy, but it is the arguments of limited efficacy in addressing the terrorist threat that weigh most heavily with us.'

In his discussion paper published in response to the Newton Report (*Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* (2004) (Cm 6147)—see [43], above) the Secretary of State said:

'36. Secondly Lord Newton proposed that new legislation should apply equally to all nationalities including British citizens. The Government believes it is defensible to distinguish between foreign nationals and our own citizens and reflects their different rights and responsibilities. Immigration powers and the possibility of deportation could not apply to British citizens. While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to the support from all parts of the public that is so essential to countering the terrorist threat.'

[65] In its Second Report of the Session 2001–2002 (HL Paper 37, HC Paper 372), drawn up very shortly after publication of the Bill which became the 2001 Act, the Joint Committee expressed concern at the potentially discriminatory effect of the proposed measure. In paras 38–39 it said:

'38. Second, by relying on immigration legislation to provide for the detention of suspected international terrorists, the Bill risks discriminating, in the authorization of detention without charge, between those suspected international terrorists who are subject to immigration control and those who have an unconditional right to remain in the United Kingdom. We are concerned that this might lead to discrimination in the enjoyment of the right to liberty on the ground of nationality. If that could not be shown to have an objective, rational and proportionate justification, it might lead to actions which would be incompatible with Article 5 of the ECHR either taken alone or in combination with the right to be free of discrimination in the enjoyment of Convention rights under Article 14 of the ECHR. It could also lead to violations of the right to be free of discrimination under Article 26 and the right to liberty under Article 9 of the ICCPR.

39. We raised this matter with the Home Secretary in oral evidence. Having considered his response, **we are not persuaded that the risk of discrimination on the ground of nationality in the provisions of Part 4 of the Bill has been sufficiently taken on board.**'

In its Fifth Report of the Session 2002–2003 (HL Paper 59, HC Paper 462, p 13 (para 32)), following the Court of Appeal's decision in these proceedings, the Joint Committee observed that the government might have to review its position on discrimination in the light of any further decision. In its Sixth Report of the Session 2003–2004 (HL Paper 38, HC Paper 381, p 17 (para 35)), the Joint Committee expressed deep concern 'about the human rights implications of making the detention power an aspect of immigration law rather than anti-terrorism law' and warned of 'a significant risk that Part 4 violates the right to be free of discrimination under ECHR Article 14'. Following the Report of the Newton Committee and the Secretary of State's discussion paper published in response to it, the Joint Committee returned to this subject in its Eighteenth Report of the Session 2003–2004 (HL Paper 158, HC Paper 713):

'42. The discussion paper rejects the Newton Report's recommendation that new legislation replacing Part 4 ATCSA 2001 should apply equally to all nationalities including British citizens. It states the Government's belief that it is defensible to distinguish between foreign nationals and UK nationals because of their different rights and responsibilities.

43. We have consistently expressed our concern that the provisions of Part 4 ATCSA unjustifiably discriminate on grounds of nationality and are therefore in breach of Article 14 ECHR. Along with Lord Newton, we find it extraordinary that the discussion paper asserts that seeking the same power to detain British citizens would be "a very grave step" and that "such draconian powers would be difficult to justify."

44. The interests at stake for a foreign national and a UK national are the same: their fundamental right to liberty under Article 5 ECHR and related procedural rights. Article 1 of the ECHR requires States to secure the Convention rights to *everyone within their jurisdiction.* Article 14 requires the enjoyment of Convention rights to be secured without discrimination on the ground of nationality. The Government's explanation in its discussion paper of its reluctance to seek the same

powers in relation to UK nationals appears to suggest that it regards the liberty interests of foreign nationals as less worthy of protection than exactly the same interests of UK nationals, which is impermissible under the Convention.' a

[66] The SIAC concluded that s 23 was discriminatory and so in breach of art 14 of the convention. It ruled ([2002] HRLR 1274 at 1313): b

'94. ... If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terrorists—and we can see powerful arguments in favour of such a derogation—the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as [counsel for the appellants] contends the threat c stems exclusively or almost exclusively from that alien section.

95. But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified—mostly in detention abroad—who fall within the definition of "suspected international terrorists", and it was clear from the submissions d made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined. In those circumstances we fail to see how the derogation can be regarded as other than discriminatory on the grounds of national origin.'

[67] The Court of Appeal ([2003] 1 All ER 816, [2004] QB 335) differed from e the SIAC on the discrimination issue. Lord Woolf CJ referred (at [45]) to a tension between arts 15 and 14 of the convention. He held (at [49]) that it would be 'surprising indeed' if art 14 prevented the Secretary of State from restricting his power to detain to a smaller rather than a larger group. He held (at [56]) that there was objective and reasonable justification for the differential treatment of the appellants. Brooke LJ (at [102] and [132]) also found good f objective reasons for the Secretary of State's differentiation, although he also relied (at [112]–[132]) on rules of public international law. Chadwick LJ found (at [152]) that since the Secretary of State had reached his judgment on what the exigencies of the situation required, his decision had to stand, and that:

'The decision to confine the measures to be taken to the detention of g those who are subject to deportation, but who cannot (for the time being) be removed, is not a decision to discriminate against that class on the grounds of nationality.' (See [153]).

[68] I must respectfully differ from this analysis. Article 15 requires any h derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 remains in full force. Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. j What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of art 14. It was also a violation of art 26 of the ICCPR and so

inconsistent with the United Kingdom's other obligations under international law within the meaning of art 15 of the convention.

[69] Brooke LJ also resolved the discrimination issue in favour of the Secretary of State in reliance on a public international law argument (see [2003] 1 All ER 816 at [112]–[132]) which the Attorney General addressed to the Court of Appeal and repeated in the House. The first step in this argument was to assert the historic right of sovereign states over aliens entering or residing in their territory. Historically, this was the position (see *European Roma Rights Centre v Immigration Officer at Prague Airport* [2004] UKHL 55 at [11]–[12], [2005] 1 All ER 527 at [11]–[12], [2005] 2 WLR 1). But a sovereign state may by international treaty restrict its absolute power over aliens within or seeking to enter its territory, and in recent years states have increasingly done so. The Attorney General submitted that international law sanctioned the detention of aliens in time of war or public emergency, and for this purpose drew attention to a number of instruments which it is necessary briefly to consider:

(1) *The Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949* (75 UNTS 287). This instrument envisaged the internment of alien enemies in time of war or armed conflict. It is not suggested that the United Kingdom is, in a legal sense, at war or involved in an armed conflict, and it has no bearing on these appeals.

(2) *The Geneva Convention Relating to the Status of Refugees* (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) (the Refugee Convention). The Attorney General submitted that art 9 of this convention, permitting states to take provisional measures 'in time of war or other grave and exceptional circumstances', was apt to cover the detention of the appellants. He referred to material supporting that interpretation: Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953), pp 94–96; Grahl-Madsen, *Commentary on the Refugee Convention 1951* (republished by UNHCR 1997), pp 26–29; United Nations High Commissioner for Refugees (UNHCR) Executive Committee conclusion 44 in the Report of the 37th Session (1986), 'Detention of Refugees and Asylum Seekers', para (b); UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999), guideline 3; Goodwin-Gill, *The Refugee in International Law* (2nd edn, 1996), p 247, n 2. It is, however, permissible under art 33(2) of the Refugee Convention to return to his home country a refugee at risk of torture or inhuman treatment in that country, a course which the convention precludes (see [9], above). It cannot therefore avail the Secretary of State to show that the detention of the appellants is permissible under the Refugee Convention if it is not permissible under the convention because it is the latter which he is said to have violated.

(3) *The Convention on the Status of Stateless Persons 1954* (360 UNTS 117). Article 9 of this convention corresponds to art 9 of the Refugee Convention. The same comment applies to it.

(4) *The ICCPR.* The Attorney General pointed out, quite correctly, that art 4(1) of the ICCPR, in requiring that a measure introduced in derogation from covenant obligations must not discriminate, does not include nationality, national origin or 'other status' among the forbidden grounds of discrimination (see Goodwin-Gill, 'International Law and the Detention of Refugees and Asylum Seekers' (1986) 20 International Migration Rev 193, p 199; Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases,*

Materials, and Commentary (2nd edn, 2004), p 829 (para 25.61)). It appears that this was deliberate (see United Nations Economic and Social Council, Commission on Human Rights, Eighth Session, 313th meeting, 10 June 1952 (UN Doc E/CN.4/SR.330), pp 3–4). However, by art 2 of the ICCPR the states parties undertake to respect and ensure to all individuals within the territory the rights in the covenant 'without distinction of any kind, such as race ... national or social origin ... or other status'. Similarly, art 26 guarantees equal protection against discrimination 'on any ground such as race ... national or social origin ... or other status'. This language is broad enough to embrace nationality and immigration status. It is open to states to derogate from arts 2 and 26 but the United Kingdom has not done so. If, therefore, as I have concluded, s 23 discriminates against the appellants on grounds of their nationality or immigration status, there is a breach of arts 2 and 26 of the ICCPR and so a breach of the United Kingdom's 'other obligations under international law' within the meaning of art 15 of the convention.

(5) *The United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live 1985.* As is apparent from the wording of this declaration, quoted at [58], above, it sanctions differences in the treatment of nationals and aliens only so long as they are not 'incompatible with the international legal obligations of the State, including those in the field of human rights'. Section 23 is incompatible with arts 5(1)(f) and 14 of the convention and arts 2, 9 and 26 of the ICCPR, all of which express international obligations of the United Kingdom.

(6) *The EC Treaty.* The Attorney General pointed out that art 39(3) of the EC Treaty is so drafted as not to encroach on member states' general right to control the entry and activity of aliens, and the 13th recital to Council Directive 2000/43/EC expressly excludes differences based on nationality from the scope of the Directive. It cannot, however, avail the Secretary of State that the United Kingdom is not in breach of the EC Treaty and this Directive if it is in breach of the convention.

(7) *The convention.* It was pointed out, quite correctly, that art 16 sanctions the imposition by member states of restrictions on the political activity of aliens. To that extent, as in the context of immigration, aliens are distinguishable from citizens. But there is nothing in the convention to warrant the discriminatory detention of aliens against whom action is not being taken with a view to deportation or extradition.

(8) Reference was made to three United States authorities. In the first of these, *Shaughnessy v US, ex rel Mezei* (1953) 345 US 206, the applicant was held not to be entitled to the protection of the due process clause because, although he had previously lived in the United States for some 25 years before a 19-month break, he was treated on his return as not having entered the country. This is not a decision which would be followed by the European Court of Human Rights, which in *D v UK* (1997) 2 BHRC 273 at 284 (para 48), showed some impatience with what in *Lynch v Cannatella* (1987) 810 F 2d 1363 at 1373 (para 15), was called 'the entry fiction':

> 'Regardless of whether or not he ever entered the United Kingdom in the technical sense ... it is to be noted that he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of art 1 of the convention since 21 January 1993.'

In *Fernandez v Wilkinson* (1980) 505 F Supp 787 the alien had again not been admitted to the United States, but despite the 'time-honoured legal fiction' of non-entry Judge Rogers, sitting in the United States District Court for Kansas, drew on customary international law to hold that the alien could not be detained indefinitely when there was no prospect of removing him. The alien in *Zadvydas v Davis* (2001) 533 US 678 had been admitted to the United States and a majority of the Supreme Court held that he could not be detained indefinitely if there was no prospect of removing him. The court did not have to consider the position of aliens judged to present a terrorist risk (see 696) but might well have sanctioned indefinite detention in such circumstances given the heightened deference shown by United States courts to the judgments of the political branches with respect to national security (see *Chae Chan Ping v US* (1889) 130 US 581; Wilsher, 'The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' (2004) 53 ICLQ 897, 912–917). It would however seem that such a ruling would be contrary to the American Convention on Human Rights 1969 (1144 UNTS 123). In its *Report on Terrorism and Human Rights* (22 October 2002), the Inter-American Commission on Human Rights stated:

> '350. ... Even in respect of rights that may be the subject of limitation or derogation, states must comply strictly with the conditions regulating the permissibility of such limitations or derogations, which in turn are based upon the fundamental principles of necessity, proportionality and non-discrimination.
>
> 351. Also non-derogable under international human rights law and international humanitarian law is the requirement that states fulfil their obligations without discrimination of any kind, including discrimination based upon ... national or social origin.'

United States authority does not provide evidence of general international practice.

[70] Neither singly nor cumulatively do these materials, in my opinion, support a conclusion other than that which I have expressed.

[71] Having regard to the conclusions I have already reached, I think it unnecessary to address detailed arguments based on alleged breaches of arts 3 and 6 of the convention. I express no opinion on those questions, nor on a question relating to the admissibility of evidence obtained by torture which was not argued before the SIAC or the Court of Appeal in the part of these proceedings which is now the subject of appeal.

[72] I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry and Baroness Hale of Richmond, and on all questions of substance I agree with them.

[73] I would allow the appeals. There will be a quashing order in respect of the derogation order. There will also be a declaration under s 4 of the 1998 Act that s 23 of the 2001 Act is incompatible with arts 5 and 14 of the convention in so far as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status. The Secretary of State must pay the appellants' costs in the House and below.

LORD NICHOLLS OF BIRKENHEAD.

[74] My Lords, indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified.

[75] The government contends that these post-9/11 days are wholly exceptional. The circumstances require and justify the indefinite detention of non-nationals suspected of being international terrorists.

[76] The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals. The extended power of detention conferred by Pt 4 of the Anti-terrorism, Crime and Security Act 2001 applies only to persons who are not British citizens. It is difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists.

[77] Three years have now elapsed since the terrorist attacks of 11 September 2001. A significant number of persons suspected of terrorist involvement in this country are British citizens. In the case of these nationals the government has, apparently, felt able to counter the threat they pose by other means. Although they too present a threat to national security, in their case the government has not found it necessary to resort to the extreme step of seeking an extended power of detention comparable to that contained in the 2001 Act.

[78] No satisfactory explanation has been forthcoming on this point. The government has vouchsafed no persuasive explanation of why national security calls for a power of indefinite detention in one case but not the other. Non-nationals may comprise the predominant and more immediate source of the threat to national security, but they are not the only source.

[79] All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.

[80] But Parliament has charged the courts with a particular responsibility. It is a responsibility as much applicable to the 2001 Act and the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644 as it is to all other legislation and ministers' decisions. The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor.

[81] In the present case I see no escape from the conclusion that Parliament must be regarded as having attached insufficient weight to the human rights of non-nationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exception all the individuals currently detained have been imprisoned now for three years and there is no prospect of imminent release. It is true that those detained may at any time walk away from their place of detention if they leave this country. Their prison, it is said, has only three walls. But this freedom is more theoretical than real. This is demonstrated by the continuing presence in Belmarsh of most of those detained. They prefer to stay in prison rather than face the prospect of ill treatment in any country willing to admit them.

[82] Nor is the vice of indefinite detention cured by the provision made for independent review by the Special Immigration Appeals Commission. The commission is well placed to check that the Secretary of State's powers are exercised properly. But what is in question on these appeals is the existence and width of the statutory powers, not the way they are being exercised.

[83] The difficulty with according to Parliament the substantial latitude normally to be given to decisions on national security is the weakness already mentioned: security considerations have not prompted a similar negation of the right to personal liberty in the case of nationals who pose a similar security risk. The government, indeed, has expressed the view that a 'draconian' power to detain British citizens who may be involved in international terrorism 'would be difficult to justify' (see *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* ((2004) (Cm 6147), pp 8–9 (para 36)). But, in practical terms, power to detain indefinitely is no more draconian in the case of a British citizen than in the case of a non-national. There is no significant difference in the potential adverse impact of such a power on (1) a national and (2) a non-national who in practice cannot leave the country for fear of torture abroad.

[84] Part of the explanation for the difference in treatment may be that the government has misconceived the human rights of non-nationals in this situation. A prominent part of the submissions of the Attorney General was to the effect that as a matter of international law (1) states may intern non-nationals who present a threat to national security and (2) states may accord different treatment to nationals and non-nationals. This line of argument suggests that when promoting Pt 4 of the 2001 Act and seeking an extended statutory power of indefinite detention the government may have regarded the human rights of non-nationals in this field as less weighty than the corresponding human rights of nationals. If that was the government's understanding, it was in my view mistaken. Unwanted aliens who cannot be deported, as much as nationals, are not to be detained indefinitely without charge or trial save in wholly exceptional circumstances.

[85] Be that as it may, for the reason given earlier and the reasons stated more fully by my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Rodger of Earlsferry, I too would allow these appeals and make the order proposed by Lord Bingham.

LORD HOFFMANN.

[86] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill and I gratefully adopt his statement of the background to this case and the issues which it raises. This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.

[87] At present, the power cannot be exercised against citizens of this country. First, it applies only to foreigners whom the Home Secretary would otherwise be able to deport. But the power to deport foreigners is extremely wide. Second, it requires that the Home Secretary should reasonably suspect the foreigners of a variety of activities or attitudes in connection with terrorism, including supporting a group influenced from abroad whom the Home Secretary suspects of being concerned in terrorism. If the finger of suspicion has pointed and the suspect is detained, his detention must be reviewed by the Special Immigration Appeals Commission. They can decide that there were no reasonable grounds for the Home Secretary's suspicion. But the suspect is not entitled to be told the grounds upon which he has been suspected. So he may not find it easy to explain that the suspicion is groundless. In any case, suspicion of being a supporter is one thing and proof of wrongdoing is another. Someone who has never committed any offence and has no intention of doing anything wrong may be reasonably suspected of being a supporter on the basis of some heated remarks overheard in a pub. The question in this case is whether the United Kingdom should be a country in which the police can come to such a person's house and take him away to be detained indefinitely without trial.

[88] The technical issue in this appeal is whether such a power can be justified on the ground that there exists a 'war or other public emergency threatening the life of the nation' within the meaning of art 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969). But I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the convention because it set out the rights which British subjects enjoyed under the common law.

[89] The exceptional power to derogate from those rights also reflected British constitutional history. There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the government. It happened during the Napoleonic Wars and during both World Wars in the twentieth century. These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to have been cruelly and unnecessarily exercised. But the necessity of draconian powers in moments of national crisis is recognised in our constitutional history. Article 15 of the

convention, when it speaks of 'war or other public emergency threatening the life of the nation', accurately states the conditions in which such legislation has previously been thought necessary.

[90] Until the Human Rights Act 1998, the question of whether the threat to the nation was sufficient to justify suspension of habeas corpus or the introduction of powers of detention could not have been the subject of judicial decision. There could be no basis for questioning an Act of Parliament by court proceedings. Under the 1998 Act, the courts still cannot say that an Act of Parliament is invalid. But they can declare that it is incompatible with the human rights of persons in this country. Parliament may then choose whether to maintain the law or not. The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with our constitutional traditions.

[91] What is meant by 'threatening the life of the nation'? The 'nation' is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the 'life' of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity.

[92] This, I think, is the idea which the European Court of Human Rights was attempting to convey when it said (in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 at 31 (para 28)) that it must be a 'threat to the organised life of the community of which the State is composed', although I find this a rather desiccated description. Nor do I find the European cases particularly helpful. All that can be taken from them is that the Strasbourg court allows a wide 'margin of appreciation' to the national authorities in deciding 'both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it' (see *Ireland v UK* (1978) 2 EHRR 25 at 91–92 (para 207)). What this means is that we, as a United Kingdom court, have to decide the matter for ourselves.

[93] Perhaps it is wise for the Strasbourg court to distance itself from these matters. The institutions of some countries are less firmly based than those of others. Their communities are not equally united in their loyalty to their values and system of government. I think that it was reasonable to say that terrorism in Northern Ireland threatened the life of that part of the nation and the territorial integrity of the United Kingdom as a whole. In a community riven by sectarian passions, such a campaign of violence threatened the fabric of organised society. The question is whether the threat of terrorism from Muslim extremists similarly threatens the life of the British nation.

[94] The Home Secretary has adduced evidence, both open and secret, to show the existence of a threat of serious terrorist outrages. The Attorney

General did not invite us to examine the secret evidence, but despite the widespread scepticism which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction, I am willing to accept that credible evidence of such plots exist. The events of 11 September 2001 in New York and Washington and 11 March 2003 in Madrid make it entirely likely that the threat of similar atrocities in the United Kingdom is a real one.

[95] But the question is whether such a threat is a threat to the life of the nation. The Attorney General's submissions and the judgment of the Special Immigration Appeals Commission ([2002] HRLR 1274) treated a threat of serious physical damage and loss of life as necessarily involving a threat to the life of the nation. But in my opinion this shows a misunderstanding of what is meant by 'threatening the life of the nation'. Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: 'Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours.'

[96] This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qa'ida. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

[97] For these reasons I think that the Special Immigration Appeals Commission made an error of law and that the appeal ought to be allowed. Others of your Lordships who are also in favour of allowing the appeal would do so, not because there is no emergency threatening the life of the nation, but on the ground that a power of detention confined to foreigners is irrational and discriminatory. I would prefer not to express a view on this point. I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

LORD HOPE OF CRAIGHEAD.

[98] My Lords, I wish at the outset to pay tribute to the way which my noble and learned friend Lord Bingham of Cornhill has described the background to this case and set out all the relevant materials. With the benefit of the introduction which he has so helpfully provided, and without attempting to rehearse again every detail, I add these comments to explain why I have reached the same conclusions as he has done on all points.

[99] Although these appeals are concerned with general issues and not with the cases of each of the appellants individually, their importance to them is nevertheless very great. Two cardinal principles lie at the heart of the argument. It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual. Among these rights is the individual's right to liberty.

[100] It is impossible ever to overstate the importance of the right to liberty in a democracy. In the words of Baron Hume, *Commentaries on the Law of Scotland respecting Crimes* (4th edn, 1844) vol 2, p 98:

> 'As indeed it is obvious, that, by its very constitution, every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law,—that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it may be, not informed of the nature of the charge against him, or the name of the accuser.'

These were not idle words. When Hume published the first edition of his *Commentaries* in 1797 grave abuses of the kind he described were within living memory. He knew the dangers that might lie in store for democracy itself if the courts were to allow individuals to be deprived of their right to liberty indefinitely and without charge on grounds of public interest by the executive. The risks are as great now in our time of heightened tension as they were then.

[101] There is a third principle which the court must also recognise when it is called upon to perform its central function, which is to strike the balance between the public interest and the right to liberty. It is that the right to liberty belongs to each and every individual. Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) enshrines this right, and s 1 of the Human Rights Act 1998 has made it part of our law. Article 5(1) defines the only situations in which a person may be deprived of his liberty, and it begins with the word 'Everyone'. The right to liberty is to be enjoyed without discrimination, as art 14 of the convention makes clear. The basic principle is that the right belongs to everyone, whoever they may be and wherever they may have come from, who happen to be within the contracting state's territory. Everyone enjoys this right. It is a right, not a privilege. And it is accorded to everyone within the jurisdiction, as art 1 of the convention declares. It is not given just to British citizens and those who have the right of abode in this country—not just to 'British nationals'.

[102] When he was opening his argument the Attorney General said that the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644 (the derogation order) was a legitimate and proportionate response to a group of foreign nationals who had no right to be here with a view to protecting the rights of millions of people in the United Kingdom who were at risk of attack by international terrorists. His description of the persons against whom the derogation order was directed as a group of foreign nationals who had no right to be here was carefully chosen. The proposition that they were to be seen, in his words, as a subset of aliens who posed a threat to this country was later to

form an important part of his argument on the discrimination issue. He submitted that, as it was legitimate for the state to distinguish between British nationals and aliens in the field of the control of immigration, their respective positions were not for the purposes of the discrimination argument to be regarded as analogous.

[103] The right of the state to control immigration has, of course, long been recognised in international law. It forms the background to art 5(1)(f) of the convention. This is why a contracting state is permitted to deprive aliens, who have no right to be in the country, of their liberty for the purpose of preventing their unauthorised entry or with a view to their deportation or extradition. But it would be a serious error, in my opinion, to regard this case as about the right to control immigration. This is because the issue which the derogation order was designed to address was not at its heart an immigration issue at all. It was an issue about the aliens' right to liberty.

[104] As the schedule to the derogation order was right to point out, art 5(1)(f) permits the detention of a person with a view to detention only in circumstances where action is being taken with a view to deportation. It is clear, too, that deportation will cease to be permissible under that article if deportation proceedings are not prosecuted with due diligence (see *Chahal v UK* (1996) 1 BHRC 405 at 430 (para 112)). It was appreciated that the exercise of the extended power to detain which is now contained in s 23 of the Anti-terrorism, Crime and Security Act 2001 might be inconsistent with the state's obligations under art 5(1). The purpose of the order was to enable the United Kingdom to exercise the extended power against a suspected international terrorist so that he could be detained under the Immigration Act 1971, despite the fact that his removal from this country was prevented either temporarily or permanently.

[105] The Secretary of State was, of course, entitled to discriminate between British nationals on the one hand and foreign nationals on the other for all the purposes of immigration control, subject to the limitations established by *Chahal v UK*. What he was not entitled to do was to treat the right to liberty under art 5 of the convention of foreign nationals who happen to be in this country for whatever reason as different in any respect from that enjoyed by British nationals. How, one might ask, can such treatment be reconciled with art 33 of the United Nations Convention Relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) and the Protocol Relating to the Status of Refugees (New York, 31 January 1967; TS 15 (1969); Cmnd 3906)? Indefinite detention for reason of their nationality is one of the evils against which refugees who would otherwise be expelled are entitled to protection under that article. A refugee who is faced with the prospect of that treatment abroad is protected, according to the principle set out in the preamble to the convention that human beings shall enjoy fundamental rights and freedoms without discrimination. Why should that protection be any less complete while he remains here?

[106] I would therefore take as my starting point the proposition that the art 5 right to liberty is a fundamental right which belongs to everyone who happens to be in this country, irrespective of his or her nationality or citizenship. The court is obliged to subject the derogation order and the legislation that resulted from it as it affects foreign nationals to the same degree of scrutiny as it would have to be given if it had been designed to deprive British nationals of their right to liberty.

[107] The Attorney General also submitted that a wide margin of discretion should be accorded at each stage in the analysis to the executive and to Parliament. He based this submission on the claim of these branches of government to democratic legitimacy, on the fact that the executive was best placed to consider the risks and on the special nature of the intelligence exercise. I accept at once that the executive and the legislature are to be accorded a wide margin of discretion in matters relating to national security, especially where the convention rights of others such as the right to life may be put in jeopardy (see *Leander v Sweden* (1987) 9 EHRR 433 at 452–453 (para 59); *Chassagnou v France* (1999) 7 BHRC 151 at 184–185 (paras 112–13). But the width of the margin depends on the context. Here the context is set by the nature of the right to liberty which the convention guarantees to everyone, and by the responsibility that rests on the court to give effect to the guarantee to minimise the risk of arbitrariness and to ensure the rule of law (see *Aksoy v Turkey* (1996) 1 BHRC 625 at 643 (para 76). Its absolute nature, save only in the circumstances that are expressly provided for by art 5(1), indicates that any interference with the right to liberty must be accorded the fullest and most anxious scrutiny.

[108] Put another way, the margin of the discretionary judgment that the courts will accord to the executive and to Parliament where this right is in issue is narrower than will be appropriate in other contexts. We are not dealing here with matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and to the legislature. We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate. It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority. The intensity of the scrutiny will nevertheless vary according to the point that has to be considered at each stage as one examines the question that was referred to the Special Immigration Appeals Commission (SIAC) under s 30 of the 2001 Act. This is whether the derogation order and Pt 4 of the 2001 Act are incompatible with the appellants' convention rights.

ARTICLE 15(1)—THE DEROGATION ORDER

[109] The first point that has to be examined is the wording of art 15. It allows states to derogate from their obligations under the convention, but only in the circumstances that it sets out. It provides:

> '(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided such measures are not inconsistent with its other obligations under international law.'

[110] Leaving a state of war aside as it does not arise in this case, the wording of this article can be broken down into three parts, each of which can be put in the form of a question. (1) Is the situation facing the high contracting party a public emergency which threatens the life of the nation? (2) Are the measures

strictly required by the exigencies of the situation which has arisen? (3) Are the measures inconsistent with the high contracting party's other obligations under international law?

[111] The phrase 'threatening the life of the nation' is unique to art 15(1). But a similar phrase appears in art 4(3)(c). It permits service in the form of forced or compulsory labour to be exacted in case of an emergency or calamity 'threatening the life or well-being of the community'. The situation contemplated by these expressions was described in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 at 31 (para 28) as an 'exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.

[112] The present tense which this formulation uses might be thought to indicate a situation that has already arisen. But the European Commission of the Human Rights in the *Greek Case* (1969) 12 YB 1 at 72 (para 153) adopted the word 'imminent' which was used in the French text of the court's judgment in *Lawless v Ireland (No 3)*. So it has been recognised that derogation is permitted in the face of an emergency which has not yet happened but is imminent. The European Court of Human Rights has said that it will accord a large margin of appreciation to states in their assessment of the question whether the situation with which they are faced constitutes an actual or an imminent emergency (see *Ireland v UK* (1978) 2 EHRR 25 at 92 (para 207). In the domestic legal order also great weight must be given to the views of the executive, for the reasons that were explained by Lord Hoffmann in *Secretary of State for the Home Dept v Rehman* [2001] UKHL 47 at [57] and [62], [2002] 1 All ER 122 at [57] and [62], [2003] 1 AC 153.

[113] Then there is the question whether the measures that are contemplated are 'strictly required' by the exigencies of the situation. This too is another matter as to which, according to the jurisprudence of the European Court of Human Rights, a large margin of appreciation is granted to the contracting states. But, as the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, pointed out in paras 7 and 8 of his Opinion 1/2002 on certain aspects of the United Kingdom's derogation from art 5(1) dated 28 August 2002 (Comm DH (2002) 7), the separation of powers whereby the government's legislative proposals are subject to the approval of Parliament and, on enactment, to review by the courts is a constitutive element of democratic government. So particular importance must be attached to the effectiveness of the process of scrutiny by the judiciary where the question raised is whether interference with the right to liberty is strictly required by the emergency. This is because the right to liberty is within its area of responsibility. As Mr Gil-Robles put it in para 9:

> 'It is, furthermore, precisely because the Convention presupposes domestic controls in the form of preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations.'

[114] Accordingly the fact that the European Court of Human Rights will accord a large margin of appreciation to the contracting states on the question whether the measures taken to interfere with the right to liberty do not exceed those strictly required by the exigencies of the situation cannot be taken as the last word on the matter so far as the domestic courts are concerned. Final

responsibility for determining whether they do exceed these limits must lie with the courts, if the test which art 15(1) lays down is to be applied within the domestic system with all the rigour that its wording indicates.

THE PUBLIC EMERGENCY

[115] The question whether there is a public emergency of the kind contemplated by art 15(1) requires the exercise of judgment. The primary meaning of the word is an occurrence that is sudden or unexpected. It has an extended meaning—a situation of pressing need. A patch of fog on the motorway or a storm which brings down power lines may create a situation of emergency without the life of the nation being under threat. It is a question of degree. The range of situations which may demonstrate such a threat will extend from the consequences of natural disasters of all kinds to the consequences of acts of terrorism. Few would doubt that it is for the executive, with all the resources at its disposal, to judge whether the consequences of such events amount to an emergency of that kind. But imminent emergencies arouse fear and, as has often been said, fear is democracy's worst enemy. So it would be dangerous to ignore the context in which the judgment is to be exercised. Its exercise needs to be watched very carefully if it is a preliminary to the invoking of emergency powers, especially if they involve actions which are incompatible with convention rights.

[116] I am content therefore to accept that the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament. The judgment that has to be formed on these issues lies outside the expertise of the courts, including the SIAC in the exercise of the jurisdiction that has been given to it by Pt 4 of the 2001 Act. But in my opinion it is nevertheless open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency, and to scrutinise the submission by the Attorney General that for the appellants to be deprived of their fundamental right to liberty does not exceed what is 'strictly required' by the situation which it has identified. The use of the word 'strictly' invites close scrutiny of the action that has been taken. Where the rights of the individual are in issue the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights. In my opinion it is the proper function of the judiciary to subject the government's reasoning on these matters in this case to very close analysis. One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency.

[117] The evidence which was placed before the SIAC in this case was divided into two parts: material which could be made public and 'closed material'. Your Lordships have not been shown the closed material, and the Attorney General said that he was not asking for that material to be seen. The material which could be made public is contained in two open generic statements which were prepared on behalf of the Home Secretary and in two witness statements by Mr Robert Whalley, a senior civil servant of the Home Office, dated 1 March 2002 and 19 June 2002.

[118] There is ample evidence within this material to show that the government were fully justified in taking the view in November 2001 that there was an emergency threatening the life of the nation. As Mr Whalley put it in his first witness statement, the United Kingdom was at danger of attacks from

the Al-Qa'ida network which had the capacity through its associates to inflict massive casualties and have a devastating effect on the functioning of the nation. This had been demonstrated by the events of 11 September 2001 in New York, Pennsylvania and Washington. There was a significant body of foreign nationals in the United Kingdom who had the will and the capability of mounting co-ordinated attacks here which would be just as destructive to human life and to property. There was ample intelligence to show that international terrorist organisations involved in recent attacks and in preparation for other attacks of terrorism had links with the United Kingdom, and that they and others posed a continuing threat to this country. There was a growing body of evidence showing preparations made for the use of weapons of mass destruction in this campaign. In his second witness statement Mr Whalley said that it was considered that the serious threats to the nation emanated predominantly, albeit not exclusively, and more immediately from the category of foreign nationals.

[119] The picture which emerges clearly from these statements is of a current state of emergency. It is an emergency which is constituted by the threat that these attacks will be carried out. It threatens the life of the nation because of the appalling consequences that would affect us all if they were to occur here. But it cannot yet be said that these attacks are imminent. On 15 October 2001 the Secretary of State said in the House of Commons that there was no immediate intelligence pointing to a specific threat to the United Kingdom (see 372 HC Official Report (6th series) col 925). On 5 March 2002 this assessment of the position was repeated in the government's response to the Second Report of the House of Commons Select Committee on Defence on the Threat from Terrorism (HC Paper 348-I (2001–2002) para 43) where it was stated that it would be wrong to say that there was evidence of a particular threat. I would not conclude from the material which we have seen that there was no current emergency. But I would conclude that the emergency which the threats constitute is of a different kind, or on a different level, from that which would undoubtedly ensue if the threats were ever to materialise. The evidence indicates that the latter emergency cannot yet be said to be imminent. It has to be recognised that, as the attacks are likely to come without warning, it may not be possible to identify a stage when they can be said to be imminent. This is an important factor, and I do not leave it out of account. But the fact is that the stage when the nation has to face that kind of emergency, the emergency of imminent attack, has not been reached.

[120] The distinction which is to be drawn between these two situations is important. The situation which is said to require the derogation is the situation which we face now, not the situation that might arise at some unknown time in the future. The life of the nation is said to be threatened. But do the exigencies of the situation which we face now require that the appellants be deprived of their right to liberty? All the factual material which may provide an answer to this question is in the hands of the Home Secretary. But has he asked himself the right question in his analysis of this material? And did the SIAC ask itself the right question when it was examining the decision of the Home Secretary?

STRICTLY REQUIRED

[121] In my opinion there were two questions that had to be addressed in order to determine whether or not the derogation that was proposed was strictly required. One was what its effects would be on the individuals who were to be affected by it. The other was whether, given those effects and the way British nationals who posed the same threat to the life of the nation were to be dealt with, derogating from the right to liberty of those individuals was strictly necessary. The second question is relevant to the discrimination issue, but I think that it also bears directly on the question whether the derogation went beyond what was strictly required. As I understand its judgment ([2002] HRLR 1274), the SIAC too appreciated this point although it dealt with it at the end of the judgment as a discrimination issue. What this part of art 15(1) requires the contracting state to do is to consider with the greatest care whether an alternative course of action can be taken to deal with the exigencies of the situation produced by the emergency which will make derogation from its obligations under the convention unnecessary.

[122] The effects on the individual of a derogation that deprives him of his right to liberty will vary according to the nature, and above all the length, of the emergency. It will usually be impossible to say when an emergency arises how long it will last. But in some cases it may be perfectly obvious from the outset that it will last for a very long time, perhaps indefinitely. That seems to be the situation in this case. A timetable of events is built into the 2001 Act for the review of the operation of ss 21–23, and their duration is limited (see ss 28 and 29). Section 29(7) provides that those sections shall by virtue of that subsection cease to have effect at the end of 10 November 2006. But if the emergency persists, and the government is right in its belief that the derogation is strictly required to deal with it, the powers which these sections give to certify and detain suspected international terrorists will have to be renewed. It is a reasonable assumption that, if the situation remains unchanged, Parliament will be asked to re-enact them for a further period. All the signs are that the detentions that result from the exercise of these powers will continue indefinitely and that the period of its duration for the future will be measured not in months but years—and no one can yet say how many.

[123] The Attorney General said that the first priority of the government is to prosecute those whom it suspects of being involved in international terrorism. But the appellants fall into the category of those whom, for a variety of reasons relating to the sources or quality of the evidence, it is unable or unwilling to prosecute. He then said that the appellants' place of detention has three walls, not four. There is no safe country to which they can be extradited, but they are free to leave the United Kingdom at any time if they wish and can find another safe country to which they can go. He pointed out that two aliens who were initially detained under s 23 of the 2001 Act have already done so—one to France and the other to Morocco. But it would be more accurate to say that the detainees who remain here are in a cul-de-sac from which, as they have no safe country to go to, there is no escape.

[124] To tell a man that he is to be incarcerated for a fixed period is one thing. To tell him that he is to be incarcerated for a period that has no end in sight is quite another. And the longer the time the incarceration will last with no end in sight the worse it is. The gravity of this interference leads inevitably to the question posed by art 15(1) which is whether, if this is the nature of the

emergency, the derogation is strictly required to deal with it. This raises the further question whether there is some other way of dealing with the emergency which will not be incompatible with the convention rights. If there is some other way of dealing with it that will meet this test, the prolonged and indefinite detention without trial of those affected by the derogation order cannot be said to be what the exigencies of the situation strictly require.

[125] Mr Whalley said in para 18 of his second witness statement that consideration was given at the time of the decision to derogate, and again at the time of the review on 18 June 2002, to the issue whether it would be appropriate to introduce a power of detention covering both British nationals and foreign nationals, but that it had been concluded that there were significant differences between these two categories. In para 19 he said that it was considered by the Secretary of State that the serious threats to the nation emanated predominantly (albeit not exclusively) and more immediately from the category of foreign nationals. In para 20 he acknowledged that a person removed to another country could re-engage in terrorist activity and might continue to be involved in acts of terrorism or the organisation of such acts from the country to which he was removed and that those acts might be directed against the United Kingdom. But he said that there was evidence to suggest, and that the Security Service so advised, that the steps which had been taken in the United Kingdom since 11 September 2001, including the measures under challenge, had had a significant effect in making it more difficult to operate here. In para 21 he said that one of the adverse effects arising from the continuing and unrestricted presence in the United Kingdom of suspected terrorists who could not be removed to third countries was the perception in other countries, particularly Muslim countries, that the United Kingdom was weak in its response to international terrorists operating in this country.

[126] I do not question this assessment. But there is a difference between a course of action that is obviously desirable and a course of action that is strictly required. Article 15(1) does not permit derogation unless the test of what is strictly required is satisfied. It is acknowledged that there are some British nationals who are thought also to present a threat to the life of the nation because they too are suspected of involvement in international terrorism. The Attorney General accepted that there may be others whom the powers in ss 22 and 23 cannot touch because, although they are not British nationals, they have a right to remain in this country. These include people whom, although suspected of involvement in international terrorism, the government is unable or unwilling to prosecute. They too cannot be removed to third countries. Yet it was decided not to introduce measures for their detention. In their case such measures, it must be assumed, were not thought to be strictly required by the exigencies of the situation that had been identified. If the threat was such that their detention was strictly required, a measure would have had to be introduced to provide for this. But that step has not been taken.

[127] Mr Whalley does not explain in either of his two witness statements what is being done to counter the threat from those in this country not covered by ss 21–23 who present the same threat as the foreign nationals. He does not say that the threat from them was regarded as insignificant. Nor does he explain why it was considered acceptable to permit those who could do so to go to France or Morocco where, as no action was taken to prevent this, they would be free to continue their activities. The SIAC said ([2002] HRLR 1274 at

1313 (para 95)) that the evidence which was before it demonstrated beyond argument that the threat was not confined to aliens who have no right to be here and that there were many British nationals at liberty in the United Kingdom who could, like the appellants, be defined as suspected international terrorists. It had the benefit of seeing the 'closed material' and of hearing submissions on it, as well as the material in the open generic statements which contain numerous references to the activities of British nationals. The Attorney General accepted that it was not being said that the threat from those who were at liberty in the United Kingdom was de minimis. He said that their right was of a different kind from that of foreign nationals, so the balance was being struck differently in their case.

[128] The point that Mr Whalley makes is that the threat from those who are at liberty is less immediate. But he draws no distinction between these two groups as regards the extent to which they are in touch with terrorist organisations or as regards other aspects of their activities. I infer that the problem which was thought to be in need of being addressed in the case of foreign nationals immediately, and was capable of being so addressed, was the perception in some countries that the United Kingdom was a safe option. This was because it could encourage terrorists to travel to this country, thus reducing its ability with its allies to tackle the threat from them. As the Attorney General put it, the threat is an international one. It had been judged at the highest level that it was necessary to persuade other countries how they should respond to it. Setting an example to other countries, and dispelling the idea that this country was a safe haven for terrorists, was a legitimate aim in view of the nature of the emergency. But the question is whether, applying the test of what was strictly required, the means chosen were proportionate.

[129] The Attorney General, for understandable reasons, was not willing to elaborate on the measures that were being taken to contain the threat to the life of this nation from British nationals. But he said that a number of measures were in place for the protection of the public, and that those involved were being prosecuted where possible. He explained that any response which provided for the indefinite detention of those people would have had to have been a different response, as they were not subject to immigration control. The distinction which was drawn between their case and that of the foreign nationals was that the foreign nationals had no right to be here. For British nationals the measure would have had to have provided for a form of detention that had four walls. It would have had to have been more draconian. But that answer, while true, does not meet the objection that the indefinite detention without trial of foreign nationals cannot be said to be strictly required to meet the exigencies of the situation, if the indefinite detention without trial of those who present a threat to the life of the nation because they are suspected of involvement in international terrorism is not thought to be required in the case of British nationals.

[130] The SIAC dealt with this issue in paras 37–45 of its judgment ([2002] HRLR 1274 at 1296–1299). The standard of scrutiny that it set for itself in para 43 was that described by the European Court of Human Rights in *Ireland v UK* (1978) 2 EHRR 25 at 95 (para 214). The court said that it was not its function to substitute for the British government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. It also drew guidance from the judgment in the Supreme

Court of Canada of McLachlin J in *RJR-MacDonald Inc v A-G of Canada* [1995] 3 LRC 653 at 735 where she said that the law must be carefully tailored so that rights are impaired no more than necessary, but that the tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. a

[131] In my opinion the SIAC fell into an error of law at this point. These references set too low a standard for the scrutiny that the national court must carry out in order to test the proposition that the derogation is strictly necessary. When the European Court of Human Rights talks about affording a margin of appreciation to the assessment of the British government it assumes that its assessment will at the national level receive closer scrutiny. As I said earlier, the fact that the court will accord a large margin of appreciation to the contracting states on the question whether the measures taken do not exceed those strictly required by the exigencies of the situation cannot be taken as the last word on the matter so far as the domestic courts are concerned. That is especially so in this case, as s 30 of the 2001 Act itself recognises that the derogation may be reviewed by the judiciary. McLachlin J's description of the approach which is taken to the scrutiny of legislation by the Supreme Court of Canada does not fit the precise wording of art 15(1) as to the standard that must be achieved by the derogation. As Brooke LJ in the Court of Appeal observed ([2002] EWCA Civ 1502 at [94], [2003] 1 All ER 816 at [94], [2004] QB 335) it is much safer to rely on the jurisprudence surrounding the convention that we are currently interpreting if there is any significant difference in the language being construed. b c d e

[132] I would hold that the indefinite detention of foreign nationals without trial has not been shown to be strictly required, as the same threat from British nationals whom the government is unable or unwilling to prosecute is being met by other measures which do not require them to be detained indefinitely without trial. The distinction which the government seeks to draw between these two groups—British nationals and foreign nationals—raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also. It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat. f g h

[133] As Mr Pannick QC put it for Liberty, s 23 of the 2001 Act is not rationally connected to the legislative objective. If the threat is as potent as the Secretary of State suggests, it is absurd to confine the measures intended to deal with it so that they do not apply to British nationals, however strong the suspicion and however grave the damage it is feared they may cause. There is also the point that foreign nationals who present the same threat are permitted, if they can safely do so, to leave this country at any time. Here too there is a clear indication that the indefinite detention of those who remain here as a means of countering the same threat is disproportionate. j

DISCRIMINATION

[134] I said earlier that it would be a serious error to regard the right to control immigration as decisive of the discrimination issue in this case. This was because the issue which the derogation order was designed to address was not at its heart an immigration issue. Yet the Attorney General insisted that the relevant comparators for the purposes of the discrimination issue were other aliens, not British nationals who present the same threat. He said that nationals and aliens are in a different position so far as concerns their right to be in the country, so it was legitimate for a contracting state to assess that their respective positions in the present context were not similar (see *Moustaquim v Belgium* (1991) 13 EHRR 802 at 815–816 (paras 48–49). It was well recognised both in international law and under the convention that each state has the right to control immigration into its territory, and this right extended to the right of extradition and to detention when this was required on grounds of national security (see *Nishimura Ekiu v US* (1892) 142 US 651 at 659; Goodwin-Gill, 'International Law and the Detention of Refugees and Asylum Seekers' (1986) 20 International Migration Rev 193, 196–202; *Chahal v UK* (1996) 1 BHRC 405 at 422 (para 73)). So in assessing the legitimacy of different treatment as between aliens and nationals it was relevant to be informed about the principles which normally prevail in democratic societies and about what these societies actually do as a matter of practice (see *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252 at 284 (para 10). Materials outside the convention itself were relevant to this assessment. This point lay at the heart of his argument.

[135] The proviso to art 15(1) of the convention states that the measures that are taken by a high contracting party under that article must not be inconsistent with its other obligations under international law. What those obligations are depends, of course, on the context and on the obligations under the convention from which the high contracting party seeks to derogate. Article 4 (1) of the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmnd 6702) (ICCPR), which permits derogation in time of public emergency, is in almost identical terms. But it contains the additional proviso that such measures do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

[136] The issue is whether it is permissible for the state to discriminate between aliens and its own nationals as regards their art 5 convention right to liberty. Article 14 of the convention provides that the enjoyment of the rights and freedoms which it sets forth shall be secured without discrimination on any ground such as, inter alia, national origins (see also art 26 of the ICCPR which prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as national or social origin). The discipline which these provisions inject, and which art 4(1) of the ICCPR also recognises, is a vital part of international human rights law. A state is not permitted to discriminate against an unpopular minority for the good of the majority. If it was a sufficient answer to those who rely on art 14 of the convention to say that it was permissible under international law for the state to discriminate between aliens and its own nationals on the grounds of national security, there would be no need for the state to derogate from its obligations under art 5 in the case of aliens. But it is conceded, rightly, that derogation from art 5 is necessary if the appellants are to be detained indefinitely.

[137] This concession acknowledges that the right of contracting states to treat aliens differently from their own nationals is subject to their obligations under international human rights law. In our case the state's obligations under the convention form part of its international obligations. *Oppenheim's International Law* (9th edn, 1992) vol 2, pp 909–910 (para 404) states:

> 'Apart from certain general requirements of customary international law, such as those which impose on a state international responsibility for denial of justice to aliens, or which require it to observe in its treatment of aliens certain minimum international standards, states are nowadays often under many treaty obligations as to the treatment of aliens in their territories.'

In *Chahal v UK* (1996) 1 BHRC 405 at 424 (para 80) the European Court of Human Rights said that the protection afforded by art 3 of the convention against ill-treatment was wider than that provided by arts 32 and 33 of the United Nations Convention on the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmnd 9171) under which states are permitted to expel aliens on the grounds of national security. The assertion in this judgment of the primacy of the state's obligations under the convention must be understood as extending to the protections afforded by art 5 and by art 14 also.

[138] The question then depends on the precise circumstances in which the contracting state seeks to treat aliens and British nationals differently. If immigration control was the issue in this case, as the Attorney General submits, the argument that the state was entitled to treat these two groups differently would appear to be unanswerable. The same would be so if there were national security grounds for treating them differently in their enjoyment of the right to liberty. But that is not this case. It is not disputed that a significant threat to national security comes from a significant number of British nationals. It must follow, in my opinion, that the treatment which is afforded to aliens who present a threat to national security is to be compared with the treatment that is afforded to British nationals who present the same threat. The SIAC said that the derogation could not fail to be regarded as other than discriminatory on grounds of national origin (see [2002] HRLR 1274 at 1313 (para 95)). Having studied the open material that is before us, I think that the conclusion that the derogation is discriminatory is inescapable.

CONCLUSION

[139] I too would allow the appeals. I would quash the derogation order. I would declare that s 23 of the 2001 Act is incompatible with the right to liberty in art 5 of the convention on the ground that it is not proportionate, and that it is incompatible with art 14 of the convention on the ground that it discriminates against the appellants in their enjoyment of the right to liberty on the ground of their national origin.

LORD SCOTT OF FOSCOTE.

[140] My Lords, I gratefully adopt my noble and learned friend Lord Bingham of Cornhill's description of the factual and statutory background to these appeals and his exposition of the relevant authorities. I am in complete agreement with the conclusions he has reached and wish to add only a few observations of my own.

THE ISSUE

[141] The issue in these appeals is not whether the indefinite executive detention of these appellants under s 23 of the Anti-terrorism, Crime and Security Act 2001 is lawful. The merits of the case against each appellant allegedly justifying his detention has not been argued in these proceedings. That issue is for another day and other proceedings and may well come before your Lordships in due course. It is possible that in those proceedings it will be held in relation to one or some or all of the appellants that his or their detention was not justified and was therefore unlawful. But that issue is not before your Lordships now.

[142] It has not been suggested, nor could it be suggested, that the 2001 Act is otherwise than an effective enactment made by a sovereign legislature. It was passed by both Houses of Parliament and received the Royal Assent. Whether the terms of the 2001 Act are consistent with the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) (ECHR) is, so far as the courts of this country are concerned, relevant only to the question whether a declaration of incompatibility under s 4 of the Human Rights Act 1998 should be made. The making of such a declaration will not, however, affect in the least the validity under domestic law of the impugned statutory provision. The import of such a declaration is political not legal.

[143] So what is the point of these proceedings and these appeals, with nine of your Lordships sitting in judgment, with intervention from the National Council for Civil Liberties and from Amnesty International and with avid attention from the media? An answer might be that the object of the proceedings is to obtain a court order quashing the Human Rights Act 1998 (Designated Derogation) Order 2001 (the order), whereby the United Kingdom, purporting to act in pursuance of art 15 of the ECHR, announced its intention to derogate from art 5(1) of the ECHR by enacting Pt 4 of the 2001 Act. The Special Immigration Appeals Commission (SIAC) did quash the order and made a declaration of incompatibility of Pt 4 with the ECHR (see [2002] HRLR 1274). The Court of Appeal disagreed (see [2003] EWCA Civ 1502, [2003] 1 All ER 816, [2004] QB 335). It set aside the quashing of the order and the declaration of incompatibility. Your Lordships are asked to reinstate the quashing order and the declaration of incompatibility.

[144] The effect, my Lords, of all this on the lawfulness under domestic law of the incarceration of the appellants is nil. A challenge to the lawfulness of their incarceration requires a challenge to be made to the exercise by the Home Secretary of the statutory powers conferred on him by s 23 of the 2001 Act. That challenge is not made in these proceedings. The SIAC judgment (delivered by Collins J), and your Lordships' opinions if these appeals succeed, may show that the enactment of Pt 4 of the 2001 Act represented a breach of the United Kingdom's treaty obligations under the ECHR but will not show that the detention of the appellants is unlawful under domestic law. The ECHR is not part of domestic law except to the extent that it has become so under the 1998 Act. The 1998 Act did not entrench the articles of the ECHR so as to bar Parliament from subsequently enacting legislation inconsistent with those articles. Parliament can, if it wishes to do so, enact such legislation. The courts, whose duty it is to construe and apply Parliamentary enactments, will not readily assume that Parliament has intended the inconsistency. But if the

statutory language is clear, and a fortiori if, as here, Parliament has expressed its intention to enact a provision inconsistent with the ECHR article in question, the courts must apply and give effect to the statutory language notwithstanding the inconsistency. The statutory provision may represent a breach by the United Kingdom of its treaty obligations under the ECHR but will nonetheless constitute valid and enforceable legislation. The 1998 Act did not, and could not, deprive Parliament of its power to legislate inconsistently with the ECHR.

[145] The normal and proper function of the courts of this country is to adjudicate on the rights and liabilities under domestic law of citizens (or of institutions with legal personality) or to adjudicate on the validity of executive actions or omissions that may affect those rights and liabilities. It is not, normally, the function of the courts to entertain proceedings the purpose of which is to obtain a ruling as to whether an Act of Parliament is compatible with an international treaty obligation entered into by the executive. The executive cannot make laws for the United Kingdom otherwise than pursuant to and within the constraints imposed by an enabling Act of Parliament. The executive has extensive and varied prerogative powers that it can exercise in the name of the Crown but none that permit law-making. In being asked, therefore, to perform the function to which I have referred, the courts are, it seems to me, being asked to perform a function the consequences of which will be essentially political in character rather than legal. A ruling that an Act of Parliament is incompatible with the ECHR does not detract from the validity of the Act. It does not relieve citizens from the burdens imposed by the Act. It provides, of course, ammunition to those who disapprove of the Act and desire to agitate for its amendment or repeal. This is not a function that the courts have sought for themselves. It is a function that has been thrust on the courts by the 1998 Act.

THE 1998 ACT

[146] Section 1 of the 1998 Act defined as 'the Convention rights' a number of specified articles of the ECHR and enacted that: 'Those articles are to have effect for the purposes of this Act subject to any designated derogation ... (as to which see sections 14 ...).' Article 5 was one of the specified articles but art 15 of the ECHR, entitled 'Derogation in time of emergency' the text of which is set out (at [10], above) in the opinion delivered by my noble and learned friend Lord Bingham was not. Unlike the specified articles art 15 did not, therefore, become part of our domestic law. It remained, and remains, no more than an article in a treaty to which the United Kingdom, by act of the executive, adheres.

[147] Section 3(1) of the 1998 Act says that 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights', but sub-s (2)(b) makes clear that the section 'does not affect the validity, continuing operation or enforcement of any incompatible primary legislation' and s 4(2) says that if a court comes to the conclusion that a provision of primary legislation is not compatible with a ECHR right, the court 'may make a declaration of that incompatibility'. The section does not identify the intended purpose of the declaration. It is, presumably, intended that the declaration will draw public attention to the incompatibility.

[148] Section 14 of the 1998 Act deals with designated derogations. These include:

> 'any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.'

And sub-s (6) says that 'A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation'. So the Secretary of State may make an order declaring in advance that the United Kingdom is proposing to enact legislation that is inconsistent with a ECHR right. Section 14 does not so state but it is beyond argument that the validity under domestic law of the legislation once enacted is not dependent on there having been a derogation order. With or without a derogation order Parliament can enact legislation inconsistent with a ECHR right provided that the statutory language makes clear the Parliamentary intention to do so.

[149] It is noteworthy that s 14 makes no reference to art 15 of the ECHR. Article 15 describes the circumstances in which signatories to the ECHR may derogate from their obligations under the ECHR and bring into effect measures inconsistent with the ECHR. This may only be done 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law' art 15(1)). These art 15 limitations on the power to derogate are not incorporated into s 14 of the 1998 Act. Indeed, s 14 prescribes no limitations of any sort on the Secretary of State's power to make a designated derogation order.

[150] It seems to me somewhat of a puzzle why s 14 was necessary at all. The 1998 Act does not assume to restrict Parliament's power to enact legislation inconsistent with the ECHR. So what was the purpose of the designated derogation section? The purpose was, perhaps, simply to enable it to be made clear that the inconsistency was deliberate and not inadvertent, and thereby to constitute an aid to the courts in construing the statutory provision.

THE DEROGATION ORDER 2001

[151] The main issue that has been debated before your Lordships is whether the order was validly made by the Secretary of State or should be quashed. It seems to have been assumed that the order could only be upheld if it could be justified as an exercise of the art 15 power of derogation. The Attorney General expressly accepted that that must be so and did not seek to uphold the order on the ground that whatever its status if tested by reference to art 15 it was a valid exercise by the Secretary of State of the order-making power conferred by s 14 of the 1998 Act. I have found this another puzzle because art 15 is not one of the specified articles incorporated into domestic law by the 1998 Act and is not referred to in s 14.

[152] In the preamble to the order the Secretary of State purported to be exercising his s 14 powers but in the schedule to the order, in which the proposed notification of the derogation from art 5(1) is set out, the derogation is described as an exercise of 'the right of derogation conferred by Article 15(1) of the Convention'. For the reasons I have indicated I have difficulty in understanding how the scope of the authority conferred by s 14 to make a designated derogation order can be regarded as limited by the terms of art 15 of the ECHR. But since the Attorney General was content to argue the case on

the footing that the order did have to be justified under art 15 I will set aside my doubts and consider the case on that footing. a

[153] Was the order compliant with art 15? Three sub-issues need to be considered. First, was there a 'public emergency threatening the life of the nation'? This is the threshold criterion. If it is satisfied then, second, was the enactment of s 23 of the 2001 Act 'strictly required by the exigencies of the situation'? If so then, third, was s 23 inconsistent with the United Kingdom's b other obligations under international law? On these three questions I have already expressed my agreement with the conclusions expressed by Lord Bingham. I have also had the advantage of reading the opinions of my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond and am in broad agreement with the views that they have expressed. I need add only a c few comments of my own.

WAS THERE A PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION?

[154] The Secretary of State's case that this threshold criterion has been met is based upon the horrific example of the 11 September attack on the Twin d Towers in New York, on the belief that those responsible may target allies of the United States for similar atrocities (a belief given credibility by the recent attack in Madrid) and on the assertion that available intelligence indicates the reality and imminence of a comparable terrorist attack on the United Kingdom. The Secretary of State is unfortunate in the timing of the judicial examination e in these proceedings of the 'public emergency' that he postulates. It is certainly true that the judiciary must in general defer to the executive's assessment of what constitutes a threat to national security or to 'the life of the nation'. But judicial memories are no shorter than those of the public and the public have not forgotten the faulty intelligence assessments on the basis of which United Kingdom forces were sent to take part, and are still taking part, in the hostilities f in Iraq. For my part I do not doubt that there is a terrorist threat to this country and I do not doubt that great vigilance is necessary, not only on the part of the security forces but also on the part of individual members of the public, to guard against terrorist attacks. But I do have very great doubt whether the 'public emergency' is one that justifies the description of 'threatening the life of g the nation'. Nonetheless, I would, for my part, be prepared to allow the Secretary of State the benefit of the doubt on this point and accept that the threshold criterion of art 15 is satisfied.

'TO THE EXTENT STRICTLY REQUIRED BY THE EXIGENCIES OF THE SITUATION'

[155] Section 23 constitutes, in my opinion, a derogation from art 5(1) at the h extreme end of the severity spectrum. An individual who is detained under s 23 will be a person accused of no crime but a person whom the Secretary of State has certified that he 'reasonably ... suspects ... is a terrorist' (s 21(1)). The individual may then be detained in prison indefinitely. True it is that he can leave the United Kingdom if he elects to do so but the reality in many cases will j be that the only country to which he is entitled to go will be a country where he is likely to undergo torture if he does go there. He can challenge before the SIAC the reasonableness of the Secretary of State's suspicion that he is a terrorist but has no right to know the grounds on which the Secretary of State has formed that suspicion. The grounds can be made known to a special

advocate appointed to represent him but the special advocate may not inform him of the grounds and, therefore, cannot take instructions from him in refutation of the allegations made against him. Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares, associated whether accurately or inaccurately with France before and during the Revolution, with Soviet Russia in the Stalinist era and now associated, as a result of s 23 of the 2001 Act, with the United Kingdom. I can understand, conceptually, that the circumstances constituting the 'public emergency threatening the life of the nation' might be of such an order as to justify describing s 23 as a measure 'strictly required by the exigencies of the situation'. But I am unable to accept that the Secretary of State has established that s 23 is 'strictly required' by the public emergency. He should, at the least, in my opinion, have to show that monitoring arrangements or movement restrictions less severe than incarceration in prison would not suffice.

[156] I have nothing to add to what my noble and learned friends have said about the United Kingdom's other obligations under international law but for the reasons given in the foregoing paragraph I conclude that the Secretary of State has failed to justify the order as a derogation permitted by art 15.

ARTICLE 14—DISCRIMINATION

[157] The order purported to derogate only from art 5(1). It did not purport to derogate from art 14 which prohibits discrimination 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin ...' etc. Detention under s 23 cannot be imposed on British nationals. It can only be invoked against immigrants who have no right of residence in this country. But a terrorist may be an immigrant or may be homegrown. The differentiation between suspected terrorists who are immigrants with no right of residence and suspected terrorists who are British nationals is, in my opinion, plainly discriminatory. The difference between the two groups, namely, that one group has the right of residence and the other group does not, seems to me to be irrelevant to the issue as to what measures are required in order to combat the threat of terrorism that their presence in this country may be thought by the Secretary of State to present.

[158] The Secretary of State argues that measures restricted in their application to those suspected terrorists who do not have rights of residence will suffice to combat the 'public emergency' and that to extend the measures to everyone who was a suspected terrorist would be to go further than was 'strictly required'. In my opinion, however, the art 15 requirement does not justify a discriminatory distinction between different groups of people all of whom are suspected terrorists who together present the threat of terrorism and to all of whom the measures, if they really were 'strictly necessary' would logically be applicable. If those who are suspected terrorists include some non-Muslims as well as Muslims, it would, in my opinion, be irrational and discriminatory to restrict the application of the measures to Muslims even though the bulk of those suspected are likely to profess to be Muslims. Some might well not be professed Muslims. Similarly, it would be irrational and discriminatory to restrict the application of the measures to men although the bulk of those suspected are likely to be male. Some might well be women. Similarly, in my opinion, it is irrational and discriminatory to restrict the

application of the measures to suspected terrorists who have no right of residence in this country. Some suspected terrorists may well be homegrown.

[159] The discriminatory character of s 23 has the result that the section is incompatible with art 14 of the ECHR. Moreover, in my opinion, the order fails to satisfy the criteria imposed by art 15 not only on the ground that s 23 goes further than 'the extent strictly required by the exigencies of the situation' but also because its discriminatory effect deprives it of the requisite proportionality.

CONCLUSION

[160] For these reasons, and those given by my noble and learned friends I conclude that the order is not compliant with art 15 of the ECHR. I understand the Attorney General to have accepted that this conclusion would require the order to be quashed. I venture to repeat my doubts about this. Article 15 is not part of domestic law and the authority conferred by s 14 to make derogation orders is not expressed to be subject to art 15 limitations. In the circumstances, however, I too would make the order suggested by Lord Bingham.

LORD RODGER OF EARLSFERRY.

[161] My Lords, in the aftermath of the attacks on targets in the United States of America on 11 September 2001 Her Majesty's government had to consider what steps they should take to guard against the risk of similar attacks in this country. In particular, they had to consider what should be done about suspected international terrorists living here who might be involved in plotting such attacks ('suspects'). In principle, the nationality of the suspects would be irrelevant to the threat that they posed. If a man is holding a gun at your head, it makes no difference whether he has a British or a foreign passport in his pocket. Similarly, if a network of terrorists is planning an attack on the life of the nation, the danger is the same, irrespective of the nationality of the individuals involved. So the question for ministers was how they were to counteract any risk from suspects living here, whether they were foreign or British.

[162] In some cases the foreign suspects could be deported—though no information is available as to the number who actually were deported after the 9/11 attacks. For other foreign suspects this was not possible, since they would be exposed to inhuman or degrading treatment or punishment if sent back to their country of origin. Their deportation would therefore involve a breach of art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953) Cmnd 8969) (the convention) and so was forbidden (see *Chahal v UK* (1996) 1 BHRC 405). Even before the attacks on the United States, the Home Secretary had identified the appellants as persons he wished to deport but could not, because of art 3. One of the aims of the government in introducing the Bill which became the Anti-terrorism, Crime and Security Act 2001 was to deal with foreign suspects of this kind. When s 23 of the 2001 Act came into force on 14 December 2001 it gave the Home Secretary the power to detain those foreign suspects who could not be deported. Within a matter of days all but one of the appellants had been detained. For the most part, they are still detained and are likely to remain in detention for the foreseeable future, probably at least until the power lapses at the end of 10 November 2006. By

contrast, the government did not invite Parliament to pass legislation for the detention of British suspects who, by definition, could also not be deported. They remain at liberty. Although the Attorney General declined to tell the House what was being done to counter the threat that the British suspects pose to the life of the nation, it must be assumed in the government's favour that ministers have good grounds for being satisfied that the threat can be properly contained by using the other powers available to the police and security services. The Attorney General did not suggest that there was any obstacle to the police and security services exercising these powers in the same way in relation to foreign suspects.

[163] For the purpose of these proceedings the Home Secretary accepts that, normally, the detention power in s 23 would violate the detained suspects' rights under art 5(1) of the convention. Section 23 therefore purports to derogate from art 5(1). To be valid, a derogation must comply with the requirements of art 15(1):

> 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

There are three requirements. First, the measures must be taken in time of war or other public emergency threatening the life of the nation. Second, the state party may take measures derogating from its obligations only 'to the extent strictly required by the exigencies of the situation'. Last, the measures must not be inconsistent with the state's other obligations under international law.

[164] Article 15 is not one of the articles that are reproduced in our domestic law by s 1(1) and (2) of the Human Rights Act 1998. So nothing in that Act would permit a domestic court to adjudicate on any alleged breach of it. But a derogation is given effect in domestic law by the making of a designation order under s 14(1). Under s 1(1) and (2) the order operates to restrict the effect of the convention right in question in our domestic law. Section 30(2) and (5) of the 2001 Act provide that any derogation from art 5(1), relating to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or the designation of that derogation in terms of s 14(1) of the 1998 Act, may be questioned in legal proceedings before the Special Immigration Appeals Commission (SIAC) and in an appeal from their decision. Parliament thereby conferred on those detained under the 2001 Act this special right to challenge the derogation from their art 5(1) convention rights. If the right is to be meaningful, the judges must be intended to do more than simply rubber stamp the decisions taken by ministers and Parliament.

[165] I can deal briefly with the appellants' argument relating to the first requirement of a valid derogation. In December 2001 the United Kingdom was not at war. Was there, however, some other public emergency threatening the life of the nation? The appellants say not. Not without some hesitation, especially in the light of the speech of my noble and learned friend, Lord Hoffmann, I have concluded that this submission falls to be rejected. The situation in December 2001 was no less grave than other situations which the European Court of Human Rights has regarded as constituting a 'public emergency threatening the life of the nation' in terms of art 15(1). For instance,

in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 at 31–32 (para 28) the court held that the Irish government had reasonably deduced the existence of such a state from a combination of factors:

> '... in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.'

The (relatively modest) scale of the terrorist activities in question can be gauged from the summary of the facts (at 18). Similarly, in its admissibility decision in *Marshall v UK* App no 41571/98 (10 July 2001, unreported), the fourth section of the court noted that in 1998 the authorities in Northern Ireland continued to be confronted with the threat of terrorist violence, even although, by that time, its actual incidence had gone down. There had therefore been no return to normality and there was no basis for the court to controvert the authorities' assessment of the situation in the province in terms of the threats which organised violence posed for the life of the community and the search for a peaceful settlement. In this connexion the court went on to recall—

> 'that by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogation necessary to avoid it ...'

[166] The unheralded attacks on the United States in September 2001 form the backdrop to the government's decision to derogate. They were mounted by terrorists who had gained entry to the United States and had lain low, waiting for their opportunity. The attacks were on an unprecedented scale and were carried out by ruthless men who were prepared to kill themselves and any number of innocent people in pursuit of their goal. More than fifty of the victims of the attacks were British. There was good reason for the government to think that, as the principal ally of the United States, this country was likely to be a prime target for any further similar attacks. And, in the days that followed, spokesmen for Al-Qa'ida specifically linked Britain with the United States and Israel as a potential target for future attacks. The government had access to reports from MI5 and MI6 and to the expertise of officials from those organisations in interpreting and analysing the available intelligence about the level of the threat. When examining the government's overall assessment of the situation, the courts must bear in mind that they do not have that expertise. Mr Emmerson QC observed, rightly, that in the autumn of 2001 the Home Secretary had stated that there was no immediate intelligence pointing to a specific threat to the United Kingdom. The following spring, he had said that it would be wrong to say that the government had evidence of a particular threat. But these statements in no way invalidate the government's assessment that the country was facing a risk of devastating attacks at some unspecified time, against which the government might have to take measures which would

not have been considered necessary before the events of 11 September. The SIAC examined all the material placed before them, including the closed material, and were satisfied that it justified the conclusion that a public emergency threatening the life of the nation existed (see [2002] HRLR 1274). Like the Court of Appeal ([2002] EWCA Civ 1502, [2003] 1 All ER 816, [2004] QB 335), I detect no error in the SIAC's approach in reaching that conclusion, and I would accordingly accept it.

[167] The next precondition for a valid derogation in terms of art 15(1) is that the exigencies of the situation facing the country in December 2001 'strictly required' the introduction of the power of detention in s 23. So in these proceedings the Home Secretary must show that the exigencies of the situation 'strictly required' the detention of foreign suspects, even although it did not require the detention of British suspects. Unless he shows this, the derogation is not to be regarded as valid and the Human Rights Act 1998 (Designated Derogation Order 2001, SI 2001/3644 (the derogation order) must be quashed.

[168] On the facts of this particular case consideration of the second issue inevitably entails a comparison of the different ways in which foreign and British suspects have been treated. Despite what the Court of Appeal appear to have thought, however, acceptance of the appellants' argument does not necessarily involve saying that the British suspects should also have been detained. Rather, the appellants say that, in the absence of any satisfactory evidence that members of the two groups posed substantially different threats, the judgment of the government and of Parliament, that the exigencies of the situation did not require the detention of British suspects, undermines their simultaneous judgment that it was necessary to detain those foreign suspects who could not be deported. For this purpose the disparity of treatment between the two groups is not said, in itself, to give rise to a breach of the convention but simply to point to the conclusion that, in terms of art 15(1), the detention of the foreign suspects was not in fact strictly required. If that inference is correct, then the derogation is invalid.

[169] The disparity of treatment comes into another argument for the appellants, however. It relates to the third requirement in art 15(1), that any measure should not be inconsistent with the United Kingdom's other obligations under international law. The appellants say that the provision for detaining only foreign suspects is not merely incompatible with art 5(1) but inconsistent with the United Kingdom's obligation under art 14 to secure to people within their jurisdiction the enjoyment of their art 5(1) rights without discrimination on the ground of national origin. Alternatively, it is inconsistent with the United Kingdom's corresponding obligations under arts 9 and 26 of the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmnd 6702) (ICCPR). For this reason, the appellants submit, even if s 23 cleared both the first two hurdles in art 15(1) of the convention, it would fall at the third.

[170] The SIAC found in the appellants' favour on that point (see [2002] HRLR 1274 at 1313 (para 95)). The Court of Appeal took the opposite view, however, on the basis that the foreign suspects who cannot be deported have, unlike British nationals, no more right to remain, only a right not to be removed, which means legally that, for the purposes of art 14, they come into a different class from those who have a right of abode (see [2003] 1 All ER 816 at [47], per Lord Woolf CJ).

[171] I am, with respect, unable to accept this reasoning. It is true, of course, that no violation of art 14 occurs merely because a foreigner with no right of abode can be deported and can be detained with a view to deportation (art 5(1)(f)), whereas a national of the country concerned cannot (see *Moustaquim v Belgium* (1991) 13 EHRR 802 at 816 (para 49)). In this case, however, so far as the need for detention is concerned, the critical factor is not the suspects' immigration status but the threat that they are suspected of posing to the life of the nation: that is why, although the Secretary of State had previously wanted to deport the appellants, it was only after 9/11 that steps were taken to provide for their detention. In being thought to pose this kind of threat, the foreign suspects are comparable with the British suspects.

[172] In any event, even supposing that, for the purposes of art 14, there were a distinction in terms of their immigration status which would justify detaining foreign suspects in circumstances where British suspects were not detained, the government would still have to show that the detention of the foreign suspects was strictly required in terms of art 15(1). The Court of Appeal considered that it was—inter alia because they took the view that the SIAC had made a finding of fact, which could not be overturned, that the derogation was strictly required by the exigencies of the situation (see [2003] 1 All ER 816 at [35] per Lord Woolf CJ, at [91] per Brooke LJ, and at [150] per Chadwick LJ).

[173] Unfortunately, the Court of Appeal misconstrued the decision of the SIAC. It by no means constituted a finding of fact in favour of the Secretary of State which foreclosed further consideration of the issue. The SIAC dealt with the matter under the overall heading 'Are the measures taken "strictly required"?' (See [2002] HRLR 1274 at 1296–1301 (paras 37–53).) Within that heading, they divided the topic into a number of compartments. In paras 41–45, under the sub-heading 'Other measures available', the SIAC rejected the appellants' arguments that detention was not strictly required because legislation could have been introduced to permit the use of telephone intercept evidence and the Terrorism Act 2000 already contained wide-ranging provisions which gave adequate protection. Under the sub-heading 'Rational connexion' (paras 46–53) they then turned to the appellants' various arguments that there was no rational connexion between the measures adopted and the objectives which the government sought to attain. In paras 47–49 they rejected the appellants' 'over-inclusiveness' argument and then, in paras 50–51, the 'Prison with Three Walls' argument. In paras 52 and 53 the SIAC referred to two 'Other matters'. The first was the appellants' contention that it was irrational to limit the detention powers to foreign nationals. The SIAC found it convenient to consider the arguments on this issue later (at 1308–1314 (paras 79–96)), along with the arguments relating to art 14. Finally, in para 53 the SIAC rejected the appellants' argument that the provisions for judicial and democratic supervision in the 2001 Act were inappropriate and insufficient.

[174] The upshot is that in paras 37–53 of their judgment the SIAC found in favour of the government on all of the points that they decided at that stage in regard to the question 'Are the measures taken "strictly required"?' My noble and learned friend, Lord Bingham of Cornhill, has rejected their reasons for accepting the government's argument on one of these points, the prison with three walls. But, even supposing that the SIAC were right on that particular point, they still left over till later one of the other relevant points, namely the appellants' contention relating to the allegedly irrational disparity of treatment

between the foreign and British suspects. And, when they came to consider that matter along with the alleged breach of art 14, in para 95 they came down in favour of the appellants. That conclusion must be read back into para 52 of the SIAC's judgment in order to see how they determined the point that they had reserved. When that is done, it is clear that the SIAC's ultimate conclusion was that it was irrational to limit the detention power to foreign suspects. Hence the answer to the overall question which the SIAC was considering in paras 37–53 of their judgment was that the measures taken by the government were not 'strictly required'. I return to the point at [186] and [187], below. Far from determining this omnibus issue in favour of the Secretary of State, therefore, they determined it against him. The real question is whether there is any proper basis for an appellate court to overturn the SIAC's decision, which was based on their assessment of the evidence.

[175] There is nothing to suggest that the SIAC erred in their general approach to the issues which they had to decide. When scrutinising a decision which has been taken on grounds of national security, the SIAC and the appellate courts must accord an appropriate degree of deference to the measures adopted by the government and by Parliament. In *Secretary of State for the Home Dept v Rehman* [2001] UKHL 47, [2002] 1 All ER 122, [2003] 1 AC 153 the House held that the SIAC had failed to appreciate the nature of their role when reviewing a deportation decision which the Home Secretary had taken in the interests of national security. Not surprisingly, therefore, at an early stage in their judgment in this case the SIAC reminded themselves that it is particularly necessary to allow a margin of discretion to the Home Secretary, as the primary decision-maker in matters relating to national security, and quoted the relevant passage of the speech of my noble and learned friend, Lord Hoffmann, in *Secretary of State for the Home Dept v Rehman* (at [57]–[58]). The SIAC's judgment is peppered with references to the need for them to accord the appropriate margin to the executive and legislature in relation to the various points that they had to consider. Indeed my noble and learned friend, Lord Hope of Craighead, considers that the SIAC gave not too little, but too much leeway to the executive and legislature.

[176] If the provisions of s 30 of the 2001 Act are to have any real meaning, deference to the views of the government and Parliament on the derogation cannot be taken too far. Due deference does not mean abasement before those views, even in matters relating to national security. Even in such matters what Simon Brown LJ said in *International Transport Roth GmbH v Secretary of State for the Home Dept* [2002] EWCA Civ 158 at [54], [2003] QB 728 at [54], [2002] 3 WLR 344, 754, holds true: 'There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.' Indeed the considerable deference which the European Court of Human Rights shows to the views of the national authorities in such matters really presupposes that the national courts will police those limits. Moreover, by enacting s 30, Parliament, including the democratically elected House of Commons, gave the SIAC and the appellate courts a specific mandate to perform that function—a function which the executive and the legislature cannot perform for themselves—in relation to this derogation. The legitimacy of the courts' scrutiny role cannot be in doubt.

[177] On a broader view, too, scrutiny by the courts is appropriate. There is always a danger that, by its very nature, a concern for national security may

bring forth measures that are not objectively justified. Sometimes, of course, as with the Reichstag fire, national security can be used as a pretext for repressive measures that are really taken for other reasons. There is no question of that in this case: it is accepted that the measures were adopted in good faith. But good faith does not eliminate the risk that, because of an understandable concern for national security, a measure may be taken which, on examination, can be seen to go too far. For example, even though it was a bona fide response to the crisis facing the nation in the summer of 1940, the mass detention of German and Italian enemy aliens, including many refugees, is sometimes thought—rightly or wrongly—to be a case in point. So, in these proceedings, even though detention of foreign suspects was introduced in good faith on grounds of national security, the SIAC and the appellate courts have a limited, but none the less important, duty to check whether, as art 15(1) stipulates, the measure was strictly required by the exigencies of the situation.

[178] In discharging that duty British courts are performing their traditional role of watching over the liberty of everyone within their jurisdiction, regardless of nationality. In the words of La Forest J in *RJR-MacDonald Inc v A-G of Canada* [1995] 3 LRC 653 at 697, 'Courts are specialists in the protection of liberty'. Here the exercise happens to take the particular form of examining the grounds for the derogation from the basic guarantees in art 5 of the convention, which aim to secure the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities (see *Kurt v Turkey* (1998) 5 BHRC 1 at 26–27 (para 122)). In performing this role and checking whether detention of the foreign suspects, such as the appellants, was strictly required, the courts are entitled to have regard to the extent of the inroad which it makes into the liberty of those foreign suspects: the greater the inroad, the greater the care with which the justification for it must be examined. On any view, the inroad into the appellants' liberty is far-reaching. It is true, of course, that they will be released from detention if they can find another country which will take them and where they do not face the risk of inhuman or degrading treatment. Two of the appellants have been able to take that route. For most of the others, however, the reality is that they have already been detained for three years and their detention is likely to continue for at least two more years. In fact it is likely to go on for even longer if the legislation is renewed in 2006, since in October 2003 the Director General of the Security Service saw no prospect of a significant reduction in the threat posed to the United Kingdom and its interests from Islamist terrorism over the following five years and, she feared, for a considerable number of years after that. The acute question is whether the exigencies of the situation strictly required a small number of foreign suspects to endure indefinite detention of this kind while, in the judgment of the government and Parliament, an undisclosed number of British suspects could safely be allowed to remain at liberty. The SIAC had to answer this question on the basis of the evidence placed before it.

[179] In his second witness statement, Mr Bob Whalley, the Head of the Terrorism and Protection Unit in the Home Office, put forward three reasons why the Home Secretary had decided to limit the power of detention to foreign suspects.

[180] One was that foreign nationals are subject to immigration control and that it remains the Home Secretary's intention to remove the persons concerned from the United Kingdom, at a future date, using the United

Kingdom's immigration powers. Since the Secretary of State wished to remove them even before September 2001, this is plainly right in the case of the appellants. As I have already pointed out, however, since they were previously at liberty, the reason for detaining them under s 23 cannot be that the Secretary of State would like to deport them. The reason is that, after 9/11, they are suspected of presenting a threat to the life of the nation. In this, the relevant, respect they are comparable to the British suspects.

[181] Another reason given by Mr Whalley is that a measure dealing with foreign suspects was required because of a perception in other countries, including Muslim countries, that the United Kingdom was weak in its response to international terrorists operating in its territory. At best, such a consideration could only be a makeweight: it could not justify the detention of the appellants without trial, if there were no other valid reason for detaining them.

[182] In his submissions the Attorney General attached most importance to the reason given in para 19 of Mr Whalley's second witness statement: 'First, it was considered by the Secretary of State that the serious threats to the nation emanated predominantly (albeit not exclusively) and more immediately from the category of foreign nationals.' There was no elucidation or elaboration of what exactly Mr Whalley meant by the threat emanating 'more immediately' from the category of foreign nationals. Whatever its importance, however, Mr Whalley's statment is simply one element in the material which was before the SIAC and on which they had to reach their conclusion.

[183] Although most of the serious threats may have come from foreign nationals, by its very terms Mr Whalley's statement shows that serious threats were also considered to emanate, to a not insignificant extent, from British nationals. This is borne out by other passages in the material which the government placed before the SIAC. I pick out some of them. The amended open statement on international terrorism linked to Usama bin Laden and Al-Qa'ida in the United Kingdom describes the way that the terrorists operated through networks, with training camps in Afghanistan. It comments that 'a number of those attending the camps have come from (and after training returned to) the UK and other countries in Europe'. It is estimated that upwards of a thousand individuals from the United Kingdom attended; there is nothing to suggest that those coming from, and returning to, the United Kingdom did not include British nationals. Indeed, para 26 of the statement shows that the 'shoe bomber' Richard Reid, a British national, attended a training camp in Afghanistan in 1998. The amended addendum to the open generic statement mentions that nine British citizens were detained as a consequence of coalition action in Afghanistan and Pakistan and points out that the attendance of one of them at a mosque in London facilitated the process whereby he became involved in terrorism. The addendum also refers to two British citizens who were suspected of being involved in a planned attack. One of them was convicted of possession of explosives with intent to endanger life and sentenced to 20 years in prison. In his summary the author of the addendum says that it reinforces knowledge of the United Kingdom as a logistics and recruitment base: 'the nine British citizens detained [in Afghanistan and Pakistan], as well as Richard REID and Zacarias MOUSSAOUI, provide clear evidence of the effectiveness of the networks to recruit in and from the UK.' Finally, in para 27 of the amended addendum to the open

derogation statement the author summarises the position by saying that the backgrounds of those detained in Afghanistan and Pakistan 'show the high level of involvement of British citizens and those otherwise connected with the UK in the terrorist networks'. a

[184] Having considered not only the open evidence, including this material, but the closed evidence as well, the SIAC explained their conclusion on art 14 in this way ([2002] HRLR 1274 at 1313 (paras 94–95)): b

> 'If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terrorists—and we can see powerful arguments in favour of such a derogation—the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as the Attorney-General contends, the threat stems exclusively or almost exclusively from that alien section. c
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> 95. But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified—mostly in detention abroad—who fall within the definition of "suspected international terrorists", and it was clear from the submissions made to us that in the opinion of the respondent there are others at liberty in the United Kingdom who could be similarly defined. In those circumstances we fail to see how the derogation can be regarded as other than discriminatory on the grounds of national origin.' d

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In their view the evidence demonstrated beyond argument that the threat did not stem exclusively or almost exclusively from the alien section of the population. Since there could be discrimination in terms of art 14 only if the foreign and British suspects both posed a comparable threat, plainly the SIAC concluded on the evidence that they did indeed do so. In other words the SIAC were not satisfied that there was a material difference in the nature of f the threat posed by foreign suspects such as would provide a rational justification for their detention while British suspects were not detained.

[185] It is important to remember that the SIAC had seen not only the open material but the closed material as well. So they knew what the closed material contained and what bearing it had on the issues to be determined. Their g assessment was that it was obvious that the closed material was most relevant to the first issue, whether there was an emergency threatening the life of the nation (see [2002] HRLR 1274 at 1286 (para 14)). The Court of Appeal did not see the closed material and, on due consideration, the Attorney General decided that it would not assist his case for your Lordships to do so. It is h therefore appropriate to proceed on the view that, on the disparity of treatment issue, there is nothing in the closed material which significantly alters the picture to be derived from the open material. In particular, while, as a general observation, it is undoubtedly true, as Brooke LJ remarked ([2003] 1 All ER 816 at [103], [2004] QB 335), that 'five generals and their chiefs of staff may pose a more serious and immediate threat than 5,000 foot-soldiers', there is nothing in j the open material which gives the slightest basis for inferring that the foreign suspects made up the generals and chiefs of staff, while the British suspects provided the foot-soldiers. On the contrary, as I have noted, the open material contains evidence that British citizens were involved at a high level in the terrorist networks. In these circumstances the SIAC's conclusion cannot be

discounted on the speculative basis that they had somehow overlooked closed evidence to the contrary effect, which would have provided an objective basis for the distinction that the Secretary of State drew. In my view, therefore, the SIAC applied the correct approach and the conclusion which they reached was open to them on the material before them. There is no basis for an appellate court to interfere with that conclusion.

[186] If, then, as the SIAC concluded, the threat posed by the foreign and British suspects was comparable, one would expect that the measures strictly required to deal with the threat from all the suspects would be the same. The fact that the foreign suspects were to be detained, while the British suspects were not, gives rise to two possible further conclusions: either both the foreign and the British suspects should have been detained in order to avert the threat or else it was unnecessary to detain either of them for that purpose.

[187] The SIAC favoured the first of these possible conclusions since they could see powerful arguments for the view that there should be a derogation to permit detention of suspects. They therefore held, in terms of the issue which they had reserved in their judgment ([2002] HRLR 1274 at 1300 (para 52)), that it was irrational to limit the detention power to foreign suspects. Since the limitation on the power was irrational, it followed that the power could not be 'strictly required' in terms of art 15(1). It followed also that the distinction between those suspects who were detained and those who were not detained was being drawn, irrationally, on the basis, not of the threat that they posed, but of their national origin, contrary to art 14. The derogation was therefore invalid because it failed to meet both the second and third requirements of art 15(1).

[188] The starting point for the SIAC's view is that there are powerful arguments in favour of detaining both groups of suspects. The government's assessment is, however, that it is not necessary to detain the British suspects in order to contain the threat that they pose. That is implicit in the entire policy that they adopted and emerges in any event from para 36 of the Home Office discussion paper on *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* (Cm 6147) issued in February 2004:

> 'While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify.'

I consider it right to defer to the government's considered judgment that it would be difficult to justify taking draconian powers to detain British suspects. In other words, the government believe that they could not show that the indefinite detention of British suspects was justified, and hence strictly required, in terms of art 15(1), in order to meet the threat that they pose to the life of the nation. Starting from that premise, the SIAC's conclusion, that the threats posed by the foreign and British suspects are comparable, leads to the further conclusion that the detention of the foreign suspects is not strictly required either. That further conclusion is not affected by the theoretical distinction that the foreign suspects can end their detention at any time by leaving for another country, whereas the British suspects could not. As the facts of the present cases demonstrate, the reality is that most of the foreign

suspects who are detained cannot actually leave: they have nowhere to go and so face remaining in detention, indefinitely, for years on end.

[189] My Lords, I have anxiously considered all the evidential and other material, as well as the arguments which the Attorney General advanced to justify the legislation. Proceeding on the same basis as the government and Parliament, that detention of the British suspects is not strictly required to meet the threat that they pose to the life of the nation, I have come, however, to the conclusion that the detention of the foreign suspects cannot be strictly required, either, to meet the comparable threat that they pose. The second requirement of art 15(1) is accordingly not satisfied. Equally, it follows that there has been a breach of art 14 and that the third of the requirements for a valid derogation under art 15(1) is not satisfied either.

[190] The Attorney General presented submissions on a number of other points, including the international law position. On these matters I respectfully agree with the conclusions reached by Lord Bingham in his comprehensive speech. I would accordingly allow the appeal, hold that the power to detain foreign suspects in s 23 of the 2001 Act was not 'strictly required' by the exigencies of the situation and make the order and declaration proposed by Lord Bingham.

LORD WALKER OF GESTINGTHORPE.

[191] My Lords, as all your Lordships recognise, these are very important and difficult appeals. Your Lordships have to consider the balancing of one of the most fundamental human freedoms—freedom from imprisonment for an indefinite period, without indictment, trial or conviction on a criminal charge—with one of the state's most basic and imperative duties—the duty of safeguarding the lives and well-being of its citizens and others resident in the United Kingdom. It is unnecessary to repeat citations as to the importance of these two principles.

[192] The detention without trial of terrorist suspects is therefore a crucial instance—probably the most crucial instance of all—of the problems of reconciling individual human rights with the interests of the community, and of determining the proper functions, in this process, of different arms of government. My noble and learned friend Lord Hoffmann has recently addressed the latter topic in *Secretary of State for the Home Dept v Rehman* [2001] UKHL 47 at [50]–[54], [2002] 1 All ER 122 at [50]–[54], [2003] 1 AC 153 (and also in his postscript, written after 11 September 2001, at [62] and in *R (on the application of ProLife Alliance) v British Broadcasting Corp* [2003] UKHL 23 at [74]–[76], [2003] 2 All ER 977 at [74]–[76], [2004] 1 AC 185. His observations are well known and I need not repeat them (see also, in *Secretary of State for the Home Dept v Rehman*, the observations of Lord Slynn of Hadley at [17], and Lord Steyn at [31]). Safeguarding national security is (with the possible exception of some questions of macro-economic policy and allocation of resources) the area of policy in which the courts are most reluctant to question or interfere with the judgment of the executive or (a fortiori) the enacted will of the legislature. Nevertheless the courts have a special duty to look very closely at any questionable deprivation of individual liberty. Measures which result in the indefinite detention in a high-security prison of individuals who have not been tried for (or even charged with) any offence, and who may be innocent of any crime, plainly invite judicial scrutiny of considerable intensity.

[193] This dilemma is heightened by the secrecy which necessarily attends most issues of national security. As my noble and learned friend Lord Rodger of Earlsferry pointed out in the course of argument, a portentous but non-specific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government. Whether or not patriotism is the last refuge of the scoundrel, national security can be the last refuge of the tyrant. It is sufficient to refer (leaving aside more recent and probably more controversial examples) to the show trial and repression which followed the Reichstag fire in Berlin and the terror associated with the show trials of Zinoviev, Bukharin and others in Moscow during the 1930s. It is therefore important to note that in this appeal no attack is made on the good faith of the Secretary of State, or any other individual or group of individuals in the executive or legislative arms of government. It is not suggested that the Secretary of State or any of his officials has given misleading or disingenuous reasons for their actions. What is said is that they have asked themselves the wrong questions, and have reached irrational and disproportionate answers.

[194] Another special feature of these appeals is that your Lordships are concerned with a derogation from the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969). Article 15 (1) of the convention provides:

> 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

The derogation was effected by the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644 made on 11 November 2001 and coming into force on 13 November 2001. The terms of the derogation (set out in a schedule to the order and repeated almost word for word in the note verbale sent to the Secretary General of the Council of Europe on 18 December 2001) described the public emergency as follows:

> 'There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.'

It then referred to the Anti-terrorism, Crime and Security Act 2001 as follows:

> 'As a result of the public emergency, provision is made in the [2001 Act], *inter alia*, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers.'

[195] The appellants and the interveners challenged the validity of the derogation on three main grounds (with a considerable degree of overlap between the second and third grounds): (a) that there was not in November 2001 a 'public emergency threatening the life of the nation' within the meaning of art 15; (b) that the measures taken by and under the 2001 Act were not 'strictly required by the exigencies of the situation'; (c) that those measures were on the contrary irrational, discriminatory and disproportionate. The first ground of challenge is a question of fact and degree which does not depend on the terms of the 2001 Act (except that by s 30 of the 2001 Act a 'derogation matter', as defined in that section, can be called into question only before or on appeal from the Special Immigration Appeals Commission (SIAC)). The second and third grounds depend crucially on the terms of the 2001 Act and the factual evidence adduced before the SIAC (of which your Lordships have seen the open part, but not the closed part). There are other subsidiary grounds of challenge. It is readily apparent that the fact that a state has decided to make a derogation from the convention does not close the door to an examination of human rights issues. On the contrary, it opens the door even wider, because of the need for the measures to be 'strictly required by the exigencies of the situation'. Your Lordships have had the benefit of submissions in support of the appeals not only from leading counsel for the two sets of appellants but also (in writing and orally) on behalf of Liberty and (in writing only) on behalf of Amnesty International as interveners. Every possible line of argument has been explored, with a very full citation of human rights case law and other materials.

[196] The appropriate intensity of scrutiny of decisions in this crucial area—involving both national security and individual liberty—presents a real dilemma which is fully discussed in your Lordships' speeches. I am not sure that I can usefully add much to the views expressed by others but I will make a few brief observations. For my part I think that in a case of this sort the court has to proceed at two different levels. The court should show a high degree of respect for the Secretary of State's appreciation, based on secret intelligence sources, of the security risks; but at the same time the court should subject to a very close scrutiny the practical effect which derogating measures have on individual human rights, the importance of the rights affected, and the robustness of any safeguards intended to minimise the impact of the derogating measures on individual human rights. In doing so the court must allow for the fact that it may be impossible for the intelligence services to identify the target or predict the scale of a violent attack by international terrorists (whose methods involve secrecy, deception and surprise). The likely effects of a natural disaster (such as a hurricane or a volcanic eruption) are, within limits, more easily predictable than those of attacks by terrorists who (on the evidence) may have access to biological, chemical or even radiological or nuclear weapons.

[197] The Strasbourg Court has in *Ireland v UK* (1978) 2 EHRR 25 approved what amounts to a precautionary approach to measures of protection against terrorist activity. It said in its judgment (at 95 (para 214)):

> 'It is certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. The Court must do no more than review the lawfulness, under the Convention, of the

> measures adopted by that Government from 9 August 1971 [the date of introduction of internment] onwards. For this purpose the Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied.'

The reference to the court is of course to the European Court of Human Rights itself. But in my view the same principle applies, with little less force, to review by a national court. The judgment continued (at 96 (para 220)):

> 'When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of article 15 must leave a place for progressive adaptations.'

[198] In his written and oral submissions the Attorney General understandably emphasised the shocking and unprecedented nature of the outrages carried out in the United States on 11 September 2001; and, equally understandably, none of those arguing for the appeals to be allowed dissented from this emphasis. I think this may have led to insufficient attention being directed, in the course of argument, to the state of the United Kingdom's anti-terrorist legislation immediately before 11 September 2001. The United Kingdom government's legislative reaction to what happened in the United States had to start from the law as it stood at that time.

[199] There is a helpful background summary by Professor ATH Smith in the chapter on offences against the state in *English Public Law* (edited by Professor David Feldman, 2004), p 1334 (para 27.12). I will set it out in full:

> 'It would be a mistake to suppose that the UK law devoted to the suppression of terrorism is particularly modern, let alone a reaction to the events that convulsed the world following the attacks in the United States in September 2001. Continuing problems in Northern Ireland meant that the statute books were replete with offences directed against terrorist groups and their activities. Some time before the American events and in the light of a continued improvement of the situation in Northern Ireland, it had been decided to replace the legislation hitherto designated as "temporary" with a revised framework. The opportunity was to be taken at the same time to acknowledge that there was an increasingly international dimension to terrorism, and the result was the Terrorism Act 2000. Further initiatives were taken in response to the American atrocities, in the Anti-terrorism, Crime and Security Act 2001. These confirm and extend the measures relating to, for example, proscribed organizations, ie organizations (including Irish and other domestic or foreign groups) membership of or support for which is a criminal offence. The jurisdiction of the courts was extended to cover inciting terrorism overseas, and to deal with bribery and corruption outside this country. The law was also extended in certain respects to cater for the situation where the motivation for the commission of offences against the person or public order offences was religious hatred. The Acts additionally offer extended police powers,

including powers to set up cordons, compulsory obtaining of testimony and evidence, additional disclosure powers in connection with financial organizations, account monitoring information, arrest without warrant, stop and search, search of premises, search of persons, parking restrictions, port and border controls, retention of communications data, electronic surveillance, curtailment of access to legal advice and the right to silence, and prohibitions on torture.'

There is also some detailed material in Professor Clive Walker's *Blackstone's Guide to the Anti-Terrorism Legislation* (2002), another work to which I acknowledge my indebtedness.

[200] The Terrorism Act 2000 in its original form was a substantial enactment which received the Royal Assent on 20 July 2000 and came into force (for the most part) on 19 February 2001. (These dates may be compared with those of the first two major Al-Qa'ida attacks on United States interests, the bombing of the embassies in Kenya and Tanzania on 7 August 1998 and the bombing of the USS Cole on 12 October 2000.) As Professor Smith points out, the 2000 Act took account both of the improved security position in Northern Ireland and the increasingly international character of terrorism. It also took account of the imminent coming into force of the 1998 Act (for instance, s 118 of the 2000 Act, dealing with reverse burdens of proof, was introduced by amendment of the Bill after the decision of your Lordships' House in *R v DPP, ex p Kebilene, R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326, in which judgment was given on 28 October 1999).

[201] The 2000 Act in its original form made many significant changes in the measures, most of them of an emergency nature, which had previously been in force to combat terrorism. There are detailed studies of the Act in Professor Walker's book and in an article by JJ Rowe QC in [2001] Crim LR 527. For present purposes the most notable points are these. The 2000 Act contained (in s 1) a new definition, in wide terms, of terrorism. This is set out in the speech of my noble and learned friend Lord Bingham of Cornhill. The Act continued the earlier system of proscription of terrorist organisations. Schedule 2 to the 2000 Act sets out a list of proscribed organisations, and the Secretary of State can add to the list by statutory instrument. In its original form, Sch 2 was restricted to organisations operating in, or closely connected with, Northern Ireland. Al-Qa'ida and the other organisations relevant to these appeals were added to the list by an order (the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001, SI 2001/1261) made on 28 March 2001 and coming into force on the following day.

[202] The 2000 Act did not provide for exclusion orders of the type permitted by s 5 of the Prevention of Terrorism (Temporary Provisions) Act 1989 or for detention of the type permitted by s 36 of the Northern Ireland (Emergency Provisions) Act 1996. Both those statutes were repealed. (Large scale internment began in Northern Ireland in August 1971 under earlier legislation but was sharply reduced and then discontinued after direct rule began in March 1972: see the useful summary in *Ireland v UK* (1978) 2 EHRR 25 at 33–58 (paras 20–91) and especially at 36–44 (paras 34–60). The powers conferred by the 1996 Act were not, in the event, exercised.)

[203] Parliament's decision not to include powers of internment in the 2000 Act was the subject of vigorous debate, described in Professor Walker's book (p 31). Experience during the First and Second World Wars had shown

that large scale internment produced many injustices (and in some cases, interfered with the war effort) with no obvious gain to national security (see Professor Brian Simpson's work, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (1992), drawn on by my noble and learned friend Lord Bingham in his 2002 Romanes Lecture, 'Personal Freedom and the Dilemma of Democracies' (2003) 52 ICLQ 841). Experience in Northern Ireland showed that (in conditions of internal sectarian violence rather than international war) internment was also a major obstacle to political progress and reconciliation. It was described (in the context of Northern Ireland) as 'the terrorist's friend'. It is not surprising, nor can it be a matter of criticism, that when the provisions of the 2000 Act came to be reconsidered after the shocking events of 11 September 2001, there was still a strong reluctance to reintroduce general powers of internment.

[204] The 2000 Act in its original form did not alter the law in relation to the state of affairs revealed by the decision of the Strasbourg court in *Chahal v UK* (1996) 1 BHRC 405. That case is described in Lord Bingham's speech. The judgment of the Strasbourg court covers several important points, but for present purposes it is sufficient to note three points: (a) art 3's prohibition on torture is absolute, and Chahal could not be returned to India; (b) his detention during the protracted litigation, lengthy though it was, was not unreasonable or unlawful, but he could be detained only so long as his deportation was the end in view; (c) the limited degree of judicial review of his detention and proposed deportation infringed art 5(4) of the convention.

[205] The outcome was that Chahal was released from detention and continued to live in this country. Parliament enacted the Special Immigration Appeals Commission Act 1997 establishing the SIAC in order to provide the necessary degree of judicial review (the SIAC's jurisdiction is extended by Pt 4 of the 2001 Act). The SIAC's procedure (following a Canadian precedent approved by the Strasbourg court in *Chahal v UK* at 469 (para 131)) makes use of special advocates to protect the interests of suspected terrorists without compromising intelligence sources. Apart from the 1997 Act, Parliament did not before 2001 take steps to meet any threat to national security revealed by the decision in *Chahal v UK*. In his speech in *Secretary of State for the Home Dept v Rehman* [2002] 1 All ER 122 at [54], [2003] 1 AC 153 (which was, as already noted, largely written before but delivered after 11 September 2001) Lord Hoffmann simply noted: 'If there is a danger of torture, the government must find some other way of dealing with a threat to national security.' That is what Pt 4 of the 2001 Act was intended to do.

[206] In summary, the reach of the legislation, in relation to Al-Qa'ida and its satellite organisations, was established and has been extended in three stages: first the 2000 Act; then the extension of the list of proscribed organisations so as to include Al-Qa'ida and its satellites; and finally the further measures introduced, after the events of 11 September 2001, by the 2001 Act. The 2001 Act is also a substantial statute, containing 129 sections and 8 schedules. It makes many amendments to the 2000 Act and introduces other provisions covering a number of different matters including freezing orders, weapons of mass destruction, security of pathogens and toxins, nuclear security and aircraft security. Only Pt 4 (ss 21–36), being concerned with alterations in immigration and asylum law, is aimed exclusively at persons who are not British nationals (had Brooke LJ, in his admirable judgment in the Court of

Appeal (see [2002] EWCA Civ 1502 at [111], [2003] 1 All ER 816 at [111], [2004] QB 335), understood the 2001 Act as a whole to be targeted at non-national terrorists alone, he would have been mistaken; but his judgment (at [96]) makes clear that at [111] he must have been referring to Pt 4 alone). Some provisions of the 2001 Act create new criminal offences in respect of acts performed overseas by British nationals only (see for instance ss 44, 47(7), 50(6) and 79(5)).

[207] In these appeals attention has of course focused on Pt 4 of the 2001 Act, since it contains the only provisions in respect of which the British government thought it necessary to make a derogation from the convention. Those are the measures which must be shown to be strictly required by the exigencies of the situation. But it would be a mistake, in my view, to divorce them entirely from their context, that is as part of a major enactment most of whose provisions are aimed impartially at British nationals and non-nationals, and some of whose provisions (those creating offences committed overseas) are aimed exclusively at nationals.

[208] As to whether the 2001 Act was passed at a time of 'public emergency threatening the life of the nation' within the meaning of art 15, both the SIAC ([2002] HRLR 1274) and the Court of Appeal concluded that there was such an emergency, and (in common with most of the House) I agree with their conclusion. A danger of terrorist action may be imminent even though there is uncertainty as to when, where and how the terrorists attack. Indeed (especially as the terrorists may try to use bacteriological, chemical, radiological or nuclear weapons) the uncertainty increases the gravity of the emergency, since it creates widespread anxiety and the need for comprehensive precautions. Given the requirement (under art 15) for a strictly proportionate response to the emergency, there is no reason to set the threshold very high, and the jurisprudence of the European Court of Human Rights in the cases concerning Northern Ireland and the Irish Republic (especially the first, *Lawless v Ireland (No 3)* (1961) 1 EHRR 15 and the most recent, *Marshall v UK* App no 41571/98 (10 July 2001, unreported)) shows that the court has not set it very high.

[209] I have the misfortune to differ from most of your Lordships as to whether the derogating measures are proportionate, rational and non-discriminatory, or are in the alternative disproportionate, irrational and offensively discriminatory. In the circumstances it would be inappropriate for me to add much to the already considerable volume of your Lordships' reasons; but it would also be inappropriate, in such an important case, not to set out briefly the reasons for my dissent. I hardly need add that having had the great advantage of reading and considering in draft all your Lordships' speeches, it is only with great diffidence that I have arrived at, and I still maintain, a different opinion. I do so for three main reasons: (1) When this country is faced, as it is, with imminent threats from enemies who make use of secrecy, deception and surprise, the need for anti-terrorist measures to be 'strictly necessary' must be interpreted in accordance with the precautionary principle recognised by the Strasbourg Court in *Ireland v UK* (1978) 2 EHRR 25. (2) I agree with the Court of Appeal, and very respectfully disagree with the SIAC and the majority of the House, on the issue of discrimination. (3) The SIAC is an independent and impartial tribunal of unquestioned standing and expertise. It carefully considers any appeal by a suspected terrorist, and periodically reviews any of its decisions which have been adverse to a detained suspect. I would in no way

dissent from condemning the odiousness of indefinite detention at the will of the executive, but such a description cannot be applied to detention under Pt 4 of the 2001 Act without so much qualification as to amount almost to contradiction. I will add some brief comments on the second and third points.

[210] As to discrimination, I greatly respect the views of the majority, but I consider that there has been insufficient recognition that Pt 4 of the 2001 Act is only a small (although undoubtedly important) part of Parliament's response to the events of 11 September 2001. Part 4 is (as its heading indicates) the only part of the 2001 Act which is concerned with immigration. It is also the only part of the 2001 Act in respect of which the government felt it necessary to make a derogation from the convention. But in my view it does not follow from those two facts that the government can be said to have acted irrationally in using immigration control as the means of dealing with non-nationals suspected of involvement in terrorism. Those liable to be detained under Pt 4 are only a small subset of non-national terrorist suspects, that is those who cannot be deported because of an apprehension of torture after their return home. All the other provisions of the 2001 Act are aimed at any terrorists or (in some cases) suspected terrorists, regardless of nationality (except that, as already noted, some offences under the 2001 Act can be committed only by nationals).

[211] What is said on behalf of the appellants is that non-nationals who cannot be deported (because they would be at risk of torture contrary to art 3) are in the same position as British nationals, in that they cannot be deported from the United Kingdom, and that they should therefore be treated in the same way. To detain one group but not the other is, it has been argued, unjustified discrimination between fair comparators. Lord Bingham has in his speech cited the approach proposed by Lord Steyn in *R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39 at [42], [2004] 4 All ER 193 at [42], [2004] 1 WLR 2196, amplifying the formulation by Brooke LJ in *Wandsworth London BC v Michalak* [2002] EWCA Civ 271 at [20], [2002] 4 All ER 1136 at [20], [2003] 1 FCR 713. The amplified formulation is useful so far as it goes but to my mind its drawback is that it hangs everything on the word 'analogous' in the fourth question. Further analysis of the issue, and the competing interests at stake, has to be undertaken in order to answer the question whether the suggested comparators are in a relevantly analogous situation. This point was made by Laws LJ in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797 at [61], [2003] 3 All ER 577 at [61], and by my noble and learned friend Baroness Hale of Richmond in *Ghaidan v Mendoza* [2004] UKHL 30 at [134], [2004] 3 All ER 411 at [134], [2004] 2 AC 557. There are attractions in the simpler test which Laws LJ proposes, but again it may still be necessary to spell out the process of reasoning adopted by his 'rational and fair-minded person'.

[212] Mr Emmerson QC, for the first group of appellants, accepted that there was a difference between the suggested groups of comparators but he described it as technical. In my view the difference, seen in this context, is by no means technical. It is fundamental. British citizens have a right of abode (under ss 1 and 2 of the Immigration Act 1971). They cannot be deported, whatever crimes they have committed or may be thought likely to commit. There is therefore no question of their being detained with a view to

deportation, regardless of whether there is any risk of their being tortured if sent overseas, or of whether there is any safe country to receive them. There is not therefore any question of detaining British citizens in 'a prison with three walls' (the phrase used in the courts below in recognition of the fact that a suspected terrorist detained under Pt 4 is free to choose, as two of Mr Emmerson's clients have chosen, to return to his own country, or to a country in which he has a status of dual nationality). Suspected terrorists who are British citizens could be detained only in 'a prison with four walls'—that is, to use the normal phrase, they would have to be interned. Their internment would be both a grave invasion of their individual human rights and a drastic reversal of the considered choice of the legislature as enacted in the 2000 Act.

[213] Mr Rabinder Singh QC (one of the counsel appearing for Liberty in the Court of Appeal and in this House) has in a recent lecture ('Equality: The Neglected Virtue' [2004] EHRLR 141, p 151) criticised the Court of Appeal's reversal of the SIAC's decision on the discrimination point:

> 'Whenever a person argues that a measure is discriminatory the state could always caricature the argument as an argument that the state has not gone far enough.
>
> To take an extreme example which one hopes would never happen in this country: suppose the state announces that there is an economic crisis and that it is necessary in the public interest that property should be seized without compensation. It seeks to derogate from Art.1 of Protocol 1. But then suppose that the state announces that the only property which is to be seized is that belonging to Jewish people. Immediately the question of discrimination arises. In one sense it could be said that the state has acted more proportionately by drafting its measure in a narrow way rather than by hitting everyone in society. But no one could seriously suggest that such a measure was compatible with human rights principles, because it would constitute the most offensive kind of discrimination.'

[214] That would indeed be discrimination of the most offensive kind. If instead the state decided to impose on every adult member of the public a capital levy of £10,000, there would be a semblance of equality, but it would still be irrational and unfair since it would have a far harsher effect on some members of the public (that is, those of modest means) than on other richer members of the public. A levy of £10,000 on every member of the public owning assets of over £100,000 would be more rational and fair, but would still produce grievances in borderline cases, and where property owners could not raise money on their assets. To take another example slightly closer to the present appeals, a decision to seal off and evacuate some part of a town because of an imminent emergency would have a far greater effect on those who were permanent residents owning houses in the area, as compared with persons who were transient lodgers. Their cases would not be the same, and different treatment would be not only justified but also necessary. In each case the government must aim at 'careful tailoring', to use McLachlin J's metaphor in *RJR-MacDonald Inc v A-G of Canada* [1995] 3 LRC 653 at 735:

> 'As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully

tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator.'

[215] In this case a power of interning British citizens without trial, and with no option of going abroad if they chose to do so, would be far more oppressive, and a graver affront to their human rights, than a power to detain in 'a prison with three walls' a suspected terrorist who has no right of abode in the United Kingdom, and whom the government could and would deport but for the risk of torture if he were returned to his own country. Detention of non-national suspects is still a cause of grave concern, and I share the anxieties expressed by Lord Woolf CJ ([2003] 1 All ER 816 at [9]) and by Brooke LJ (at [86]) in the Court of Appeal. But in my view Pt 4 of the 2001 Act is not offensively discriminatory, because there are sound, rational grounds for different treatment.

[216] This conclusion is in line with the decision of the European Court of Human Rights in *Moustaquim v Belgium* (1991) 13 EHRR 802 at 816 (para 49). The brevity of the court's judgment on the point shows that it was regarded as clear and uncontroversial. The court's decision in *Gaygusuz v Austria* (1997) 23 EHRR 364, by contrast, was a case of unjustifiable discrimination, since in the field of contributory social security benefits there was no good reason for discriminating against the applicant because he was not an Austrian citizen. He had worked in Austria and paid his social security contributions, and there was no good reason for discriminating against him on the ground of his nationality.

[217] As I have said, the detention without trial of non-national suspected terrorists is a cause of grave concern. But the judgment of Parliament and of the Secretary of State is that these measures were necessary, and the 2001 Act contains several important safeguards against oppression. The exercise of the Secretary of State's powers is subject to judicial review by the SIAC, an independent and impartial court, which under ss 25 and 26 of the 2001 Act has a wide jurisdiction to hear appeals, and must also review every certificate granted under s 21 at regular intervals. Moreover the legislation is temporary in nature. Any decision to prolong it is anxiously considered by the legislature. While it is in force there is detailed scrutiny of the operation of ss 21–23 by the individual (at present Lord Carlile of Berriew QC) appointed under s 28. There is also a wider review by the Committee of Privy Councillors appointed under s 122. All these safeguards seem to me to show a genuine determination that the 2001 Act, and especially Pt 4, should not be used to encroach on human rights any more than is strictly necessary.

[218] I think it is also significant that in a period of nearly three years no more than 17 individuals have been certified under s 21. Of course every single detention without trial is a matter of concern, but in the context of national security the number of persons actually detained (now significantly fewer than 17) is to my mind relevant to the issue of proportionality. Liberty in its written submissions appears to rely on the small number of certifications as evidence that there is not a sufficiently grave emergency. That is, I think, a striking illustration of the dilemma facing a democratic government in protecting national security. I would dismiss these appeals.

BARONESS HALE OF RICHMOND.

[219] My Lords, I have read with admiration and complete agreement the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote and Lord Rodger of Earlsferry. They have said everything that could possibly be said. I have nothing original to add. But this is the most important case to come before the House since I have been a member. Perhaps the most helpful thing that I can do is to provide a simple summary of the principles governing what we are doing and why we are doing it.

[220] We do not have power in these proceedings to order that the detainees be released. This is not a challenge to the individual decisions to detain them. That may come before us in future. It is in that context that the issue of the admissibility of evidence which may have been obtained by the use of torture abroad could arise. But that issue is not before us at present. Before us is a challenge to the validity of the law under which the detainees are detained. That law is contained in an Act of Parliament, the Anti-terrorism, Crime and Security Act 2001. The Human Rights Act 1998 is careful to preserve the sovereignty of Parliament. The courts cannot strike down the laws which the Queen in Parliament has passed. However, if the court is satisfied that a provision in an Act of Parliament is incompatible with a convention right (under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act)), it may make a declaration of that incompatibility (under s 4 of the 1998 Act). This does not invalidate the provision or anything done under it. But government and Parliament then have to decide what action to take to remedy the matter.

[221] The convention right in question here is the right under art 5(1): 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases ...'

[222] There are then listed six possible reasons for depriving a person of his liberty, none of which applies here. These people are not detained under art 5(1)(f) 'with a view to deportation or extradition' because they cannot be deported and no other country has asked for their extradition. They are being detained on suspicion of being international terrorists, a reason which does not feature in art 5. It does not feature because neither the common law, from which so much of the convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned. It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.

[223] Yet that is what the 2001 Act allows. The Home Secretary may issue a certificate (under s 21) if he reasonably (a) believes that a person's presence here is a risk to national security, and (b) suspects that he is a terrorist. A terrorist is someone who takes part in acts of international terrorism, belongs to an international terrorist group, or merely supports or assists such a group. These are all likely to be criminal offences under the Terrorism Act 2000 or other legislation. But a person so certified can be detained indefinitely (under s 23) without being charged with or tried for any criminal offence (indeed one

of the detainees has been tried and acquitted of such an offence). There are safeguards, as the Attorney General has rightly pointed out, greater than under any earlier internment powers. Belmarsh is not the British Guantanamo Bay. Their cases must be reviewed by the Special Immigration Appeals Commission (SIAC). The SIAC can see all the material which was available to the Home Secretary. But much of this is 'closed' so that the detainee and his lawyers cannot see it. Instead there are 'special advocates' who can see it, cross-examine witnesses, and make representation to the SIAC about it, and may even persuade the SIAC that some of the material should be disclosed to the detainee. But they cannot discuss it with or take instructions from the detainee, so they do not know whether he might have an answer to it. The detainee does not know a good deal of the case against him. He is not even interviewed by the authorities so that he can attempt to give some account of himself (although that might be rather limited if they cannot tell him what they have against him). The SIAC does know the case against him, but all it can do is decide whether the Home Secretary's belief and suspicion were in the circumstances reasonable. The SIAC does not decide whether the detainee actually is an international terrorist as defined in the 2000 Act, merely whether the Home Secretary reasonably suspects that he is. Suspicion is an even lower hurdle than belief: belief involves thinking that something *is* true; suspicion involves thinking that something *may be* true. It is not surprising that, of the 17 who have been detained under s 23 so far, only one has had his certificate cancelled by the SIAC. Another has had his certificate discharged by the Home Secretary. Two others have left for other countries. For the rest there is no end in sight and no clear idea of what they might be able to do to secure their release. One has been transferred to Broadmoor (we have not been told the legal basis for this) and another has been granted bail by the SIAC on very strict conditions of house arrest because of his mental condition. If we have any imagination at all, this should come as little surprise. We have always taken it for granted in this country that we cannot be locked up indefinitely without trial or explanation.

[224] Article 5 applies to 'Everyone'. States who are parties to the convention are required by art 1 to secure the rights and freedoms defined in the convention to 'everyone within their jurisdiction'. This includes everyone physically present within their territory. So it was necessary for the United Kingdom to depart from its normal obligations under the convention in order to enact this legislation. Departure is permitted under art 15:

> 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

[225] The rights defined in the convention have become rights in United Kingdom law by virtue of the 1998 Act; but s 1(2) provides that the rights defined in the convention articles shall have effect subject to any 'designated derogation'. This means a derogation designated in an order made by the Secretary of State under s 14, in this case the Human Rights Act 1998

(Designated Derogation) Order 2001, SI 2001/3644. Such an order would not be within his powers if it provided for a derogation which was not allowed by the convention. Section 30(2) and (5) of the 2001 Act allows the detainees to challenge this derogation from their art 5(1) rights in proceedings before the SIAC and in an appeal from the SIAC's decision. Thus it is that we have power to consider the validity of the derogation order made by the Secretary of State and to quash it if it is invalid. If the derogation order is invalid, it follows that detention powers under the 2001 Act are incompatible with the convention rights as defined in the 1998 Act and that we have power to declare it so. It will then be for Parliament to decide what to do about it.

[226] The courts' power to rule on the validity of the derogation is another of the safeguards enacted by Parliament in this carefully constructed package. It would be meaningless if we could only rubber stamp what the Home Secretary and Parliament have done. But any sensible court, like any sensible person, recognises the limits of its expertise. Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the government and its advisers. They may, as recent events have shown, not always get it right. But courts too do not always get things right. It would be very surprising if the courts were better able to make that sort of judgment than the government. Protecting the life of the nation is one of the first tasks of a government in a world of nation states. That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny. If a government were to declare a public emergency where patently there was no such thing, it would be the duty of the court to say so. But we are here considering the immediate aftermath of the unforgettable events of 11 September 2001. The attacks launched on the United States on that date were clearly intended to threaten the life of that nation. The SIAC were satisfied that the open and closed material before them justified the conclusion that there was also a public emergency threatening the life of this nation. I, for one, would not feel qualified or even inclined to disagree.

[227] But what is then done to meet the emergency must be no more than 'is strictly required by the exigencies of the situation'. The government wished to solve a problem which had three components: (1) it suspected certain people living here of being international terrorists—in the very broad definition given to that term by the 2000 Act; but (2) either it could not or it did not wish to prove this beyond reasonable doubt by evidence admissible in a court of law; and (3) it could not solve the problem by deporting them, either for practical or for legal reasons.

[228] The government knew about certain foreign nationals presenting this problem, because they were identified during the usual immigration appeals process. But there is absolutely no reason to think that the problem applies only to foreigners. Quite the reverse. There is every reason to think that there are British nationals living here who are international terrorists within the meaning of the 2000 Act; who cannot be shown to be such in a court of law; and who cannot be deported to another country because they have every right to be here. Yet the government does not think that it is necessary to lock them up. Indeed, it has publicly stated that locking up nationals is a draconian step which could not at present be justified. But it has provided us with no real explanation of why it is necessary to lock up one group of people sharing

exactly the same characteristics as another group which it does not think necessary to lock up.

[229] The Attorney General's arguments were mainly directed to the entirely different question of whether it is justifiable in international law to treat foreigners differently from nationals. The unsurprising answer is that some differences in treatment are indeed allowed. Foreigners do not have to be given the same rights to participate in the politics and government of the country as have citizens (see art 16 of the convention). Nor do they have to be given the same rights to come or to stay here; if they are here, they may be refused entry or deported (and detained for that purpose under art 5(1)(f)). But while they are here they have the same human rights as everyone else. This includes not being forcibly removed to a place where they are liable to suffer torture or other severe ill-treatment contrary to art 3 of the convention. It also includes not being locked up except in the circumstances allowed under art 5.

[230] The Attorney General did argue that it would have been discriminatory to lock up the nationals as well as the foreigners, because the foreigners are free to leave this country if they can and want to do so, but nationals have no other country which has an obligation to receive them. It is correct that we have no power to force our nationals to go, unless some other country wishes to extradite them. But if it is necessary to lock anyone up in a 'prison with three walls', the reality is that it will depend upon the personal circumstances of each individual whether he has in fact somewhere else to go. Some nationals may, for example, have dual nationality or friends in foreign countries which are happy to receive them. But the very fact that it is a prison with only three walls also casts doubt upon whether it is 'strictly required by the exigencies of the situation'. What sense does it make to consider a person such a threat to the life of the nation that he must be locked up without trial, but allow him to leave, as has happened, for France where he was released almost immediately?

[231] The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation.

[232] It is also inconsistent with our other obligations under international law from which there has been no derogation, principally art 14 of the convention. This states:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[233] This has five components, some of which overlap: (i) people belonging to a particular group or status (ii) must not be singled out for less favourable treatment (iii) from that given to other people who are in the same situation (iv) in relation to the enjoyment of their convention rights (v) unless there is an objective justification for the difference in treatment.

[234] Article 14 would make it unlawful to single out foreign nationals for less favourable treatment in respect of their art 5 rights whether or not the derogation from those rights was 'strictly required by the exigencies of the situation'. It is wrong to single them out for detention without trial if detention without trial is *not* strictly required to meet the exigencies of the situation. It is also wrong to single them out for detention without trial if detention without trial *is* strictly required, if there are other people who are in the same situation and there is no objective justification for the difference in treatment. Like cases must be treated alike.

[235] Are foreigners and nationals alike for this purpose? The Attorney General argued that they are not. The foreigners have no right to be here and we would expel them if we could. We only have to allow them to stay to protect them from an even worse invasion of their human rights. Hence, he argued, the true comparison is not with suspected international terrorists who are British nationals but with foreign suspected international terrorists who can be deported. This cannot be right. The foreigners who can be deported are not like the foreigners who cannot. These foreigners are only being detained because they cannot be deported. They are just like a British national who cannot be deported. The relevant circumstances making the two cases alike for this purpose are the same three which constitute the problem: a suspected international terrorist, who for a variety of reasons cannot be successfully prosecuted, and who for a variety of reasons cannot be deported or expelled.

[236] Even then, the difference in treatment might have an objective justification. But to do so it must serve a legitimate aim and be proportionate to that aim. Once again, the fact that it is sometimes permissible to treat foreigners differently does not mean that every difference in treatment serves a legitimate aim. If the situation really is so serious, and the threat so severe, that people may be detained indefinitely without trial, what possible legitimate aim could be served by only having power to lock up some of the people who present that threat? This is even more so, of course, if the necessity to lock people up in this way has not been shown.

[237] Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities. As Thomas Jefferson said in his first inaugural address (4 March 1801):

> '[T]hough the will of the majority is in all cases to prevail, that will to be rightful must be reasonable ... [T]he minority possess their equal rights, which equal law must protect, and to violate would be oppression.'

[238] No one has the right to be an international terrorist. But substitute 'black', 'disabled', 'female', 'gay', or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up that group but not the 'white', 'able-bodied', 'male' or 'straight' suspected international terrorists. The answer is clear.

[239] I would therefore allow the appeals, quash the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644, and declare s 23 of the 2001 Act incompatible with the right to liberty in art 5(1) of the convention.

LORD CARSWELL.

[240] My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill, and for the reasons which he has given, which also appear in the opinions of those of your Lordships who have reached the same conclusions, I would allow the appeals and make the order which he proposes.

Appeals allowed. Human Rights Act 1998 (Designated Derogation) Order 2001 quashed. Declaration made that s 23 of the Anti-terrorism, Crime and Security Act 2001 incompatible with arts 5, 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

Kate O'Hanlon Barrister.

Uphill v BRB (Residuary) Ltd

[2005] EWCA Civ 60

COURT OF APPEAL, CIVIL DIVISION

TUCKEY AND DYSON LJJ

13 JANUARY, 3 FEBRUARY 2005

Court of Appeal – Practice – Permission to appeal – Second appeals from county court or High Court – Appeals raising important point of principle or practice – Some other compelling reason – CPR 52.13(2).

CPR 52.13(2)[a] provides that the Court of Appeal will not give permission to appeal on a second appeal unless it considers '(a) that the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it'. The reference to 'an important point of principle or practice' is to an important point of principle or practice that has not yet been established. What is contemplated by 'some other compelling reason' is an appeal which does not raise an important point of principle or practice. It is unlikely that the court will find that there is a compelling reason unless it forms the view that the prospects of success are very high, although that requirement may not be sufficient to justify the grant of permission. This necessary condition will be satisfied where it is clear that the judge on the first appeal made a decision which is perverse or otherwise plainly wrong. It may be clear that the decision is wrong because it is inconsistent with authority of a higher court. In view of the exceptional nature of the jurisdiction conferred by r 52.13(2) it is important not to assimilate the criteria for giving permission for a first appeal with those which apply in relation to second appeals. However, the fact that the prospects of success are very high will not necessarily be sufficient to provide a compelling reason. For example, if it is the appellant's fault that the first appeal was dismissed, because he failed to refer to authority of a higher court which demonstrates that the decision on the first appeal was wrong, the court may conclude that justice does not require the Court of Appeal to give the appellant a second opportunity, in that there is a reason for giving permission, but it is not compelling, because the appellant contributed to the court's mistake. There may be circumstances where there is a compelling reason to grant permission to appeal even where the prospects of success are not very high. The court may be satisfied that there are good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal unfair. In such a situation, the court might conclude that there was a compelling reason, even though the appellant had no more than a real, as opposed to a fanciful, prospect of success, as it would be plainly unjust to deny a second appeal in such circumstances, since to do so, might, in effect, deny him a right of appeal altogether (see [18], [19], [24], below).

a CPR 52.13 provides: '(1) Permission is required from the Court of Appeal for any appeal to that court from a decision of a county court or the High Court which was itself made on appeal. (2) The Court of Appeal will not give permission unless it considers that—(a) the appeal would raise an important point of principle or practice; (b) there is some other compelling reason for the Court of Appeal to hear it.'

Notes

For second appeals from appeals in county courts and High Court, see 37 *Halsbury's Laws* (4th edn reissue) para 1521.

Cases referred to in judgment

Ahmed v Stanley A Coleman & Hill [2002] EWCA Civ 935, [2002] All ER (D) 117 (Jun).

Anderton v Clwyd CC [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174.

Brown v Fenwick [2001] EWCA Civ 1481.

Cranfield v Bridgegrove Ltd [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441.

Hashtroodi v Hancock [2004] EWCA Civ 652, [2004] 3 All ER 530, [2004] 1 WLR 3206.

Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

Application for permission to appeal

The defendant, BRB (Residuary) Ltd applied for permission to appeal from the decision of Judge Wyn Williams QC in the Cardiff County Court on 7 May 2004 dismissing its appeal from the decision of District Judge Doel on 17 October 2003 refusing to set aside the order of Deputy District Judge Jones made on 25 November 2002 granting an extension of time for service of the claim form by the claimant, Mrs Uphill, the widow and administratrix of Malcolm Ernest Uphill, in proceedings claiming damages for negligence under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934. The facts are set out in the judgment of the court.

Mark James (instructed by *Weightmans*) for the defendant.

Robert O'Leary (instructed by *Hugh James*, Blackwood) for the claimant.

Cur adv vult

3 February 2005. The following judgment of the court was delivered.

DYSON LJ.

[1] The claimant is the widow and administratrix of the estate of Mr Malcolm Uphill. Between 4 June 1951 and 14 April 1956, Mr Uphill was employed as an apprentice by British Transport Commission or its predecessors in title. It is the claimant's case that during this period he was exposed to asbestos dust, as a result of which he died of mesothelioma on 15 August 1999. In these proceedings, the claimant claims damages for negligence under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934. The defendant is a residuary body, which was created to deal with such claims brought against its predecessors in title. The limitation period expired on 14 August 2002.

[2] The claimant consulted Messrs Hugh James, solicitors, in March 2002. The claim was handled by Mr Lysaght, assisted by Miss Evans. On 31 May 2002, they wrote to the defendant asking for confirmation that it was the correct party to sue. The reply dated 26 June came from Miller Fisher, a firm of loss adjusters. They did not explicitly state for whom they were acting or that the defendant was

the correct party to the proposed litigation, but they asked for various information. A reminder was sent by the claimant's solicitors on 15 July, but this produced no reply.

[3] On 29 July, Miss Evans telephoned Miller Fisher. She spoke to a Mr Crawford. She recorded the gist of the conversation in an attendance note as follows:

> 'MLE spoke to Mr Crawford at Miller Fisher. I told him we were issuing proceedings and I needed the correct name. He confirmed it was BRB Residuary Limited. I asked if it was his address and he said yes.'

[4] Mr Crawford says in his witness statement that he has no recollection of this conversation. The district judge held that the conversation recorded in the attendance note was insufficient to amount to a clear agreement that service on the defendant could be effected by serving the claim form on its loss adjusters. Accordingly, he held, the claim form should have been served either on the defendant itself or on its solicitors.

[5] On 6 August, the claimant's solicitors sent the claim form to the court. It was issued by the court on 8 August. CPR 7.5(2) provides that the general rule is that the claim form 'must be served within 4 months after the date of issue'. It was not so served. The reasons for this are set out at paras 5–7 of the witness statement of Mr Lysaght. He considered that he did not have the material necessary to enable him to prepare a 'meaningful' schedule of loss. Accordingly, he applied for an extension of time for service of the claim form. On 25 November 2002, Deputy District Judge Jones granted without notice an extension of time for service until 1 April 2003.

[6] The claimant's solicitors purported to effect service by sending the claim form by first class post under cover of a letter dated 11 March 2003 to Mr Crawford at the address of Miller Fisher in Derby. He forwarded the document to the defendant's solicitor who received it on 17 March. On 18 March, the defendant acknowledged service of the proceedings by its solicitors. In the acknowledgment of service, the solicitors ticked a box indicating that the defendant intended to contest the whole of the claim, but they did not tick the box which indicated that it intended to contest jurisdiction. On the same day, they wrote to the claimant's solicitors seeking an extension of time for service of the defence. The claimant's solicitors acceded to this request. On 1 April 2003, the defendant's solicitors sought further information relevant to the merits of the claim.

[7] On 10 April, the defendant applied for an order that '1. The "without notice" order dated 25 November 2002 be set aside. 2. The purported service of the claim form be set aside. 3. The action be dismissed with the claimant paying the defendant's costs.'

[8] These applications were heard by District Judge Doel on 17 October 2003. The district judge refused to set aside the order of 25 November 2002. He said at para 15 that he would not himself have granted the extension of time for service, but would have ordered the claimant to serve the claim form without further delay. He explained at para 19 that, having regard to the overriding objective of dealing with cases justly, it would be wrong to set aside the order granting an extension of time. If he were to set aside the order, the claimant would be left without a remedy against the defendant. This would be unjust, not least because

there was no evidence that the defendant had been prejudiced by the extension of time and the delayed service of the claim form.

[9] As we have already said, the district judge held that service on the loss adjusters was not good service. But he went on to make an order under CPR 6.9 dispensing with service of the claim form on the grounds that the document had in fact been delivered to the defendant's solicitors within the extended time for service, so that 'any arguments about irregularity are completely overridden.'

[10] Finally, although it was not necessary for him to do so, the district judge dealt with the claimant's argument that the defendant had waived the right to object to service of the claim form, and held that there had been no waiver.

[11] Permission to appeal was given by Judge Graham Jones. The appeal was heard by Judge Wyn Williams QC on 7 May 2004. There were three issues: (i) should the district judge have set aside the order of 25 November 2002 extending time for service of the claim form until 1 April 2003? If not, (ii) was the claim form validly served two days after it was posted to Miller Fisher on 11 March, and if not, was the district judge right retrospectively to dispense with service of the claim form? (iii) (by a respondent's notice) was the district judge right to hold that the defendant had not waived the right to challenge the validity of the service of the claim form?

[12] The judge held: (i) the order of 25 November 2002 should not be set aside; (ii) the claim form was not validly served but there were exceptional circumstances justifying the retrospective dispensing with service; and (iii) the defendant had waived its right to challenge the validity of service.

[13] On behalf of the defendant, it is submitted that the judge erred in each of these conclusions. Dyson LJ adjourned the application for permission to appeal, because it seemed to him that the application raised important questions as to the meaning and scope of CPR 52.13(2) which provides that the Court of Appeal will not give permission to appeal on a second appeal unless it considers that '(a) the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it.'

[14] The principles applicable to the grant of an extension of time for service of a claim form under CPR 7.6 have been identified by this court in *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 3 All ER 530, [2004] 1 WLR 3206. The principles applicable to the making of an order dispensing with service under r 6.9 have been identified by this court in a number of decisions, including *Anderton v Clwyd CC* [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174 and *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441.

[15] The broad questions that arise on the current application are (i) whether, and if so in what circumstances, permission to appeal should be given under r 52.13(2)(a) where the ground of appeal is that there has been a failure to apply correctly a point of practice or principle which has already been established by a court of higher authority, and (ii) the scope and meaning of the phrase 'other compelling reason' in r 52.13(2)(b).

[16] The *Practice Direction (citation of cases: restrictions and rules)* [2001] 2 All ER 510, [2001] 1 WLR 1001 provides at para 6.1 that judgments on applications for permission to appeal may not be cited before any court 'unless it clearly indicates that it purports to establish a new principle or to extend the present law'. This judgment is intended to provide guidance as to the true meaning and effect of r 52.13(2)(a) and (b) and may be cited in future cases.

[17] In considering these questions, it is important to have in mind what Brooke LJ said in *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801 at 810–812, [2000] 1 WLR 1311 at 1319–1320. It is only in an 'exceptional' case that a second appeal may be sanctioned. The general rule is that the decision of the appeal court on the first appeal will be the final decision. It is no longer possible to pursue a second appeal merely because the appeal is properly arguable or has a real prospect of success. The principle embodied in r 52.13(2) reflects the need for certainty, reasonable expense and proportionality.

'IMPORTANT POINT OF PRINCIPLE OR PRACTICE'

[18] In our judgment, it is clear that the reference in r 52.13(2)(a) to 'an important point of principle or practice' is to an important point of principle or practice that has not yet been established. The distinction must be maintained between (a) establishing and (b) applying an established principle or practice correctly. Where an appeal raises an important point of principle or practice that has not yet been determined, then it satisfies r 52.13(2)(a). But where the issue sought to be raised on the proposed appeal concerns the correct application of a principle or practice whose meaning and scope has already been determined by a higher court, then it does not satisfy r 52.13(2)(a). We cannot accept the submission of Mr James that the question whether an established point of principle or practice has been properly applied in an individual case itself raises an important point of principle or practice. Were the position to be otherwise, the door would be open to second appeals in all cases which concern the application of an important principle or practice. That is clearly not what was intended.

'SOME OTHER COMPELLING REASON'

[19] We turn to r 52.13(2)(b) and 'some other compelling reason'. What is contemplated here is an appeal which does not raise an important point of principle or practice. 'Compelling' is a very strong word. It emphasises the truly exceptional nature of the jurisdiction. This is because the philosophy which underlies r 52.13(2) is, as explained by Brooke LJ in *Tanfern*, that second appeals are exceptional. We also refer to what Brooke LJ said in *Ahmed v Stanley A Coleman & Hill* [2002] EWCA Civ 935, [2002] All ER (D) 117 (Jun) at [2]:

> 'The restriction on second appeals is important because Parliament has made it clear that it wishes pre-trial disputes in civil litigation to be dealt with, on the whole, at a level lower than this court. It may be that judges in the courts below may make orders which judges in this court would not have made, but the philosophy of the Civil Procedure Rules 1998 is to confirm and bolster the authority of the judges in the lower courts.'

[20] Rule 52.13(2)(b) gives the court the residual power in cases which do not raise an important point of principle or practice (and which, therefore, are of little or no general interest) to give permission to appeal where there is a *compelling* reason to do so. It is tempting to say that the word 'compelling' is an ordinary English word which does not require explanation or amplification. But, despite the strictures contained in para 6.1 of the *Practice Direction (Citation of Authorities)*, our attention has been drawn to a number of decisions where permission for a second appeal has been given, which indicate that there may be differences of view as to how stringent a test is imposed by the words 'other compelling reason.'

[21] The editors of the *Civil Court Service 2004* (the 'Brown Book') suggest at p 1145 that r 52.13(2)(b)—

> 'was inserted to provide an ultimate safety valve. It would allow the Court of Appeal to entertain an appeal notwithstanding that the point was a "one-off" of no general import, if, for example, the decision sought to be appealed was so grossly erroneous or unfair that it would be an affront to justice to allow it to stand.'

[22] Mr O'Leary submits that unless a decision crosses this threshold of error and/or unfairness, there cannot be a compelling reason for giving permission to appeal. Mr James submits that there will always be a compelling reason to give permission to appeal where it is necessary to do so in order to correct a plain injustice. He refers to what Ward LJ said in *Brown v Fenwick* [2001] EWCA Civ 1481 at [24]:

> 'Quite how securely the door to the Court of Appeal should be shut by narrowly confining CPR 52.13(2)(a) to *new* points or principle, and precisely what the interrelationship is between (2)(a) and (2)(b), are matters which may need to be subject to further and fuller argument if this Court is to be able to correct plain injustices.'

[23] We are, of course, mindful of the need to interpret r 52.13(2) so as to give effect to the overriding objective of enabling the court to deal with cases justly: r 1.2. But we doubt whether it is appropriate to substitute a different form of wording (such as 'where it is necessary to in order to correct a plain injustice') for 'other compelling reason'. Nevertheless, in view of the apparent uncertainty as to the stringency of the test, it may be helpful if we attempt to elucidate the phrase. What follows (which is not intended to be exhaustive) has been approved by Lord Phillips of Worth Matravers MR and the Vice-President of the Court of Appeal (Civil Division) (Brooke LJ).

[24] (1) A good starting point will almost always be a consideration of the prospects of success. It is unlikely that the court will find that there is a compelling reason to give permission for a second appeal unless it forms the view that the prospects of success are very high. That will usually be a necessary requirement, although as we shall explain, it may not be sufficient to justify the grant of permission to appeal. This necessary condition will be satisfied where it is clear that the judge on the first appeal made a decision which is perverse or otherwise plainly wrong. It may be clear that the decision is wrong because it is inconsistent with authority of a higher court which demonstrates that the decision was plainly wrong. Subject to what we say at (3) below, anything less than very good prospects of success on an appeal will rarely suffice. In view of the exceptional nature of the jurisdiction conferred by r 52.13(2), it is important not to assimilate the criteria for giving permission for a first appeal with those which apply in relation to second appeals.

(2) Although the necessary condition which we have mentioned at (1) is satisfied, the fact that the prospects of success are very high will not necessarily be sufficient to provide a compelling reason for giving permission to appeal. An examination of all the circumstances of the case may lead the court to conclude that, despite the existence of very good prospects of success, there is no compelling reason for giving permission to appeal. For example, if it is the appellant's fault that the first appeal was dismissed, because he failed to refer to

the authority of a higher court which demonstrates that the decision on the first appeal was wrong, the court may conclude that justice does not *require* this court to give the appellant the opportunity to have a second appeal. There is a reason for giving permission to appeal, but it is not compelling, because the appellant contributed to the court's mistake. On the other hand, if the authority of a higher court which shows that the decision on the first appeal was wrong post-dated that decision, then there might well be a compelling reason for giving permission for a second appeal.

(3) There may be circumstances where there is a compelling reason to grant permission to appeal even where the prospects of success are not very high. The court may be satisfied that there are good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal unfair. Suppose, for example, that the judge did not allow the appellant to present his or her case. In such a situation, the court might conclude that there was a compelling reason to give permission for a second appeal, even though the appellant had no more than a real, as opposed to fanciful, prospect of success. It would be plainly unjust to deny an appellant a second appeal in such a case, since to do so might, in effect, deny him a right of appeal altogether.

[25] We have given these examples in an attempt to elucidate our understanding of the phrase 'other compelling reason'. In the present case, there is no suggestion that there was any procedural unfairness in the court below. But it is said in relation to the first ground of appeal at least, that that Court of Appeal authority which was not cited to the judge shows that his decision was plainly wrong. We, therefore, turn to the grounds of appeal.

THE FIRST GROUND OF APPEAL

[26] Mr James submits that the decision of this court in *Hashtroodi*'s case demonstrates that (a) Deputy District Judge Jones should not have extended the time for service of the claim form, (b) District Judge Doel should have acceded to the defendant's application to set aside the extension of time and (c) Judge Wyn Williams QC should have allowed the defendant's appeal against the refusal of District Judge Doel to set aside the extension. In *Hashtroodi*'s case, this court gave guidance as to how the power to extend time for service of a claim form under r 7.6(2) should be exercised. It was held that there is no threshold requirement that a 'good reason' need be shown for failure to serve a claim form within the specified period before the court can exercise its power to extend time under r 7.6(2). But since the power must be exercised in accordance with the overriding objective, it will always be relevant for the court to determine and evaluate the reason why the claim was not served within the specified four months' period. If there was a very good reason, an extension of time would usually be granted; the weaker the reason, the more likely the court would be to refuse the extension. If the claimant or his legal representative simply overlooked the requirement to effect service within the specified period, that would be a strong reason for refusing an extension of time: see judgment of Dyson LJ ([2004] 3 All ER 530 at [17]–[20]).

[27] In the present case, the reason for not serving the claim form within the specified four months' period was that the claimant's legal representative believed that it was not possible to serve the claim form without a fully particularised schedule of loss. It is common ground that this belief was mistaken. There was no good reason for not serving the claim form within the specified

period. This was acknowledged by District Judge Doel who said that he would not have granted the extension of time, but would have ordered the claimant to serve the claim form without more ado.

[28] In our judgment, subject to any arguments about waiver, an appeal against the refusal to set aside the grant of an extension of time for service of the claim form has very strong prospects of success. The necessary condition to which we have referred at [22](1), above is satisfied. We do not accept the submission of Mr O'Leary that, in effect, the judges below applied the *Hashtroodi* approach. They did not consider, still less evaluate, the reason why the claim form was not served within the specified period. The district judge simply said that it would be wrong to set aside the extension of time for service, since otherwise the claimant would be left without a remedy. This is a puzzling observation, since on the face of it, the claimant would have a right of action in negligence against her solicitors. Be that as it may, it is clear that there was no application of what *Hashtroodi*'s case referred to as the 'calibrated' approach.

[29] Does it follow that there is a compelling reason to grant permission to appeal in this case? In deciding whether justice requires permission to be given, it is necessary to examine the timing of the publication of the judgment in *Hashtroodi*'s case in relation to the appeal before the judge in the present case. The hearing before Judge Williams was completed on 7 May 2004. On 19 May, a copy of his draft judgment was sent to the parties by email. They were invited to submit corrections and agree the order. On 25 May, the judgments in *Hashtroodi*'s case were handed down. The decision was very fully reported in the Times on 4 June. It was also reported in the Independent on 16 June. On 15 June, the parties' solicitors lodged an agreed order with the court, and the order was sealed by the court on 18 June.

[30] *Hashtroodi*'s case was obviously a case of great importance. There had previously been no decision of this court as to the proper approach to r 7.6(2). The defendant's legal advisers admit that they became aware of this decision in the first week of June. Mr James submits that, even so, it was not surprising that they did not appreciate its significance for the present case: the argument had been completed and a draft judgment already sent out to the parties. He submits that it would be harsh to criticise the defendant's legal advisers for not acting upon the decision in *Hashtroodi*'s case before 18 June. It is not to be expected that lawyers should immediately act upon relevant decisions on procedural law.

[31] We find it surprising that neither the solicitors nor counsel acted upon this decision before 18 June. It was the first decision by the Court of Appeal on r 7.6(2). It was clearly an important decision. It was well publicised. We would have expected them to have appreciated the significance of the decision for the present case. This was the authoritative decision which provided guidance which had been lacking as to the proper approach to r 7.6(2). In our view, it is plain that the defendant (as the unsuccessful party) should have drawn *Hashtroodi*'s case to the attention of the judge, and asked for permission to make further submissions. It is the failure to take this course which leads us to conclude that there is no compelling reason in this case to give the defendant permission to appeal on this point. We do not consider that justice requires that the defendant be given a third bite at the cherry. In reaching this decision, we have not lost sight of the submission by Mr James that the vagaries of court listing have operated harshly against the defendant. He makes the point that the defendant's original application in the present case was issued on 10 April 2003 and its application to

this court was considered on the papers on 18 October 2004 (18 months later); whereas in *Hashtroodi*'s case, the defendant's original application was issued on 9 June 2003 and judgment was handed down in this court on 25 May 2004 (12 months later). The fact remains, however, that if the defendant had drawn the attention of the judge to *Hashtroodi*'s case before 18 June 2004 and been given permission (as surely it would have been) to make further submissions, the judge would have been likely to set aside the extension of time for service of the claim form but for his finding that the defendant had waived its right to challenge this order. Since a draft of this judgment was circulated to the parties the latter point has led the defendant to submit that there would have been no point in making further submissions to the judge because there were no grounds for asking him to reconsider his decision on waiver which had been reached after hearing full argument. But if that is right, then the *Hashtroodi* point was not determinative of this case and there is no reason, let alone a compelling reason, for this court to hear it.

[32] For these reasons, we refuse permission to advance the first ground of appeal.

THE SECOND GROUND OF APPEAL

[33] The second ground of appeal is that the judge was wrong to hold that the defendant had waived its right to challenge the validity of the claim form. The waiver argument is put by the claimant in two distinct ways. First, it is said that the defendant waived the right to challenge the extension of time for service of the writ. Secondly, it is said that it waived the right to challenge the service of the claim form on the defendant's loss adjusters. The first of these arguments is academic, since we have refused permission to appeal to challenge the extension of time for service of the claim form. We, therefore, propose to say no more about the first waiver argument. The second argument is not academic, since the defendant submits that the judges below were right to hold that the claim form was not validly served on the loss adjusters, and were wrong to dispense with service of the claim form.

[34] Mr James submits that there is an important point of principle or practice as to the circumstances in which a defendant will be held to have waived the right to challenge the validity of service of the claim form. But during the course of argument, he accepted that the position is governed by CPR Pt 11. This provides that a defendant who wishes to dispute the court's jurisdiction to try the claim may apply to the court for an order declaring that it has no such jurisdiction. r 11(4) provides that an application must be made within 14 days after filing an acknowledgment of service. Rule 11(5) provides that 'if the defendant—(a) files an acknowledgment of service; and (b) does not make such an application within the period specified in paragraph (4), he is to be treated as having accepted that the court has jurisdiction to try the claim'. In our judgment, the issue of waiver is clearly resolved by Pt 11, and no important point of principle or practice is raised.

[35] Nor do we consider that there is any other compelling reason for giving permission to appeal on the waiver point. Although the judge's reasoning on this issue is somewhat difficult to identify, there can be no doubt that, on the facts of the present case, the effect of r 11(5) is that the defendant is to be treated as having accepted that the court has jurisdiction to try the claim. This means that it is not open to the defendant to submit that service on the loss adjusters was invalid service (with the consequence that there was no service within the extended time

for service of the claim form). The chronology is that the acknowledgment of service was filed on 18 March 2003 and the application seeking an order that the claim form had not been validly served was made on 10 April 2003 ie more than 14 days later. It is true that neither the district judge nor the judge made reference to Pt 11, although we were told that there was some reference to it in the course of argument. But the position is that the waiver point is fatal to the defendant's complaint that the claim form was not validly served. For these reasons, we do not give permission to appeal on the second ground of appeal.

THE THIRD GROUND OF APPEAL

[36] The third ground of appeal is that there were no grounds for dispensing with service of the claim form. But, as Mr James concedes, this issue becomes moot if it is not open to the defendant to challenge the service of the claim form on the loss adjusters. Since, for the reasons that we have given, such a challenge is not open to the defendant, no useful purpose would be served by giving permission to appeal on the third ground.

CONCLUSION

[37] It follows that we refuse this application for permission to appeal.

Application refused.

Kate O'Hanlon Barrister.

Hertsmere Primary Care Trust and others v Administrators of Balasubramanium's Estate and another

[2005] EWHC 320 (Ch)

CHANCERY DIVISION

LIGHTMAN J

3, 7 MARCH 2005

Practice – Offer to settle – Technical error in CPR Pt 36 offer – Overriding objective of CPR – Defendants notifying claimants of existence of error in Pt 36 offer but failing to disclose its nature – Whether claimants entitled to rely on Pt 36 offer – CPR 1.3, 1.4, 36.21.

A locum optician claimed payments from the statutory predecessors of the claimants for more work than he had done. A prosecution against him was discontinued on his death and the claimants brought proceedings against his estate. They obtained an order of the Court of Appeal under which they were entitled to summary judgment for an account of the overpayments. CPR 36.21[a] provided that where a claimant made an offer under CPR Pt 36 and obtained judgment more advantageous to the claimant than the proposals contained in the offer, the court could order: interest at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court; and costs assessed on an indemnity basis from the same date. Under r 1.3[b] parties were required to help the court to further the overriding objective of the CPR, which was of enabling the court to deal with cases justly. Under r 1.4[c] the court had a duty to further the overriding objective by actively managing cases, and active case management included 'encouraging the parties to co-operate with each other in the conduct of the proceedings'. The claimants made an offer to the defendants under CPR Pt 36 of £450,000 (including interest) plus costs by a letter dated 22 July 2002. The letter did not comply with Pt 36, because it did not state not merely that the offer would remain open for 21 days from the date on which it was made, but also that the defendants could only thereafter accept the offer if the parties agreed the liability for costs or the court gave permission. Six weeks later at a settlement meeting the defendants told the claimants that the

a CPR 36.21, so far as material, provides: '(1) This rule applies where at trial—(a) a defendant is held liable for more; or (b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant's Part 36 offer … (2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court. (3) The court may also order that the claimant is entitled to—(a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court …'

b CPR 1.3 provides: 'The parties are required to help the court further the overriding objective.'

c CPR 1.4, so far as material, provides: '(1) The court must further the overriding objective by actively managing cases. (2) Active case management includes—(a) encouraging the parties to co-operate with each other in the conduct of the proceedings …'

letter had not complied with the terms of Pt 36, but declined to elaborate. They deliberately failed to respond to a later request to explain the basis on which the letter had not complied. The master took accounts pursuant to the order of the Court of Appeal and a costs hearing followed. A day before the hearing, the claimants notified the defendants of their reliance on the Pt 36 offer. At the hearing the defendants disclosed for the first time the non-compliance which they relied on. The master took the view that the error had been a pure technicality and that recourse to that technicality ought not to preclude the entitlement of the claimants to the full benefit of the provisions of r 36.21. He held the overpayments to be some £390,201 and directed payment of some £150,666 being interest up to 13 August 2003 and payment of the claimants' costs to that date on the standard basis. Pursuant to r 36.21 he directed a payment of interest at 10% above base rate from 14 August 2003 and costs from that date on an indemnity basis. The defendants appealed against, inter alia, the application of r 36.21, contending that there had been no duty on the defendants to enable the claimant to have perfected the defect in the Pt 36 offer and rectify the error.

Held – The requirement in r 1.3 that parties were required to help the court to further the overriding objective included assisting the court to further the objective by co-operating with each other. Moreover, the active case management by which r 1.4 provided that the court had to further the overriding objective included encouraging the parties to co-operate with each other in the conduct of the proceedings. In the instant case, the defendants had therefore been duty bound to co-operate with the claimants and that duty had obliged them to provide the information requested as to the non-compliance with CPR Pt 36. The defendants were not entitled to reap any benefit from their breach of that duty and the consequent failure of the claimants to rectify the error by serving a fresh Pt 36 offer. The master's decision had plainly been correct. Accordingly, the appeal would be dismissed (see [11], [12], below).

Notes

For the overriding objective, the application by the court of the overriding objective, and active case management, and for the costs and other consequences where a claimant does better than he proposed in his Pt 36 offer, see 37 *Halsbury's Laws* (4th edn reissue) paras 60–62 and para 826.

Case referred to in judgment

Mitchell v James [2002] EWCA Civ 997, [2003] 2 All ER 1064, [2004] 1 WLR 158.

Appeal and application for permission to appeal

The adminstrators of the estate of Balasubramanium Rabindra-Anandh and Ketheeswary Rabindra-Anandh (i) appealed with permission of Lewison J from the part of the decision of Master Bowman on 29 October 2004 in proceedings brought by the claimants, Hertsmere Primary Care Trust, South East Hertfordshire Primary Care Trust, Enfield Primary Care Trust, Haringey Primary Care Trust, Barnet Primary Care Trust, Camden Primary Care Trust, Islington Primary Care Trust, and Welwyn and Hatfield Primary Care Trust, against the estate to recover overpayments made by the statutory predecessors of the claimants awarding them payment of interest of £55,822·63 in respect of overpayments of £390,201·07 and costs from 14 August 2003 assessed on an indemnity basis pursuant to CPR 36.21; and (ii) applied for permission to appeal

from the earlier judgment of Master Bowman given on taking accounts and directions. The facts are set out in the judgment.

James Ramsden (instructed by *Capsticks*) for the claimants.
Lawrence Power (instructed by *JH Law*, Rugby) for the estate.

Cur adv vult

7 March 2005. The following judgment was delivered.

LIGHTMAN J.

[1] The late Dr Balasubramanium (the deceased) practised as an optician. He worked extensively as a locum in the health authority areas administered by the statutory predecessors of the claimants. He routinely and systematically claimed from those predecessors payment for sight tests which he did not carry out and duplicated claims for payment in respect of those which he did carry out. He was arrested on 6 November 2000. He then ceased practice. He was formally charged on 29 January 2002. He died on 24 June 2002, and in consequence the prosecution was discontinued.

[2] The claimants commenced these proceedings against the estate of the deceased (the estate) on 15 July 2002 and obtained a freezing order. By an order of the Court of Appeal dated 19 February 2004, it was ordered that the claimants were entitled to summary judgment for an account of overpayments made by the claimants' predecessors to the deceased.

[3] I have before me: (1) an appeal (pursuant to permission granted by Lewison J) by the estate against the judgment (the costs judgment) of Master Bowman dated 29 October 2004 in relation to costs and interest consequent upon the judgment (the account judgment) which he had earlier given on taking accounts and directions pursuant to an order of the Court of Appeal; and (2) a renewed application by the estate for permission to appeal the account judgment, permission to appeal had previously been refused on paper by Lewison J.

[4] I can deal with the application for permission to appeal very shortly. The basis of the application is a challenge to the account judgment on the ground (in a word) that Master Bowman wrongly accepted the evidence of the claimants' expert Mr Martin Topping of BDO Stoy Hayward and discounted evidence by the estate's expert Mr George Sim of Sim Kapila. The master had a full opportunity to form a view of the weight to be attributed to the evidence of each of the experts and, for the cogent reasons which he gave, he clearly preferred the evidence of Mr Topping. None the less on the application for permission the estate invites this court to allow an appeal against the master's findings based on the expert evidence. For the court to undertake the exercise of evaluating the master's judgment on this issue, it is not sufficient for the court to have before it (as it has) merely selective parts of the transcripts of the expert evidence chosen by the estate. But that is all that the estate has provided to the court. The critical parts have been omitted. There is a transcript of part only of Mr Sim's evidence and no transcript of the evidence of Mr Topping. The estate made no effort before their selection to agree with the claimants what part or parts of transcripts (less than the whole) should be provided.

[5] In these circumstances the court is quite unable to undertake the exercise requested by the estate. The claimants took this point at the forefront of their skeleton argument why permission to appeal should be refused, and I consider that this argument should be upheld. I appreciate that the estate took this course to limit the expenditure of costs, but no fair hearing can proceed without the full evidence, and plainly the reality is that an application for permission and (if given) a full hearing would not make economic sense for the estate or anyone else. I should add that I have carefully considered the detailed submissions made by both parties in their skeleton arguments based on the limited evidence before me, and (with respect) I fully agree with the decision of Lewison J that an appeal against the account judgment would in any event be bound to fail. I accordingly can confine this judgment to the challenge to the costs judgment.

[6] Master Bowman held that the overpayments amounted to £390,201·07 and directed payment of £150,666·63 in respect of interest being calculated at the rate of 8% from the date of the overpayments up to 26 November 2004 and payment of the claimants' costs up to 13 August 2003 assessed on the standard basis. No challenge is made to those directions. But the master went on, pursuant to CPR 36.21, to direct payment of interest of £55,822·87 (representing interest at a rate of 10% above the base rate from time to time of Barclays Bank plc) from 14 August 2003 to 26 November 2004 and that the estate pay the claimants' costs from 14 August 2003 to be assessed on an indemnity basis. By this appeal the estate seeks to challenge the application of r 36.21 and in particular the directions for the payment of interest calculated at the significantly higher rate and the direction for assessment of costs on an indemnity basis instead of on the standard basis in respect of the period from 14 August 2003.

[7] The essential reason why the master made this order was because the claimants had by letter dated 22 July 2003 (the letter) made an offer expressed to be made under Pt 36 to settle their claim (including their claim to interest) in respect of overpayments upon payment of £450,000 plus legal costs. It is common ground that the letter did not comply with the provisions of r 36.5 because it did not state (as was required), not merely that the offer was to remain open for 21 days from the date on which it was made, but because it did not also provide that after 21 days the estate might only accept the offer if the parties agreed the liability for costs or the court gave permission.

[8] The estate was legally represented throughout. Six weeks after the letter a settlement meeting took place at which the estate's counsel told the claimants' solicitors that the letter did not comply with the terms of Pt 36 but declined to elaborate. In consequence on 6 October 2003 the claimants' solicitors wrote to Messrs SI Jaffar, who at the time were instructed as the estate's solicitors, recounting what had occurred and requesting that, if the estate wished to persist with this line of defence further, the estate's solicitors should explain exactly the basis upon which the letter did not comply. Quite deliberately the estate's solicitors did not respond. The claimant's solicitors notified the estate's solicitors of reliance on the Pt 36 offer on the day before the hearing before the master. The estate's solicitors first disclosed the non-compliance relied on at the hearing before the master.

[9] Rule 36.21 provides that, where a claimant makes a Pt 36 offer and obtains judgment more advantageous to the claimant than the proposals contained in the offer, the court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the

defendant could have accepted the offer without needing the permission of the court and may order the defendant to pay costs assessed on an indemnity basis from the same date, and require the court to make such orders unless it considers it unjust to do so. CPR 36.21(5) provides that in considering whether it would be unjust the court will take into account all the circumstances including the terms of the Pt 36 offer, the stage of the proceedings when the offer was made, the information available to the parties at the time and the conduct of the parties. CPR 36.1(2) however provides that if an offer is made which does not comply with requirements specified in Pt 36 it will only have the consequence specified in r 36.21 if the court so orders. The question before the master was whether he should so order.

[10] The master held that he should do so. Both parties were represented by lawyers, the error was obvious on the face of the letter, the estate's lawyers appreciated it immediately, and no question arose of the omission from the letter misleading the estate or occasioning any prejudice. The error was a pure technicality and recourse to this technicality should not preclude the entitlement of the claimants to the full benefit of the provisions of CPR 36.21. His decision accords with the judgment of Peter Gibson LJ in the Court of Appeal in *Mitchell v James* [2002] EWCA Civ 997 at [24]–[25], [2003] 2 All ER 1064 at [24]–[25], [2004] 1 WLR 158. There is no relevant distinction (as suggested on behalf of the estate) whether the Pt 36 offer is made before or after judgment on liability. He accordingly made the directions which I have set out.

[11] In my judgment the view of the master was plainly correct and most certainly it is not flawed or open to challenge. In view of the submissions made on behalf of the estate I should add a further reason. The estate's complaint regarding non-compliance with r 36.5 should be given no weight for one reason, that the estate's lawyers deliberately withheld from the claimants' lawyers identification of the non-compliance with r 36.5 and accordingly the opportunity to rectify it. The estate's counsel submitted that it was perfectly proper for the estate's lawyers to act in this way, to withhold the information and to take advantage of the non-compliance at a later date. He submitted that there was no duty on the part of the estate's lawyers to enable the claimant to perfect the defect and rectify the error. That may have been the law prior to the CPR, but it is not the law today. Rule 1.2 provides that the court must seek to give effect to the overriding objective when exercising any power or interpreting any rule. Rule 1.1 provides that the overriding objective is to enable the court to deal with cases justly, and dealing with cases justly includes saving expense and ensuring that they are dealt with expeditiously and fairly. Rule 1.3 provides that the parties are required to help the court to further the overriding objective. In this context that must include assisting the court to further the objective by co-operating with each other. It is to be noted that r 1.4 provides that the court must further the overriding objective by actively case managing cases and active case management includes encouraging the parties to co-operate with each other in the conduct of the proceedings. In my view the estate was duty bound to co-operate with the claimants and this duty obliged the estate to provide the information requested. The estate should not be entitled to reap any benefit from its breach of this duty and accordingly the failure of the claimants (on being informed of it) to rectify it by serving a fresh Pt 36 offer. I should add that in any event the failure to do so must constitute conduct which can and should be taken into account in exercise of the court's discretion under r 44.5 whether to assess costs on an indemnity basis.

[12] In my judgment the master in his full and careful judgment dealt with all the relevant considerations and his decision and reasoning cannot be faulted. Whether or not the estate could have paid the £450,000 and costs because the estate was in administration did not render it unjust for the master to make the order which he did. The estate could have written stating willingness to pay the sum so far as assets of the estate were sufficient or to submit to an order for payment. No such statement or offer was ever made. Nor do I think that it was unjust on the suggested ground that the estate did not have available information necessary for an informed decision. No suggestion was ever made by the estate that it needed further information and no willingness was expressed to accept the offer even when the estate was fully prepared for trial. The estate in argument sought to rely for the first time on the appeal on an offer made to settle all claims (and not merely claims in respect of overpayments). This offer was not referred to before the master. Its terms were ambiguous and no doubt for good reasons the estate decided that the offer had no significance. It is not open to the estate to rely on it on this appeal. There is no basis for the challenge made to the master's decision and the appeal must accordingly be dismissed.

Permission to appeal against account judgment refused. Appeal against costs judgment dismissed.

Neneh Munu Barrister.

Re Z (local authority: duty)

[2004] EWHC 2817 (Fam)

FAMILY DIVISION

HEDLEY J

29, 30 NOVEMBER, 3 DECEMBER 2004

Local authority – Statutory duty – Vulnerable adult – Vulnerable adult seeking assisted suicide abroad – Husband proposing to make necessary arrangements and to accompany her – Husband thereby potentially committing criminal offence – Duties of local authority – Whether duty lying on local authority to seek injunctive relief against husband – Whether court would act of its own motion – Local Government Act 1972, s 222.

Z was diagnosed as suffering from a condition which attacked that part of her brain controlling her motor function. The condition was incurable, irreversible, and would eventually cause death. Z became increasingly disabled and required extensive support from the local authority in whose area she resided. Some five years after the diagnosis, then aged about 65, Z began to express strong views about seeking assisted suicide. Her husband informed the local authority that he proposed to make all the necessary arrangements and accompany Z to Switzerland for an assisted suicide. A person who aided the suicide of another committed a criminal offence under the Suicide Act 1961. The local authority informed the police of the situation and obtained an injunction under the inherent jurisdiction of the High Court restraining Z's husband from removing her from England and Wales. A medical report established that Z had capacity and that the decision to seek assisted suicide had been hers alone entirely uninfluenced by outside considerations. The court considered: (i) whether, the competence of Z having been established, the local authority was under a duty to apply for the continuation of the injunction, under the power contained in s 222[a] of the Local Government Act 1972, which provided that where a local authority considered it expedient for the promotion or protection of the interests of the inhabitants of their area, they could prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, could institute them in their own name; and (ii) whether the court should grant any such injunction in any event.

Held – The duties which lay on a local authority when it learned that the welfare of a vulnerable adult in its area was seriously threatened by a decision taken by that person were: (i) to investigate the position of the vulnerable adult to consider what was her true position and intention; (ii) to consider whether she was legally competent to make and carry out her decision and intention; (iii) to consider whether any other (and, if so, what) influence could be operating on her position and intention and to ensure that she had all relevant information and knew all the available options; (iv) to consider whether she was legally competent to make

a Section 222 provides, so far as material: '(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name ... '

and carry out her decision and intention; (v) to consider whether to invoke the inherent jurisdiction of the High Court so that the question of competence could be judicially investigated and determined; (vi) in the event of the adult not being competent, to provide all such assistance as might be reasonably required both to determine and give effect to her best interests; (vii) in the event of the adult being competent, to allow her in any lawful way to give effect to her decision although that should not preclude the giving of advice or assistance in accordance with what were perceived to be her best interests; (viii) where there were reasonable grounds to suspect that the commission of a criminal offence might be involved, to draw that to the attention of the police; and (ix) in very exceptional circumstances, to invoke the jurisdiction of the court under s 222 of the 1972 Act. In the instant case, although the local authority had power, under s 222, to seek to continue the injunction, they had no obligation to do so. Moreover, the court should not seek of its own motion to continue the injunction in the circumstances of the instant case where no-one with the necessary standing sought such an order, where the criminal justice agencies had the requisite knowledge and power, and where the effect of the injunction was to deny a right to a seriously disabled but competent person she could not exercise herself by reason only of her physical disability. Accordingly, the injunction would be discharged (see [18]–[21], below).

City of London Corp v Bovis Construction Ltd [1992] 3 All ER 697 and *R (on the application of Pretty) v DPP* [2002] 1 All ER 1 applied.

Notes

For legal proceedings by and against local authorities, see 29(1) *Halsbury's Laws* (4th edn reissue) para 440.

For the Local Government Act 1972, s 222, see 25 *Halsbury's Statutes* (4th edn) (2001 reissue) 350.

Cases referred to in judgment

Airedale NHS Trust v Bland [1993] 1 All ER 821, [1993] AC 789, [1993] 2 WLR 316, Fam D, CA and HL.

B (adult: refusal of medical treatment), Re [2002] EWHC 429 (Fam), [2002] 2 All ER 449.

City of London Corp v Bovis Construction Ltd [1992] 3 All ER 697, CA.

Gouriet v Union of Post Office Workers [1977] 3 All ER 70, [1978] AC 435, [1977] 3 WLR 300, HL.

R (on the application of Burke) v General Medical Council [2004] EWHC 1879 (Admin), [2004] 3 FCR 579, [2005] 2 WLR 431.

R (on the application of Pretty) v DPP [2001] UKHL 61, [2002] 1 All ER 1, [2002] 1 AC 800, [2001] 3 WLR 1598.

Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] 2 All ER 332, [1984] AC 754, [1984] 2 WLR 929, HL.

Cases also cited or referred to in skeleton arguments

A-G v Able [1984] 1 All ER 277, [1984] QB 795, [1983] 3 WLR 845, DC.

Broadmoor Hospital Authority v R [2000] 2 All ER 727, [2000] QB 775, [2000] 1 WLR 1590, CA.

F v West Berkshire Health Authority (Mental Health Act Commissioner intervening) [1989] 2 All ER 545, sub nom *Re F (mental patient: sterilisation)* [1990] 2 AC 1, [1989] 2 WLR 1025, HL.

Keenan v UK (2001) 10 BHRC 319, ECt HR.
MB (an adult: medical treatment), Re [1997] 2 FCR 541, CA.
NHS Trust A v M, NHS Trust B v H [2001] 1 All ER 801, [2001] Fam 348, [2001] 2 WLR 942.
Osman v UK (1998) 5 BHRC 293, ECt HR.
Phelps v London Borough of Hillingdon, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor) [2000] 4 All ER 504, [2001] 2 AC 619, [2000] 3 WLR 776, HL.
Venables v News Group Newspapers Ltd [2001] 1 All ER 908, [2001] Fam 430, [2001] 2 WLR 1038.
X (Minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Application

A local authority applied for and was granted an injunction under the inherent jurisdiction of the court by Black J on 19 November 2004 restraining Mr Z from removing Mrs Z from England and Wales. The Official Solicitor was invited to act on behalf of Mrs Z and an assessment of her legal capacity to elect for suicide obtained. The matter returned to the court, it was accepted that Mrs Z was competent, and the Official Solicitor accepted appointment as an advocate to the court. The facts are set out in the judgment.

Mark Everall QC and *Jonathan Butler* for the local authority.
Malcolm Sharpe for Mr Z.
Jennifer Richards for the Official Solicitor.

Cur adv vult

3 December 2004. The following judgment was delivered.

HEDLEY J.

[1] The critical issue in this case is the extent of the duty owed by a local authority when the welfare of a vulnerable person in their area is threatened by the criminal (or other wrongful) act of another. The facts of this case highlight this issue as vividly as any that could be imagined.

[2] Mr and Mrs Z reside in the area of the local authority. In 1998 Mrs Z was diagnosed as having cerebella ataxia, a condition which attacks that part of the brain that controls the body's motor functions. She has become increasingly disabled by this condition which is incurable and irreversible. She would in due course die as a result of it.

[3] Although Mrs Z has continued to live at home, she has required extensive support from the local authority and these needs have grown as her condition has deteriorated. In late 2003 (around the time of her sixty-fifth birthday) Mrs Z developed signs of Parkinsonism and it was thought that this pointed to a diagnosis of multi-system atrophy. Quite apart from serious restrictions of motor control, Mrs Z also has speech and hearing difficulties.

[4] In April 2000 Mrs Z was admitted to hospital having taken an overdose of paracetemol tablets; she had left a suicide note. There is no doubt that this was precipitated by her deteriorating physical condition. However it was not until late 2003 that she began to express strong views about seeking assisted suicide. She knew that that could be arranged in Switzerland. Initially her husband and adult children were all strongly opposed to the idea. However,

she persisted in that view and the family, although deeply unhappy at the prospect, gradually came to the view that her wishes should be supported. This was of practical as well as emotional significance since such an assisted suicide could not be effected without another making all the arrangements to get her to the clinic in Switzerland.

[5] Although the evidence discloses that Mr Z could at times appear to be a difficult man, it has to be said that throughout this affair he has acted entirely honourably. He has kept the local authority informed and, most particularly informed them in early November that he had entirely changed his mind and now proposed to make all the necessary arrangements and accompany his wife to Switzerland for the assisted suicide.

[6] The local authority convened a planning meeting (at which a specialist police officer attended) having concluded that Mrs Z was a vulnerable person living in their area. The impression of the social worker was that Mrs Z was legally competent to make the decision that she had made. However, it appeared that that decision could only be carried out if Mr Z provided all necessary assistance and, should he do so, it would appear that he would be committing a criminal offence.

[7] The local authority therefore sought to invoke the inherent jurisdiction of the High Court. On 24 November 2004 Black J sitting in Manchester granted an injunction restraining Mr Z from removing Mrs Z from England and Wales. The matter was listed for hearing before me, the Official Solicitor was invited to act on behalf of Mrs Z and arrangements were made for Professor Tom Sensky, a distinguished consultant psychiatrist, to examine Mrs Z and make an assessment of her legal capacity to elect for suicide.

[8] The court is greatly indebted to Professor Sensky for having a full report available to the court at the adjourned hearing on the 29 November which he also attended. His report, which was accepted on all sides, clearly established two matters. First, that Mrs Z had all the requisite attributes necessary to establish legal capacity to make her own decisions; it should be added that she had also made an 'advance directive' to the like effect. Secondly, that the decision was hers alone entirely uninfluenced by outside considerations; indeed she had long persisted in the view contrary to the expressed wishes of her family. Once it was apparent that Mrs Z had legal competence, the Official Solicitor could no longer act on her behalf. The court is therefore very grateful that he was willing to accept appointment as an advocate to the court and his submissions as advanced through counsel have been of the greatest assistance.

[9] When the matter came before me, it was urged that I should deal with it at once and not further adjourn it. Indeed I was told that all the necessary arrangements had been made for Mrs Z to travel to Switzerland on Wednesday, 1 December 2004. I made it clear that in my view the matter should be heard in public and (subject to the necessary reporting restrictions in terms of identifying Mr and Mrs Z) no one opposed that. Accordingly the hearing took place in open court on Tuesday, 30 November.

[10] I start then with the position of the local authority. I am satisfied that they owed to Mrs Z duties under both s 29 of the National Assistance Act 1948, the National Health Service Act 1977 and the National Health Service and Community Care Act 1990. Moreover the Department of Health had issued a circular: 'No secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse' under s 7 of the Local Authority Social Services Act 1970 (thus making the guidance

obligatory). It follows from that that the local authority were obliged to treat Mrs Z as a vulnerable adult. However, care must be exercised in the use of the term 'vulnerable'. In some context or other every human being is vulnerable. The term only has meaningful content in a specific context. In this case that context is physical and mental deficit. What has caused difficulty here is not the fact of a duty but the extent of it. It was common ground that the common law duties owed by the local authority to Mrs Z did not extend the scope of the statutory duties. At the very least the local authority could not ignore the position once Mr Z had informed them of it.

[11] It would be of little assistance in this case, nor indeed would the scope of the argument warrant it, to try to produce an exhaustive analysis of the actual duties owed in this case. It is however, to be observed that none of the duties are all-embracing in, for example, the ways provided in s 33 and Pt III of the Children Act 1989. They are all limited in scope to addressing the particular needs of a person as assessed by the authority. I propose simply to focus on the actual obligations that in my judgment were placed on the local authority in these circumstances.

[12] I then turn to the position of Mrs Z. The finding of competence in this case is fundamental to the court's approach in respect of her. I start with the broad legal perspective within which her position is to be seen. It is powerfully stated in the judgment of Hoffmann LJ (as he then was) in the case of *Airedale NHS Trust v Bland* [1993] 1 All ER 821 at 851, [1993] AC 789 at 826 where he says this:

> 'I start with the concept of the sanctity of life ... [W]e have a strong feeling that there is an intrinsic value in human life, irrespective of whether it is valuable to the person concerned or indeed to anyone else. Those who adhere to religious faiths which believe in the sanctity of all God's creation and in particular that human life was created in the image of God himself will have no difficulty with the concept of the intrinsic value of human life. But even those without any religious belief think in the same way. In a case like this we should not try to analyse the rationality of such feelings. What matters is that, in one form or another, they form part of almost everyone's intuitive values. No law which ignores them can possibly hope to be acceptable. Our belief in the sanctity of life explains why we think it is almost always wrong to cause the death of another human being, even one who is terminally ill or so disabled that we think that if we were in his position we would rather be dead. Still less do we tolerate laws such as existed in Nazi Germany, by which handicapped people or inferior races could be put to death because someone else thought that their lives were useless. But the sanctity of life is only one of a cluster of ethical principles which we apply to decisions about how we should live. Another is respect for the individual human being and in particular for his right to choose how he should live his own life. We call this individual autonomy or the right of self-determination. And another principle, closely connected, is respect for the dignity of the individual human being: our belief that quite irrespective of what the person concerned may think about it, it is wrong for someone to be humiliated or treated without respect for his value as a person. The fact that the dignity of an individual is an intrinsic value is shown by the fact that we feel embarrassed and think it wrong when someone behaves in a way which we

think demeaning to himself, which does not show sufficient respect for himself as a person.'

Hoffmann LJ then goes on to point out, however: '... what is not always realised, and what is critical in this case, is that they are not always compatible with each other.' Section 1 of the Suicide Act 1961 abrogated the rule that made suicide criminal. It did not make suicide lawful, much less did it encourage it; it simply removed suicide from being punishable as a criminal act. It follows inevitably that our law does not penalise the decision of a competent person to take their own life. Moreover nor does the law prohibit them from so doing. Human freedom, if it is to have real meaning, must involve the right to take what others may see as unwise or even bad decisions in respect of themselves; were that not so, freedom would be largely illusory. It follows that the court has no basis in law for exercising the jurisdiction so as to prohibit Mrs Z from taking her own life. The right and responsibility for such a decision belongs to Mrs Z alone.

[13] If, of course, the court had come to a different conclusion on capacity, then the result might have been very different. There is a legal presumption in favour of capacity but that could have been rebutted by evidence of inability to assimilate the issues, or fully appreciate the consequences, or being unduly influenced by the views of others or by undue concern for the burden that her condition imposed on others. There is no such evidence in this case; indeed, as I have already indicated, the evidence is all the other way. Had, however, Mrs Z lacked capacity, the court could have decided what should happen in accordance with her best interests. In the circumstances here, Mrs Z's best interests are no business of mine. I am in much the same position here as Dame Elizabeth Butler-Sloss P found herself in the case of *Re B (adult: refusal of medical treatment)* [2002] EWHC 429 (Fam), [2002] 2 All ER 449 where a patient who was legally competent refused treatment even though death was the inevitable consequence of that refusal. The court is simply not entitled to interfere whatever views it may have about the decision in question.

[14] The position in relation of Mr Z, however, is much less clear. Section 2 of the Suicide Act 1961 provides:

> '(1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years ...
>
> (4) ... no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.'

Although it is the case that all that Mr and Mrs Z propose to do is not criminal under the law of Switzerland, it seems to me inevitable that by making arrangements and escorting Mrs Z on the flight, Mr Z will have contravened s 2(1) above. It follows that in order for Mrs Z actually to be able to carry out her decision, it will require the criminal conduct of another. That said I remind myself of sub-s (4). Although not unique, the provision is rare and is usually found where Parliament recognises that although an act may be criminal, it is not always in the public interest to prosecute in respect of it.

[15] Two questions thus arise: first, whether the local authority are under a duty to apply for the continuation of the injunction granted by Black J now that the competence of Mrs Z has been established; and secondly, whether the court should grant any such injunction in any event. In order to determine these

issues in this case, it is useful to consider briefly the law generally in the use of injunctions to restrain criminal behaviour. a

[16] It is clear that a jurisdiction to restrain criminal acts is available to the High Court—see *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70, [1978] AC 435. There it was suggested that the power should be used sparingly and should be reserved for those cases where there were continued breaches of the law or serious injury was threatened. An example of the former is where the b power was used in relation to Sunday trading where the profitability of non-compliance greatly exceeded the financial penalties to which traders were liable—see *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] 2 All ER 332, [1984] AC 754.

[17] Whilst in such cases injunctive relief is usually sought at the suit of the c Attorney General (who although served has elected not to intervene in this case), it is clear that the local authority may also apply pursuant to powers conferred by s 222 of the Local Government Act 1972. In *City of London Corp v Bovis Construction Ltd* [1992] 3 All ER 697 it is suggested that the jurisdiction should be invoked and exercised exceptionally and with great caution, that there must be something more than mere infringement of the criminal law and d that there must be a necessary inference that the unlawful activity will continue unless and until restrained and that nothing less than an injunction will be necessary to do that. It will be readily observed that this is an area of enforcement in which the judge should tread warily.

[18] So I return to the question of whether the local authority have any duty e to seek the continuance of this injunction. It is the case, as appears above, that they owe duties to Mrs Z as a vulnerable person. In *R (on the application of Pretty) v DPP* [2001] UKHL 61, [2002] 1 All ER 1, [2002] 1 AC 800, the House of Lords recognised that whilst the state has a special responsibility to those in its custody or (by parity of reasoning) those who lack competence, the position in relation to a competent person, albeit vulnerable, is different and the positive f obligation to protect life 'is weaker than in such cases'. Clearly art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), the right to life, is engaged but so are arts 3 and 8. Counsel for Mr Z contended that arts 2, 3 and 8 should not be seen as competing but interlocking rights. That is no g doubt a good description but, however one describes it, the question as to the relationship between them on the facts of any particular case remains for the court to resolve. I again acknowledge with gratitude the survey of this area of the law provided by Munby J in *R (on the application of Burke) v General Medical Council* [2004] EWHC 1879 (Admin), [2004] 3 FCR 579, [2005] 2 WLR 431 and in this context, particularly at [51]–[79] and [117]–[162]. It seems to me that in h the context of a person of full capacity, whilst the right to life is engaged, it does not assume primacy (at the hands of another especially) over rights of autonomy and self-determination. The position is lucidly stated by Hoffmann LJ in *Airedale NHS Trust v Bland* [1993] 1 All ER 821 at 851–852, [1993] AC 789 at 826–827:

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> 'No one, I think, would quarrel with these deeply rooted ethical principles. But what is not always realised, and what is critical in this case, is that they are not always compatible with each other. Take, for example, the sanctity of life and the right of self-determination. We all believe in them and yet we cannot always have them both. The patient who refuses medical treatment

which is necessary to save his life is exercising his right to self-determination. But allowing him, in effect, to choose to die, is something which many people will believe offends the principle of the sanctity of life. Suicide is no longer a crime, but its decriminalisation was a recognition that the principle of self-determination should in that case prevail over the sanctity of life ... A conflict between the principles of the sanctity of life and the individual's right of self-determination may therefore require a painful compromise to be made. In the case of the person who refuses an operation without which he will certainly die, one or other principle must be sacrificed. We may adopt a paternalist view, deny that his autonomy can be allowed to prevail in so extreme a case, and uphold the sanctity of life. Sometimes this looks an attractive solution, but it can have disturbing implications. Do we insist upon patients accepting life-saving treatment which is contrary to their strongly held religious beliefs? Should one force-feed prisoners on hunger strike? English law is, as one would expect, paternalist towards minors. But it upholds the autonomy of adults. A person of full age may refuse treatment for any reason or no reason at all, even if it appears certain that the result will be his death.'

That is the law that I have to apply in this case and that is the perspective that the local authority is required to adopt.

[19] In my judgment in a case such as this the local authority incurred the following duties: (i) to investigate the position of a vulnerable adult to consider what was her true position and intention; (ii) to consider whether she was legally competent to make and carry out her decision and intention; (iii) to consider whether any other (and if so, what) influence may be operating on her position and intention and to ensure that she has all relevant information and knows all available options; (iv) to consider whether she was legally competent to make and carry out her decision and intention; (v) to consider whether to invoke the inherent jurisdiction of the High Court so that the question of competence could be judicially investigated and determined; (vi) in the event of the adult not being competent, to provide all such assistance as may be reasonably required both to determine and give effect to her best interests; (vii) in the event of the adult being competent to allow her in any lawful way to give effect to her decision although that should not preclude the giving of advice or assistance in accordance with what are perceived to be her best interests; (viii) where there are reasonable grounds to suspect that the commission of a criminal offence may be involved, to draw that to the attention of the police; (ix) in very exceptional circumstances, to invoke the jurisdiction of the court under s 222 of the 1972 Act. My view is that their duties do not extend beyond that. In this case, although they have the power to do so under s 222 of the 1972 Act, in my judgment they have no obligation to seek the continuation of the injunction made by Black J. It is clear that the criminal justice agencies have all the necessary powers. Moreover Parliament has committed to the Director of Public Prosecutions the discretion as to whether to permit a prosecution. Both those points militate strongly against the intervention of the civil remedy of an injunction. The local authority have made it clear that if they are under no duty to seek the continuation of the injunction, they do not wish to do so.

[20] Should the court nevertheless of its own motion continue this injunction? In my judgment it should not in circumstances where no one with

the necessary standing seeks any such order, where the criminal justice agencies have the requisite knowledge and power and where the effect of the injunction is to deny a right to a seriously disabled but competent person that cannot be exercised herself by reason only of her physical disability. Moreover, all that has to be set in the context of the caution urged by the decided cases referred to above in the use of the injunctive jurisdiction. It was for all these reasons that at the conclusion of the hearing on 30 November I discharged the injunction made herein on 24 November.

[21] This case affords no basis for trying to ascertain the court's views about the rights or wrongs of suicide, assisted or otherwise. This case simply illustrates that a competent person is entitled to take their own decisions on these matters and that that person alone bears responsibility for any decision so taken. That is the essence of what some will regard as God-given free will and what others will describe as the innate right of self-autonomy. It illustrates too that the civil court, and in this context, especially the family court, will be slow to restrain behaviour consistent with the rights of others simply because it is unlawful where adequate powers are vested in the criminal justice agencies. If this case decides anything positive, it is the duties which the court holds to lie on a local authority when it learns that the welfare of a vulnerable person in their area is seriously threatened by a decision taken by that person.

Order accordingly.

Pamela Hardisty Barrister (NZ).

Technology and Construction Court: Statement by the Lord Chief Justice of England and Wales

QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)
LORD WOOLF CJ, MAY LJ AND JACKSON J
7 JUNE 2005

Practice – Technology and Construction Court – Case management – Interim arrangements.

LORD WOOLF CJ delivered the following statement in open court.

1. This announcement is made on behalf of myself and the Lord Chancellor. It reflects the importance which both the Lord Chancellor and I attach to the work of the Technology and Construction Court (TCC).

2. The TCC is a specialist court, which operates at 11 court centres across the country. It comprises one High Court judge (who devotes about half of his working time to the business of the TCC) and 41 senior circuit and circuit judges. Of these circuit judges are eight full time TCC judges and the remainder spend only part of their time hearing TCC cases. Of the eight full time TCC judges, five are based in St Dunstan's House in London (the London TCC), one in Birmingham, one in Manchester and one in Liverpool. There are also 23 recorders who, because of their experience of the relevant classes of work, are specifically authorised to hear TCC cases when required. Most of the full time TCC judges (and all of those at the London TCC) are senior circuit judges.

3. The construction sector accounts for about 10% of the UK's GDP. The IT sector also accounts for a significant and growing proportion of GDP. Disputes within these industries or between providers and end users are often of considerable complexity. The sums at issue are huge. Some of the disputes arise from construction projects overseas or involve international parties. These disputes are of comparable size and importance to general commercial litigation. TCC judges try some of the most arduous and complex cases that come before the civil courts.

4. The existing TCC judges have a high degree of expertise in the management and trial of complex construction and IT cases. I pay tribute to the excellent work, which those judges are doing and have done for many years. Nevertheless the lack of involvement of High Court judges in the work of the TCC has been a source of concern within the IT and construction industries and within the profession. Hitherto the TCC has only had the services of one High Court judge for approximately half of his working time. It is now desirable for High Court judges to play a larger role in the management and trial of IT and construction litigation.

5. Arrangements for the longer term future of the TCC are currently under consideration by the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls. In the meantime, however, we have decided that interim arrangements must be put in place, in order to ensure that all TCC cases are tried by appropriate judges. The interim arrangements, which will come into effect today, are as follows:

(i) The High Court judge in charge of the TCC (currently Jackson J) will no longer be required to spend half of each term away from the TCC. Instead he will be principally based at the TCC and will only sit in other courts when there is no TCC work requiring the immediate involvement of a High Court judge. *a*

(ii) The judge in charge of the TCC will (with the assistance of his registry manager) consider every new case which is started in or transferred into the London TCC. He will classify each new case as 'HCJ' or 'SCJ'. The most complex and heavy cases will be classified 'HCJ'. These will be managed and tried either by the judge in charge of the TCC or by another suitable High Court judge. The majority of cases, however, will be classified 'SCJ'. These cases may be allocated to a named senior circuit judge by the judge in charge of the TCC; alternatively, they will be so allocated by operation of the rota. *b*

(iii) It is neither practicable nor necessary for the judge in charge of the TCC to consider TCC cases which are commenced in, or transferred to, court centres outside London. Nevertheless, if any TCC case started outside London appears to require management and trial by a High Court judge, then the full time or principal TCC judge at that court centre should refer the case to the judge in charge of the TCC for a decision as to its future management and trial. *c*

(iv) When proceedings are commenced in, or transferred to, the London TCC, any party to those proceedings may make brief representations by letter as to the appropriate classification. *d*

6. Work is currently in progress on the preparation of a new edition of the TCC guide. There has been widespread consultation with judges, court users and the profession about the contents of the guide. The new edition of the guide will set out the criteria which the judge in charge of the TCC will apply, when allocating cases to the appropriate level of judge. It will also provide that the judge in charge may change the classification from 'HCJ' to 'SCJ', or vice versa, as appropriate. *e*

7. I am confident that the TCC will continue, as it has done in the past, constantly seeking to improve the service which it provides to court users. *f*

Martyn Gurr Barrister.

Re J (a child) (return to foreign jurisdiction: convention rights)

[2005] UKHL 40

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND AND LORD BROWN OF EATON-UNDER-HEYWOOD

4, 5 MAY, 16 JUNE 2005

Family proceedings – Orders in family proceedings – Specific issue order – Child welfare – Father applying for return of child to foreign jurisdiction – Different legal concepts of child welfare – Approach of court.

The child's father was a Saudi Arabian national. The mother had dual Saudi Arabian and British nationality. The parents were married in 1998 in Saudi Arabia according to Shariah law. The child was born in 2000. The mother brought divorce proceedings in a Shariah court and the father agreed to the divorce. It was a term of the divorce agreement that the mother would not remove the child from Saudi Arabia without the father's consent. The parents remarried in accordance with Shariah law in 2002. Later that year the mother and the child visited the United Kingdom with the father's consent. The mother presented a divorce petition in the domestic court. The father applied for a specific issue order for the summary return of the child to Saudi Arabia. His case was that he accepted that the marriage was at an end, and that the child should continue in his mother's care, but that they should both return to live in Saudi Arabia. The judge held that, on balance, had it not been for one factor, namely that the father had raised and then withdrawn allegations about the mother's association with another man and the effect of such allegations in Saudi Arabian Shariah law, he would have found it in the child's best interests to be returned to Saudi Arabia. Hence he declined to make the order sought. The Court of Appeal held that there could be no criticism of the judge's direction on the law, but allowed the father's appeal on the basis that the judge's conclusion on the risk to the child's interests had not been justified by the evidence and that he had given it too much weight in his overall conclusion. The mother appealed. The issue arose as to how, if at all, it was relevant that the laws and procedures in the country to which the child would be returned were different from those which would apply if the child's future were to be decided in England.

Held – (1) Where a trial judge had a discretion in which various factors were relevant, the evaluation and balancing of those factors was a matter for him. Only if his decision were so plainly wrong that he must have given far too much weight to a particular factor was the appellate court entitled to interfere. If trial judges were led to believe that, even if they directed themselves impeccably on the law, made findings of fact which were open to them on the evidence, and were careful in their evaluation and weighing of the relevant factors, as the judge in the instant case had been, their decisions were liable to be overturned unless they reached a particular conclusion, they would come to believe that they did

not in fact have any choice or discretion in the matter. Accordingly, the Court of Appeal had been wrong to interfere with the exercise of the judge's discretion (see [1]–[3], [10]–[12], [48], below); *Piglowska v Piglowski* [1999] 3 All ER 632 and *G v G* [1985] 2 All ER 225 applied.

(2) In determining any question directed to a child's upbringing the welfare of the child was the court's paramount consideration. The focus of the trial judge had to be on the individual child in the particular circumstances of the case. Where the choice lay between deciding the question of what was best for any individual child here or deciding it in a foreign country, differences between the legal systems could not be irrelevant. If there were a genuine issue between the parents as to whether it was in the best interests of the child to live in this country or elsewhere it had to be relevant whether that issue was capable of being tried in the courts of the country to which he was to be returned. If those courts had no choice but to do as the father wished, so that the mother could not ask them to decide, with an open mind, whether the child would be better off living here or there, then the domestic courts had to ask themselves whether it would be in the interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction might be a decisive factor. However, if it appeared that the mother would not be able to make a good cause for relocation, that factor might not be decisive. There were also bound to be many cases where the connection of the child and all the family with the other country was so strong that any difference between the legal systems here and there should carry little weight. In the instant case, the trial judge had been wrong to leave out of account the absence of a jurisdiction in the home country to enable the mother to bring the child back here without the father's consent. Accordingly, the appeal would be allowed (see [1]–[3], [37], [39], [46]–[48], below); *Re JA (a minor) (abduction: non-convention country)* [1998] 2 FCR 159 approved.

Notes

For the power of the court to make section 8 orders, for specific issue orders, and for supplementary provision as to section 8 orders, see 5(3) *Halsbury's Laws* (4th edn reissue) paras 401, 407, 411.

Cases referred to in opinions

B's Settlement, Re, B v B [1951] 1 All ER 949n, [1940] Ch 54.

E (child abduction: non-Convention country), Re, Osman v Elasha [1999] 3 FCR 497, [2000] Fam 62, [2000] 2 WLR 1036, CA.

F (minor: abduction: jurisdiction), Re [1990] 3 All ER 97, [1991] Fam 25, [1990] 3 WLR 1272, CA.

G v G (minors) [1991] FCR 12, CA.

G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

J v C [1969] 1 All ER 788, [1970] AC 668, [1969] 2 WLR 540, HL.

JA (a minor) (abduction: non-convention country), Re [1998] 2 FCR 159, CA.

L (minors) (wardship: jurisdiction), Re [1974] 1 All ER 913, [1974] 1 WLR 250, CA.

M (Minors) (Abduction: Non-Convention Country), Re [1995] 2 FCR 265, CA.

M (Minors) (Abduction: Peremptory Return Order), Re [1996] 1 FCR 557, CA.

McKee v McKee [1951] 1 All ER 942, [1951] AC 352, PC.

P (a minor) (child abduction: non-convention country), Re [1996] 3 FCR 233, [1997] Fam 45, [1997] 2 WLR 223, CA.

Piglowska v Piglowski [1999] 3 All ER 632, [1999] 1 WLR 1360, HL.

R (minors) (wardship: jurisdiction), Re (1981) 2 FLR 416, CA.
R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, [2004] 3 WLR 23; *affg* [2002] EWCA Civ 1856, [2003] 3 All ER 1174, [2003] 1 WLR 770.
S (Minors) (Abduction), Re [1993] 2 FCR 499, CA.

Cases referred to in list of authorities

Abdulaziz v UK (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR.
Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FCR 385.
Biogen Ltd v Medeva plc (1996) 38 BMLR 149, [1997] RPC 1, HL.
de Dampierre v de Dampierre [1987] 2 All ER 1, [1988] AC 92, [1987] 2 WLR 1006, HL.
Di Savini v Lousada (1870) 18 WR 425.
Islam v Secretary of State for the Home Dept, R v Immigration Appeal Tribunal, ex p Shah [1999] 2 All ER 545, [1999] 2 AC 629, [1999] 2 WLR 1015, HL.
Nugent v Vetzera (1866) LR 2 Eq 704, [1861–73] All ER Rep 318, VC Ct.
Payne v Payne [2001] EWCA Civ 166, [2001] 1 FCR 425, [2001] Fam 473, [2001] 2 WLR 1826.
Pellegrini v Italy (2002) 35 EHRR 44, [2001] ECHR 30882/96, ECt HR.
R (on the application of Razgar) v Secretary of State for the Home Dept [2004] UKHL 27, [2004] 3 All ER 821, [2004] 2 AC 368, [2004] 3 WLR 58.
R (on the application of Saadi) v Secretary of State for the Home Dept [2002] UKHL 41, [2002] 4 All ER 785, [2002] 1 WLR 3131.
Soering v UK (1989) 11 EHRR 439, [1989] ECHR 14038/88, ECt HR.
ZP v PS, Re PS, ex p ZP [1994] CLR 639, Aus HC.

Appeal

The mother of J, a child, appealed with permission of the House of Lords Appeal Committee given on 13 January 2005, from the decision of the Court of Appeal (Thorpe and Wall LJJ) on 2 April 2004 ([2004] EWCA Civ 417, [2004] 2 FCR 337) allowing the appeal of the father of J from the decision of Hughes J on 31 October 2003 refusing the application of the father for a specific issue order under s 8 of the Children Act 1989 that J be summarily returned to Saudi Arabia. The facts are set out in the opinion of Baroness Hale of Richmond.

Timothy Scott QC and *Debbie Taylor* (instructed by *Percy Short & Cuthbert*) for the mother.
Henry Setright QC and *Ian Lewis* (intructed by *Dawson Cornwell*) for the father.

Their Lordships took time for consideration.

16 June 2005. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would allow this appeal.

LORD HOFFMANN.

[2] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I too would allow this appeal.

LORD WALKER OF GESTINGTHORPE.

[3] My Lords, I am in full agreement with the opinion of my noble and learned friend Baroness Hale of Richmond, which I have had the privilege of reading in draft. For all the reasons given in her opinion I too would allow this appeal.

BARONESS HALE OF RICHMOND.

[4] My Lords, the issue of principle in this case is the proper approach to applications for the summary return of children to countries which are not parties to the Hague Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33) (the Hague Convention). But it is also another example of intervention by the Court of Appeal in the exercise of discretion by a trial judge despite the fact that he had, in the view of the appeal court, properly directed himself on the law. I believe that the Court of Appeal (Thorpe and Wall LJJ) ([2004] EWCA Civ 417, [2004] 2 FCR 337) were wrong on both points.

THE FACTUAL BACKGROUND

[5] These proceedings are about a little boy, F, who was born in the United States on 5 April 2000. He is a citizen, not only of the United States, but also of the United Kingdom and of Saudi Arabia. His mother was born in the United Kingdom in 1972 to Iraqi Kurdish parents who had come here as refugees. The family moved to Saudi Arabia when she was six and she has dual citizenship. Her father is still working there as a doctor but her mother has already returned to live in this country where they have always kept a home and both plan to retire. The mother returned here aged 16 to study for her A levels and then for a degree. In 1998 she went back to work in Saudi Arabia where she met the father, who is a Saudi citizen. They were legally married there according to Shariah law in December 1998. Their son was born in the United States for medical reasons but was soon taken to Saudi. However, marital difficulties arose in 2001, and the mother brought the child to this country for a while, but she returned to begin divorce proceedings in the Shariah court. The father agreed to divorce the mother later that year, and it was a term of the divorce agreement that the mother would not remove the child from Saudi Arabia without the father's consent. However, the parents remarried in accordance with Shariah law in January 2002. At the end of July 2002, the mother and child came here again with the father's consent, initially for a holiday but he later agreed to their staying on while she pursued a one-year master's degree course. The father visited them here in October 2002 and their marital difficulties returned. The mother decided that she did not wish to return to Saudi Arabia when her course was over. Technically, had this been a Hague Convention case, this would probably have amounted to a wrongful retention of the child, albeit far removed from the popular picture of a kidnapping or even an abduction.

THE PROCEEDINGS

[6] On 7 May 2003, the mother presented a divorce petition in the Principal Registry of the Family Division, relying for jurisdiction upon her domicile of origin in this country together with six months' habitual residence. She also applied to the Muslim Council in London to obtain a divorce according to Shariah law. On 26 June 2003, the father applied for a specific issue order under s 8 of the Children Act 1989 that the child be summarily returned to Saudi Arabia. He also applied for a stay of the English divorce proceedings so that matters could be dealt with in the Shariah courts there.

[7] His case was that he accepted that the marriage was at an end, and that the child should continue in his mother's care, but that they should both return to live in Saudi Arabia. The mother applied for a residence order under the 1989 Act. Her case was that following the breakdown of her marriage, she wished to remain in this country and that as she was the natural carer of the child, he should remain here with her.

[8] The applications came before Hughes J in October 2003. The principal issue was whether he should direct the summary return of the child to Saudi Arabia. Accordingly he dealt with that first. He identified six principles from the authorities. He regarded the decision as a difficult one (para 69). On balance, were it not for one factor, he would have found it in the child's best interests to be returned to Saudi Arabia for his future to be decided 'according to the norms of his own society' (para 67). The factor tipping the balance the other way, however, was that the father had raised and then withdrawn allegations about the mother's association with another man. The judge had heard expert evidence about, among other things, the effect of such allegations in Saudi Arabian Shariah law. He was—

> 'seriously concerned that an occasion will arise in which [the child's] interests are seriously damaged by a dispute between the parents in which father deploys complaints of this kind and they have the dramatic effects that they would have in Saudi Arabia.' (See para 64.)

Hence he declined to order that the child be summarily returned to Saudi Arabia. As the father had always taken the view that the child should be looked after by the mother, he agreed that if F was not to be summarily returned to Saudi Arabia, a residence order should be made in her favour with reasonable contact to him.

[9] The Court of Appeal held ([2004] 2 FCR 337 at [6]) that there could be no criticism of the judge's 'impeccable direction' on the applicable legal principles. Nevertheless, they allowed the father's appeal on the ground that the judge had 'elevated this specific anxiety above a level that the evidence justified' (see [19]). Accordingly it should not have had such a decisive effect in what had earlier been described as 'an otherwise balanced judgment' (see [16]).

SHOULD THE COURT OF APPEAL HAVE INTERVENED?

[10] The Court of Appeal appears to have intervened on the basis, first, that the judge's conclusion on the risk was not justified by the evidence and second, that he had given it too much weight in his overall conclusion. Yet the assessment of the risk depended entirely on the judge's evaluation of the father's present intentions and likely future behaviour and its impact upon the child. There was objective evidence of the risk in the fact that the father had made the allegations in writing and then withdrawn them when he saw that they were

damaging rather than helping his case. Whether he might do so again depended crucially on the judge's evaluation of his oral evidence. The judge was the only person who could do this. He concluded that, while the father was sincere in his current intention not to raise such allegations again, there was a serious risk that if disputes arose in future, as they might easily do, he would resurrect them. These were findings of credibility and primary fact with which, for all the reasons explained by Lord Hoffmann in *Piglowska v Piglowski* [1999] 3 All ER 632 at 643–644, [1999] 1 WLR 1360 at 1372–1373, an appeal court is not entitled to interfere.

[11] Furthermore, once the judge has made such a finding, it becomes a factor to be weighed in the balance in the exercise of his discretion. To say that it should not have tipped the balance in a case such as this, which the judge regarded as a difficult one, is tantamount to saying that it should not have been taken into account at all or that the other considerations were so strongly in favour of return that it should not have been allowed to outweigh them. But even the brief account of the facts given above shows that this was not a case in which all other considerations pointed only one way. The age of the child, the length of time he had lived here and the substantial connection of both mother and child with this country were all relevant.

[12] If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is also a matter for the trial judge. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere (see *G v G* [1985] 2 All ER 225, [1985] 1 WLR 647). Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful, as this judge undoubtedly was, in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter. On that ground alone, and even assuming that the principles applied by the judge were indeed correct, I would allow this appeal.

THE ISSUE OF PRINCIPLE

[13] But were those principles correct? The mother takes issue, in particular with the judge's fourth (para 38):

> '... [an order for summary return] will not necessarily be confined to a return to a country where society and its laws operate in a way broadly similar to our own. The principle extends to those countries whose idea of child welfare is based on propositions which would not find a place in our practice. This includes Muslim countries which rely significantly on the concept of a family unit with a single responsible head of the family in the father.'

[14] The issue, therefore, is how, if at all, it is relevant that the laws and procedures in the country to which the child is to be returned are very different from those which would apply if the child's future were to be decided here. Competing views have been expressed in the Court of Appeal. One view is

encapsulated in the judgment of Ward LJ in the case of *Re JA (a minor) (abduction: non-convention country)* [1998] 2 FCR 159, the other in the judgment of Thorpe LJ in the case of *Re E (child abduction: non-Convention country)*, *Osman v Elasha* [1999] 3 FCR 497, [2000] Fam 62.

[15] In *Re JA* [1998] 2 FCR 159 at 172, Ward LJ (with whom Lord Woolf MR and Mummery LJ agreed) accepted a submission that—

> '[t]he court cannot be satisfied that it is in the best interests of the child to return it to the court of habitual residence in order that the court may resolve the disputed question, unless this court is satisfied that the welfare test will apply in that foreign court.'

In practice, however, as foreign law is presumed to be the same as English law, it will be for the party resisting return to show that there is a difference which may be detrimental to the child's welfare. In the case before him, it was the lack of any process whereby the mother might gain the right to return to this country with the child, with the result that she and the child might be 'locked in' to a life there, which would put at risk the mother's health and the child's care.

[16] In *Re E (child abduction: non-Convention country)*, *Osman v Elasha* [1999] 3 FCR 497 at 503, [2000] Fam 62 at 70, on the other hand, Thorpe LJ (sitting with Stuart-Smith and Pill LJJ) commented:

> 'The further development of international collaboration to combat child abduction may well depend upon the capacity of states to respect a variety of concepts of child welfare derived from differing cultures and traditions. A recognition of this reality must inform judicial policy with regard to the return of children abducted from non-member states.'

Accordingly he emphasised 'the importance of according to each state liberty to determine the family justice system and principles that it deems appropriate to protect the child and to serve his best interests' (see [1999] 3 FCR 497 at 505, [2000] Fam 62 at 72). As we made no investigation and permitted no criticism of the family justice systems operating in states parties to the Hague Convention, he was extremely doubtful of the wisdom of permitting such criticism of non-member states—

> 'save in exceptional circumstances, such as those therein defined by Lord Donaldson of Lymington MR in [*Re F (minor: abduction: jurisdiction)* [1990] 3 All ER 97 at 100, [1991] Fam 25 at 31], where he referred to persecution, or ethnic, sex, or any other discrimination.'

He distinguished *Re JA* on the basis that the expert evidence showed a risk of harm to the child if return was ordered.

[17] Both judgments were based on what their authors saw as a consistent line of previous authority, on the one hand expecting that the foreign system of law would be broadly comparable to our own and on the other hand assuming that it will be in the child's best interests to return to his home country even if its system of family law is very different from our own. As this is the first time that the issue has come before this House, it seems right to remind ourselves of first principles.

THE PRINCIPLES

[18] Three points can be readily agreed. First, since 1925, any court which is determining any question with respect to the upbringing of a child has had a statutory duty to regard the welfare of the child as its paramount consideration. Before that, the principle that the welfare of the individual child might outweigh any other considerations had been developed by the Chancery judges in the exercise of their inherent jurisdiction over children. The statutory duty was first laid down by s 1 of the Guardianship of Infants Act 1925 and later consolidated in s 1 of the Guardianship of Minors Act 1971. It applied to 'any proceedings in any court' and the court was expressly instructed to disregard whether from any other point of view the claim of the father was superior to that of the mother or vice versa. That proposition was regarded as too obvious to require repetition when the welfare principle was re-enacted in s 1(1) of the 1989 Act. It applies in any proceedings where the court has jurisdiction to determine a question concerning a child's upbringing, whether on an application for an order under the 1989 Act itself, as in this case, or in the inherent jurisdiction of the High Court.

[19] It is not disputed that our courts have jurisdiction in this case. As it happens, there are pending divorce proceedings (see ss 2(1) and 2A(1) of the Family Law Act 1986); but even if there were not, the English courts would have jurisdiction on the basis of the child's presence here, unless it were excluded by the existence of matrimonial proceedings in another part of the United Kingdom (see ss 2(2) and 3(1), (2) of the 1986 Act). (Under the new regime introduced by Council Regulation (EC) No 2201/2003 of 27 November 2003 the court only has jurisdiction if it has jurisdiction under the regulation or under the old rules where the regulation does not apply (see s 2(1)(a) of the 1986 Act, as amended with effect from 1 March 2005 by the European Communities (Jurisdiction in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265).) If our courts have jurisdiction, then the welfare principle applies, unless it is excluded, and our law has no concept of the 'proper law of the child'.

[20] Second, however, the application of the welfare principle may be specifically excluded by statute; one example is the Child Abduction and Custody Act 1985, passed to give effect in domestic law to two international treaties, the Hague Convention and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191) (as set out in Sch 2 to the 1985 Act). Both treaties were motivated by the belief that it is in the best interests of children for disputes about their future to be decided in their home countries, and that one parent should not be able to take a child from one country to another, either in the hope of obtaining a tactical advantage in the dispute or to avoid the effects of an order made in the home country. Instead of deciding the dispute itself, therefore, the country to which the child was taken agreed that with very few exceptions it would either send the child back or enforce the order made in the home country. This necessarily meant that the receiving country might on occasion have to do something which was not in the best interests of the individual child involved. The states which became parties to these treaties accepted this disadvantage to some individual children for the sake of the greater advantage to children in general. Parents would be deterred from moving their children across borders without consent. States which sent other countries' children back could expect that other states

would send their own children back in return. The obligations were mutual and reciprocal.

[21] The Hague Convention is widely regarded as a great success, particularly in combating the paradigm case which its authors had in mind: the child who was living with one parent but snatched or spirited away by the other. Currently the Hague Convention is in force between the United Kingdom and the 74 contracting states listed in Sch 1 to the Child Abduction and Custody (Parties to Conventions) Order 1986, SI 1986/1159, as amended. The two most recent entrants are Brazil and Lithuania. In at least three contracting states, Turkey, Turkmenistan and Uzbekistan, the predominant religion practised by their populations is Islam. Obviously, the cultures and legal systems of the contracting states will differ widely from one another. All are prepared to accept these differences for the sake of the reciprocal benefits which membership can bring. But one group of states is conspicuous by its absence. These are states which adopt some form of Shariah law.

[22] There is no warrant, either in statute or authority, for the principles of the Hague Convention to be extended to countries which are not parties to it. Section 1(1) of the 1989 Act, like s 1 of the Guardianship of Infants Act 1925 before it, is of general application. This is so even in a case where a friendly foreign state has made orders about the child's future. This was explained by Morton J in *Re B's Settlement, B v B* [1951] 1 All ER 949n, [1940] Ch 54:

> 'I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country.' (See [1940] Ch 54 at 63–64.)

[23] Despite some critical initial comment by authors on private international law, that view has now become orthodox. It was expressly approved by the Judicial Committee of the Privy Council in *McKee v McKee* [1951] 1 All ER 942 at 947–948, [1951] AC 352 at 363–364, which emphasised that there was a choice open to the trial judge:

> 'It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. It is, however, the negation of the proposition ... that the infant's welfare is the paramount consideration, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case.'

[24] This House, in the leading case of *J v C* [1969] 1 All ER 788, [1970] AC 668, regarded it as clearly decided by *Re B's Settlement* and *McKee v McKee* that the existence of a foreign order would not oust the jurisdiction or preclude the

operation of the welfare principle. This applies a fortiori where the foreign court would have had jurisdiction to make an order but has not done so, so that no question of comity arises (see [1969] 1 All ER 788 at 812, [1970] AC 668 at 700–701, per Lord Guest, [1969] 1 All ER 788 at 824, [1970] AC 668 at 714, per Lord MacDermott, and [1969] 1 All ER 788 at 828–829, [1970] AC 668 at 720, per Lord Upjohn).

[25] Hence, in all non-Hague Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. If they do decide to return the child, that is because it is in his best interests to do so, not because the welfare principle has been superseded by some other consideration. This was so, even in those cases decided around the time that the Hague Convention was being implemented here, where it was held that the courts should take account of its philosophy (see, for example, *G v G (minors)* [1991] FCR 12). The Court of Appeal, in *Re P (a minor) (child abduction: non-convention country)* [1996] 3 FCR 233, [1997] Fam 45 has held that the Hague Convention concepts are not to be applied in a non-Hague Convention case. Hence, the first two propositions set out by Hughes J in this case were entirely correct: the child's welfare is paramount and the specialist rules and concepts of the Hague Convention are not to be applied by analogy in a non-Hague Convention case.

[26] Thirdly, however, the court does have power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits. In a series of cases during the 1960s, these came to be known as 'kidnapping' cases. The principles were summed up by Buckley LJ in *Re L (minors) (wardship: jurisdiction)* [1974] 1 All ER 913 at 925–926, [1974] 1 WLR 250 at 264, rightly described by Ward LJ in *Re P* and *Re JA* [1998] 2 FCR 159 as the locus classicus:

> 'To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country ...'

[27] He went on to emphasise that in doing so, the court was not punishing the parent for her conduct, but applying the cardinal rule. The same point was made by Ormrod LJ in *Re R (minors) (wardship: jurisdiction)* (1981) 2 FLR 416 at 425: the 'so-called kidnapping' of the child, or the order of a foreign court, were relevant considerations—

> 'but the weight to be given to either of them must be measured in terms of the interests of the child, not in terms of penalising the 'kidnapper', or of comity, or any other abstraction. 'Kidnapping', like other kinds of unilateral

action in relation to children, is to be strongly discouraged, but the discouragement must take the form of *a swift, realistic and unsentimental assessment of the best interests of the child, leading, in proper cases, to the prompt return of the child to his or her own country*, but *not* the sacrifice of the child's welfare to some other principle of law.' (First emphasis mine)

[28] It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child.

MAKING THE CHOICE

[29] How then is the trial judge to set about making that choice? His focus has to be on the individual child in the particular circumstances of the case. The policy considerations which have led this country to enter into international treaties for the good of children in general are irrelevant. A fortiori, the hope that countries which have not yet become parties to such treaties might be encouraged to do so in future is irrelevant. There may be good reasons why those countries are unable to join the club. They may well believe that it would be contrary to the fundamental principles of their laws to accept the reciprocity entailed. As my noble and learned friend, Lord Hoffmann, pointed out in the course of the argument, they may have no incentive to join if their children are returned to them without their having to return other children to a system which is so completely different from their own. This is all pure speculation and has nothing to do with the welfare of the little boy whose future has to be decided in this case.

[30] Nevertheless, it was urged upon us by Mr Setright QC, for the father, that there should be 'a strong presumption' that it is 'highly likely' to be in the best interests of a child subject to unauthorised removal or retention to be returned to his country of habitual residence so that any issues which remain can be decided in the courts there. He argued that this would not mean the application of the Hague Convention principles by analogy, but the results in most cases would be the same.

[31] That approach is open to a number of objections. It would come so close to applying the Hague Convention principles by analogy that it would be indistinguishable from it in practice. It relies upon the Hague Convention concepts of 'habitual residence', 'unauthorised removal', and 'retention'; it then gives no indication of the sort of circumstances in which this 'strong presumption' might be rebutted; but at times Mr Setright appeared to be arguing for the same sort of serious risk to the child which might qualify as a defence under art 13(b) of the Hague Convention. All of these concepts have their difficulties, even in Hague Convention cases. For example, different approaches have been taken in different countries to the interpretation of the vital concept of habitual residence. By no means everyone shares our view, which is based on the exercise of parental authority (see R Schuz, 'Habitual residence of children under the Hague Child Abduction Convention—theory and practice' [2001] 13 CFLQ 1). There is no warrant for introducing similar technicalities into the 'swift, realistic and unsentimental assessment of the best interests of the child' in non-Hague Convention cases. Nor is such a presumption capable of taking into account the huge variety of circumstances in which these cases can arise, many of them very far removed from the public perception of kidnapping or abduction.

[32] The most one can say, in my view, is that the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed, in this or any other case, that allowing a child to remain here while his future is decided here inevitably means that he will remain here for ever.

[33] One important variable, as indicated in *Re L (minors) (wardship: jurisdiction)* [1974] 1 All ER 913, [1974] 1 WLR 250, is the degree of connection of the child with each country. This is not to apply what has become the technical concept of habitual residence, but to ask in a commonsense way with which country the child has the closer connection. What is his 'home' country? Factors such as his nationality, where he has lived for most of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far will all come into this.

[34] Another closely related factor will be the length of time he has spent in each country. Uprooting a child from one environment and bringing him to a completely unfamiliar one, especially if this has been done clandestinely, may well not be in his best interests. A child may be deeply unhappy about being recruited to one side in a parental battle. But if he is already familiar with this country, has been here for some time without objection, it may be less disruptive for him to remain a little while longer while his medium and longer time future is decided than it would be to return.

[35] This brings me to the question of different legal conceptions of welfare. The first reported cases in this area which came after *Re L* and *Re R (minors) (wardship: jurisdiction)* (1981) 2 FLR 416 were concerned with removals from countries in the common law or western European traditions (see *G v G (minors)* [1991] FCR 12 (Kenya); *Re F (minor: abduction: jurisdiction)* [1990] 3 All ER 97, [1991] Fam 25 (Israel); see also *Re M (Minors) (Abduction: Non-Convention Country)* [1995] 2 FCR 265 (Italy)). It is not surprising that the courts here were prepared to assume or accept that the approach in those countries would not differ significantly from that of the English courts.

[36] Nevertheless, in *Re F (minor: abduction: jurisdiction)* [1990] 3 All ER 97 at 100–101, [1991] Fam 25 at 31, Lord Donaldson MR referred to 'whether the [other] court will apply principles which are acceptable to the English courts as being appropriate'. There followed cases from other countries in which principles which were not necessarily the same as those applied here were considered 'appropriate' because of the family's close connection with that country: see *Re S (Minors) (Abduction)* [1993] 2 FCR 499 (Pakistan); and *Re M (Minors) (Abduction: Peremptory Return Order)* [1996] 1 FCR 557 (Dubai), in which the court went so far as to refuse to admit evidence of the legal system in the other country and assumed that the wife would receive a fair hearing there. These culminated in the difference of view expressed in *Re JA (a minor) (abduction: non-convention country)* [1998] 2 FCR 159 (United Arab Emirates), *Osman v Elasha* [1999] 3 FCR 497, [2000] Fam 62 (Sudan), and again in the present case.

[37] Like everything else, the extent to which it is relevant that the legal system of the other country is different from our own depends upon the facts of the particular case. It would be wrong to say that the future of every child who

is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not inevitably to be preferred to another. Indeed, we do not have any fixed concept of what will be in the best interests of the individual child. Once upon a time it was assumed that all very young children should be cared for by their mothers, but that older boys might well be better off with their fathers. Nowadays we know that some fathers are very well able to provide everyday care for even their very young children and are quite prepared to prioritise their children's needs over the demands of their own careers. Once upon a time it was assumed that mothers who had committed the matrimonial offence of adultery were only fit to care for their children if the father agreed to this. Nowadays we recognise that a mother's misconduct is no more relevant than a father's: the question is always the impact it will have on the child's upbringing and well-being. Once upon a time, it may have been assumed that there was only one way of bringing up children. Nowadays we know that there are many routes to a healthy and well-adjusted adulthood. We are not so arrogant as to think that we know best.

[38] Hence our law does not start from any a priori assumptions about what is best for any individual child. It looks at the child and weighs a number of factors in the balance, now set out in the well-known 'check-list' in s 1(3) of the 1989 Act; these include his own wishes and feelings, his physical, emotional and educational needs and the relative capacities of the adults around him to meet those needs, the effect of change, his own characteristics and background, including his ethnicity, culture and religion, and any harm he has suffered or risks suffering in the future. There is nothing in those principles which prevents a court from giving great weight to the culture in which a child has been brought up when deciding how and where he will fare best in the future. Our own society is a multi-cultural one. But looking at it from the child's point of view, as we all try to do, it may sometimes be necessary to resolve or diffuse a clash between the differing cultures within his own family.

[39] In a case where the choice lies between deciding the question here or deciding it in a foreign country, differences between the legal systems cannot be irrelevant. But their relevance will depend upon the facts of the individual case. If there is a genuine issue between the parents as to whether it is in the best interests of the child to live in this country or elsewhere, it must be relevant whether that issue is capable of being tried in the courts of the country to which he is to be returned. If those courts have no choice but to do as the father wishes, so that the mother cannot ask them to decide, with an open mind, whether the child will be better off living here or there, then our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction must do more than give the judge pause (as Hughes J put it in this case); it may be a decisive factor. On the other hand, if it appears that the mother would not be able to make a good case for relocation, that factor might not be decisive. There are also bound to be many cases where the connection of the child and all the family with the other country is so strong that any difference between the legal systems here and there should carry little weight.

[40] The effect of the decision upon the child's primary carer must also be relevant, although again not decisive. A child who is cared for by nannies or sent away to boarding school may move between households, and indeed countries,

much more readily than a child who has always looked to one parent for his everyday needs, for warmth, for food, clean clothing, getting to school, help with homework and the like. The courts are understandably reluctant to allow a primary carer to profit from her own wrong by refusing to return with her child if the child is ordered to return. It will often be entirely reasonable to expect that a mother who took the risk of uprooting the child will return with him once it is ordered that he should go home. But it will sometimes be necessary to consider whether it is indeed reasonable to expect her to return, the sincerity of her declared refusal to do so, and what is to happen to the children if she does not.

[41] These considerations should not stand in the way of a swift and unsentimental decision to return the child to his home country, even if that home country is very different from our own. But they may result in a decision that immediate return would not be appropriate, because the child's interests will be better served by allowing the dispute to be fought and decided here. Our concept of child welfare is quite capable of taking cultural and religious factors into account in deciding how a child should be brought up. It also gives great weight to the child's need for a meaningful relationship with both his parents. It does not follow, therefore, that a Saudi Muslim boy who is mainly cared for by nannies and nursery schools will be better off living with his mother and maternal grandparents in multi-cultural London than with his father or some other female relative in his home country.

HUMAN RIGHTS

[42] The fact remains that the unchallenged evidence before the trial judge was that the law in Saudi Arabia treats fathers and mothers differently and in significant respects the mother is in a less favourable position than the father. Under arts 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the Human Rights Convention), the right to respect for family life is to be enjoyed without discrimination on grounds of sex. The Court of Appeal held ([2004] 2 FCR 337 at [34]) that the fact that the mother might experience in Saudi Arabia what would be regarded here as breaches of her convention rights did not render the English court in breach of those rights if it returned F to Saudi Arabia. In reaching that conclusion the court relied principally on the decision of the Court of Appeal in *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2002] EWCA Civ 1856, [2003] 3 All ER 1174, [2003] 1 WLR 770: our obligations were only engaged if the likely treatment in another state would engage the prohibition against torture and inhuman or degrading treatment or punishment in art 3 of the Human Rights Convention. This House has since held that our obligations may be engaged where there is a real risk of particularly flagrant breaches of other articles in the foreign country (see [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323). This is not a case of such a risk. In relation to art 8, however, a distinction has also been drawn between 'domestic' cases, where a family life established here may be disrupted by a forced return to another country, and 'foreign' cases, where the only breach would take place abroad (see Lord Bingham of Cornhill [2004] 3 All ER 785 at [7]–[9]). In practice, this adds nothing to the welfare inquiry, once it is accepted that the strength of the child's connection with this country, and the effect upon his parent here, are relevant to whether a summary return will be in his best interests.

[43] However, there is another way in which the human rights considerations might have been relevant. Article 20 of the Hague Convention provides:

> 'The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.'

[44] This was not included in the provisions incorporated into our law by the 1985 Act because at that time it would have been difficult to say what our fundamental principles relating to the protection of human rights and fundamental freedoms were. Now that we have incorporated the Human Rights Convention, that is no longer a problem. Mr Setright acknowledged that had the 1998 Act preceded rather than followed the 1985 Act there would have been no reason not to incorporate art 20.

[45] The importance of art 20 is that it asks whether what might happen in the foreign country would be permitted under those fundamental principles were it to happen here. (It thus goes further than the principle under consideration in *Ullah*'s case, which asks whether it is a breach of this country's obligations to send a person away to a country where his human rights may be violated.) In this country, it would not be acceptable to distinguish *automatically* between father and mother in their relationship with their children. Non-discrimination between the sexes is a fundamental principle of our law. Were art 20 of the Hague Convention to be incorporated, we would be entitled, though not obliged, to decline to return a child on that ground alone. If we were, therefore, to be applying the spirit of the Hague Convention in a non-Hague Convention case, there would be no reason not to apply the whole of the Hague Convention, including art 20. Any discrimination in the foreign country which was contrary to art 14 of the Human Rights Convention would allow, but not require, the court to refuse to return the child. This consideration serves to reinforce the view that the legal system in the foreign country cannot be irrelevant to the issue of summary return.

CONCLUSION

[46] For all those reasons, I would hold that the Court of Appeal was wrong to interfere with the exercise of the trial judge's discretion in this case. But I would also hold that the trial judge was wrong to leave out of account the absence of a jurisdiction in the home country to enable the mother to bring the child back here without the father's consent. The approach adopted by Ward LJ in *Re JA (a minor) (abduction: non-convention country)* [1998] 2 FCR 159 is to be preferred to that of Thorpe LJ in *Re E (child abduction: non-Convention country), Osman v Elasha* [1999] 3 FCR 497, [2000] Fam 62. It was, along with everything else, a factor to be weighed in the balance in deciding whether summary return to Saudi Arabia was in the best interests of this little boy.

[47] I would therefore allow the appeal and restore the orders made by the trial judge. It has been suggested that we might remit the case to him on the ground that the evidence before him on Saudi law, although unchallenged by the father at the time because it also accorded with the father's understanding of the position, may not have given the full picture. Mr Setright very properly acknowledges that he has no basis for inviting this court to admit fresh evidence which both could and should have been adduced before the trial judge. We cannot use the mere suggestion that he might have made different findings about

the foreign law as a basis for asking him to make his decision on the application for summary return again. There is, of course, nothing to prevent the father from making another application about the child's future in which such evidence might be adduced. Whether it would be in F's best interests for him to do so is another matter.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[48] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would allow this appeal.

Appeal allowed.

Celia Fox Barrister.

Englewood Properties Ltd v Patel and another

[2005] EWHC 188 (Ch)

CHANCERY DIVISION

LAWRENCE COLLINS J

17 DECEMBER 2004, 16 FEBRUARY 2005

Sale of land – Vendor – Fiduciary duty to purchaser – Vendor as trustee for purchaser – Whether scope of fiduciary duty extending beyond land the subject of sale.

The claimant property developer owned a parade of shops which included a shop and ancillary accommodation (the sale property) leased to a large chain store which traded from the sale property. The claimant had originally purchased an underlease (the 1939 lease) of the sale property from the chain store and granted it a leaseback (the 1991 underlease). The 1939 lease contained a lessor's covenant not to sell or let any of the shops in the parade to anyone (except the chain store) whose business was of a specified kind and not to sell or let any of the shops without inserting an appropriate covenant to prevent the purchaser or lessee so doing. The 1991 underlease contained a lessor's covenant to enforce the covenant in the 1939 lease. The claimant later acquired the headlease in the parade and the freehold and applied for first registration and merger. The claimant put the parade up for sale at public auction in various lots of which the sale property was one. The draft transfer provided that the transferee covenanted to perform the covenants in the 1939 lease and to indemnify the transferor. The first defendant (as agent for the second defendant) successfully bid for the sale property. The deposit was paid. The defendants' solicitors then asked the claimant's solicitors to confirm that in respect of each lot a covenant not to let the property for uses or to users which would breach the covenant in the 1939 lease was to be imposed on the buyers. The claimant's solicitors replied that the auction special conditions on the other lots made no reference to the covenant. The proposed mortgagee then declined to finance the purchase, taking the view that while the chain store remained as a tenant there would remain an unquantifiable risk of a claim for damages from the chain store should a business of the kind specified in the covenant begin trading in any of the parade shops. The defendants refused to complete, on the basis that as after contract the claimant as vendor had become in equity a trustee for the defendants as purchaser, it was in breach of its duty as trustee in failing to have inserted any covenant or condition in the sale agreements relating to the other lots in the parade that would have protected the purchaser of the sale property from liability under the covenant in the 1939 lease. The claimant brought proceedings for specific performance and successfully applied for summary judgment. The defendants appealed. The claimant contended that the scope of the duty of a vendor to a purchaser between contract and completion did not extend to properties other than that which was the subject of the sale. The defendants contended that there was no such limitation on a vendor's duty.

Held – The duty imposed on a vendor was to preserve the property in its state as at the time of the contract because equity imposed duties on a vendor to protect, pending completion, the interest which the purchaser had acquired under the contract. The instant case concerned a lessor's covenant and was not a case where the actions of the vendor could have led to a forfeiture of the interest which was the subject matter of the sale. For the purposes of the instant case the most relevant obligations which equity imposed on the vendor were to take reasonable care to preserve the property in question, not to damage the property, and not to prejudice the purchaser's interest in the property pending completion. Those obligations did not extend to a lessor's duty to impose covenants on purchasers of adjoining properties unless that duty was imposed by the contract of sale of the property in question. Accordingly, it was not arguable in the instant case, in the absence of an agreement to the contrary, that the claimant had had a duty to require the purchasers of the lots sold subsequently to the sale property to comply with the covenant in the 1939 lease. The appeal would therefore be dismissed (see [54], [58], [59], below).

Sinclair-Hill v Sothcott (1973) 26 P & CR 490 doubted.

Notes

For the effect of agreement for sale and for the nature of vendor's trusteeship, see 42 *Halsbury's Laws* (4th edn reissue) paras 177–181.

Cases referred to in judgment

Abdulla v Shah [1959] AC 124, [1959] 2 WLR 12, PC.

Belvedere Court Management Ltd v Frogmore Developments Ltd [1996] 1 All ER 312, [1997] QB 858, [1996] 3 WLR 1008, CA.

Berkley v Poulett [1977] 1 EGLR 86, CA.

Clarke v Ramuz [1891] 2 QB 456, [1891–4] All ER Rep 502, CA.

Cumberland Consolidated Holdings Ltd v Ireland [1946] 1 All ER 284, [1946] KB 264, CA.

Davron Estates Ltd v Turnshire Ltd (1982) 133 NLJ 937, CA.

Dowson v Solomon (1859) 1 Drew & Sm 1, 62 ER 278.

Egmont (Earl) v Smith (1877) 6 Ch D 469.

Golden Bread Co Ltd v Hemmings [1922] 1 Ch 162, [1921] All ER Rep 569.

Hamilton-Snowball's Conveyance, Re [1958] 2 All ER 319, [1959] Ch 308, [1958] 2 WLR 951.

Heronsgate Enterprises Ltd v Harman (Chesham) Ltd (21 January 1993, unreported), CA.

Kern Corp Ltd v Walter Reid Trading Pty Ltd (1987) 71 ALR 417, 163 CLR 164, Aus HC.

Lucie-Smith v Gorman [1981] CLY 2866.

Lyne-Stephens and Scott-Miller's Contract, Re [1920] 1 Ch 472, CA.

Lysaght v Edwards (1876) 2 Ch D 499.

Musselwhite v CH Musselwhite & Son Ltd [1962] 1 All ER 201, [1962] Ch 964, [1962] 2 WLR 374.

Palmer v Goren (1856) 25 LJ Ch 841.

Raffety v Schofield [1897] 1 Ch 937.

Rayner v Preston (1881) 18 Ch D 1, [1881–5] All ER Rep Ext 1795, CA.

Shaw v Foster (1872) LR 5 HL 321, [1861–73] All ER Rep Ext 1220, HL.

Sinclair-Hill v Sothcott (1973) 26 P & CR 490.

Snook v London & West Riding Investments Ltd [1967] 1 All ER 518, [1967] 2 QB 786, [1967] 2 WLR 1020, CA.

Cases referred to in skeleton arguments

Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, [1982] QB 84, [1981] 3 WLR 565, CA.

Johnson v Gore Wood & Co (a firm) [2001] 1 All ER 481, [2002] 2 AC 1, [2001] 2 WLR 72, HL.

Appeal on application for summary judgment

The defendants, Shailesh Patel and Cornberry Ltd, appealed with permission of Master Moncaster from his order made on 20 August 2004, following the application of Englewood Properties Ltd (Englewood) for summary judgment, that judgment be entered against the defendants for specific performance of the contract made at public auction on 3 December 2003 between Englewood and the defendants for the sale and purchase of freehold and leasehold property at 235–241 Heathway, Dagenham, Essex. The facts are set out in the judgment.

Mark Warwick (instructed by *Jeffrey Green Russell*) for the defendants.

David Hodge QC (instructed by *Russell-Cooke*) for Englewood.

Cur adv vult

16 February 2005. The following judgment was delivered.

LAWRENCE COLLINS J.

I THE BACKGROUND

[1] The claimant, Englewood Properties Ltd (Englewood), is a property developer, which at the material times owned a parade of shops in Dagenham. According to his evidence, the first defendant, Mr Shailesh Patel, is a property consultant and agent. The second defendant, Cornberry Ltd, is a British Virgin Islands company.

[2] Number 233 to 253 (odd) Heathway, Dagenham, Essex, consist of a three-storey parade of shops. At a public auction held by Allsop & Co at the Berkeley Hotel, Wilton Place, London SW1, on 3 December 2003 the shops (together with other properties) were put up for sale in seven lots, lots 10 to 16.

[3] Lot 11 consisted of Nos 235 to 241, which was a large Woolworths store (the property), with ancillary accommodation. The title comprised within the property is both freehold and leasehold. At the time of the auction the freehold owner was Englewood, which also owned the freehold of lot 10 and lots 12 to 16. The freehold and leasehold titles have not merged.

[4] The auction catalogue distributed to prospective buyers at the auction incorporated notices to prospective buyers, particulars of sale for each lot, and the common auction conditions. The notices to potential buyers stated (para 5.3) that the conditions of sale consisted of the notices to prospective

buyers, the common auction conditions, the special conditions of sale, and any addenda relating to the lot. The notices provided: *a*

> '6. Liability of Bidder
>
> 6.1 If you bid at the Auction, you will be personally liable in respect of any accepted bid. This will be the case even if you bid as agent or other representative for another party. *b*
>
> 6.2 If you bid as agent or representative then you and the person or organisation on whose behalf you have bid will be jointly and severally liable under the contract of sale ...'

[5] The common auction conditions included a section headed 'The Conduct of the Auction' which provided as follows: *c*

> 'if YOU make a successful bid for a LOT
>
> YOU are personally liable to buy it even if you are acting as an agent ...
>
> If the BUYER does not comply with its obligations under the CONTRACT YOU are personally liable to buy the LOT and must indemnify the SELLER in respect of any loss the SELLER incurs as a result of the BUYER's default.' *d*

[6] The auctioneer was Mr Moir of Allsop & Co. Mr Patel successfully bid for the property at the auction, which was knocked down to him at a price of £1,320,000. Mr Hodgson of Allsop & Co then inserted Mr Patel's name in section 2 of the buyer's slip under the heading 'Full name, address and telephone number of the Buyer (ie the person, firm or company who is intended to be the owner of the property)' and the name of Mr Patel's solicitors in section 4. Mr Hodgson then took the buyer's slip to Mr MacKilligan of Allsop & Co, who inserted Mr Patel's name in section 3 under the heading 'Successful Bidder's full name' etc and asked Mr Hodgson to get Mr Patel to sign it. Mr Patel then signed the buyer's slip, which provides that Allsop & Co will sign any memorandum or contract of the sale on behalf of the relevant parties. Mr MacKilligan made a handwritten note on the buyer's slip 'Shailesh to complete later'. Mr Patel was also the successful bidder on lot 14. *e* *f* *g*

[7] On 4 December 2003 Alan Ross & Partners sent a client account cheque for the deposit of £132,000 to Allsop & Co with a covering letter signed by one of its partners, Mr Sanjiv R Patel, addressed to Mr MacKilligan of Allsop & Co referring to 'my client Cornberry Limited's purchase of [the property] at Auction yesterday' and confirming that Allsop & Co had authority to sign the contract on their behalf, or alternatively they could send the contract to him for signature. *h*

[8] Allsop & Co then prepared a sale memorandum in respect of the sale of the property which showed Cornberry Ltd as the buyer of the property at the bid price and signed it on behalf of Cornberry Ltd. *j*

II THE TITLE

[9] The parade, including the property, was part of freehold land originally owned by the London County Council (the LCC). On 30 June 1939, the LCC

granted a 99-year lease from 25 March 1938 (the June 1939 headlease) of the parade to Wigram Family Settled Estates Ltd (Wigram).

[10] On 18 October 1939 Wigram granted an underlease (the October 1939 lease) of the property to FW Woolworth & Co Ltd (Woolworths) as lessee. The underlease was for a term of 99 years (except for the last three days) from 25 March 1938.

[11] On 15 October 1991 Englewood purchased the October 1939 lease at auction, and on 12 November 1991 Englewood granted a leaseback to Woolworths of the property for a term of 25 years from 29 September 1991 at an initial rent of £85,000 pa (the November 1991 underlease). The underleasehold title was subsequently registered under title EGL291972.

[12] Subsequently, as a result of transactions in November 1991, Englewood acquired the headlease interest in the parade, and in November 1998 Englewood acquired the freehold interest in the parade from the London Borough of Barking and Dagenham. On registration of the freehold, Englewood applied for first registration of the freehold title and merger of the June 1939 headlease, and registration of the purchase and the merger were completed in April 1999. Freehold title is registered under EGL385095, and the charges register shows the October 1939 lease (and the other occupational leases of the other shops in the parade) as leases of which the proprietor of the freehold title would be the immediate reversioner.

III THE COVENANTS

[13] Neither the October 1939 lease nor the November 1991 underlease was in evidence, but there is no dispute as to the relevant provisions. By cl 5(c) of the October 1939 lease:

> 'The Lessors will not during the term hereby granted sell or let any of their shops numbers 233, 243, 246, 247, 249 and 251/253 ... to any person corporation or firm (except S.W. Woolworth [sic] ...) whose primary business is that of a fixed price store and in particular but without limitation to the foregoing will not sell or let any such shops or any part thereof to [certain named companies] ... and the Lessors will in every conveyance or lease of any such shops or any part thereof insert an appropriate covenant to prevent the purchaser or the lessee as the case may be from selling or letting any such shops to any person corporation or firm ... whose primary business is that of a fixed price store or to [named companies] ...'

[14] The November 1991 underlease contains a lessor's covenant relating to the enforcement of provisions in the October 1939 lease. Clause 5.4 of the November 1991 underlease contains a covenant by the landlord 'to enforce at the Landlord's cost the covenants contained or referred to in the Headlease on the part of the Lessor ...'. The 'Headlease' is defined as the October 1939 lease.

IV THE SPECIAL CONDITIONS OF SALE

[15] The special conditions of sale in relation to the property stated that on completion the seller was to deliver to the buyer with the freehold and

leasehold land certificates the original and counterpart of the June 1939 lease, and the draft transfer provided:

> 'The Transferee and its successors in title hereby covenant with the Transferor at all times hereafter to observe and perform all the covenants conditions and stipulations on the part of the Landlord and Tenant contained or referred to in the Lease dated 30th June 1939 made between the London City Council [sic] (1) and Wigram Family Settled Estates Limited (2) and to indemnify the Transferor and its successors in title from and against all proceedings costs claims demands and expenses arising out of any future breach or non-observance or non-performance thereof.'

[16] It is likely (but there is no evidence on the point) that there was a similar special condition in relation to the other lots, and it is possible that the reference to the June 1939 headlease between the LCC and Wigram was an error, and that it was intended to refer to the October 1939 lease between Wigram and Woolworths.

V THE PROBLEM ARISES

[17] After the auction Stephenson Harwood, the solicitors for the Bank of Scotland (the bank), who were to provide finance for the purchase, raised questions on the covenant in the October 1939 lease. On 16 December 2003 the defendants' then solicitors, Alan Ross & Partners, asked Englewood's solicitors, Russell-Cooke, to confirm that in respect of each lot a covenant not to let the properties for uses or to users which would breach that covenant was to be imposed on the buyers as required by the covenant in the October 1939 lease. Russell-Cooke immediately replied that the auction special conditions on the other lots did not refer to the covenant. In the pleadings Englewood admits that in none of the agreements relating to the other properties was the relevant covenant or condition inserted.

[18] Stephenson Harwood then suggested to Alan Ross & Partners that the defendants should seek indemnity insurance. First Title (who are legal indemnity providers) were approached but subsequently stated that they regarded the covenant as enforceable and would not cover the risk.

[19] The bank declined to finance the purchase in the light of the report on title prepared by Stephenson Harwood. The bank's view was that while Woolworths remained as tenants there would remain an unquantifiable risk to the purchaser of a claim for damages from Woolworths should a fixed price store or one of the other stores mentioned commence trading in the relevant numbered properties.

[20] Chestertons (the bank's valuers) subsequently advised that the market value of the freehold interest in the property with the title defect was £800,000. Chestertons' report stated that the existence of a large number of fixed price and discount stores in the vicinity meant that the market was already diluted and an additional discount store would have a reasonably small effect on Woolworths. But the existence of the restrictive covenant would reduce the number of investors willing to consider the property, and the market might be restricted to cash buyers, who would normally seek a 20%–30% discount from market value, where the purchase could not be financed from borrowings.

[21] On 5 January 2004 the defendants' solicitors wrote to Englewood's solicitors asserting that Englewood had acted in breach of its duties as trustee, and was not entitled to enforce the contract of sale. The defendants refused to complete on the stipulated completion date, 6 January 2004.

[22] On 12 January 2004 Englewood's solicitors served a formal notice to complete, which was extended by 48 hours until 28 January 2004 by a letter of 26 January 2004, and then again to 2 February 2004 by letter of 28 January 2004. On 2 February 2004 the defendants' solicitors wrote to Englewood's solicitors enclosing the valuation from Chestertons and asserting that their client was ready, able and willing to complete at the abated price of £800,000.

VI THE PRESENT PROCEEDINGS

[23] On 8 March 2004 Englewood brought proceedings against the defendants for specific performance. On 10 March 2004 Master Moncaster gave permission for the claim form to be served outside the jurisdiction on Cornberry Ltd. Mr Patel and Cornberry Ltd served, separately, a defence and counterclaim in April and May 2004 respectively. Mr Patel claimed that he acted only as agent: further or alternatively Englewood was estopped from asserting that Mr Patel was a buyer or joint buyer because after the auction Englewood and the defendants proceeded on the basis of the assumption that Cornberry Ltd was the sole buyer of the property and it would be unfair or unjust to allow Englewood to go back on this assumption. Mr Patel relies on the fact that all of Englewood's dealings with the property after Mr Patel's solicitor identified Cornberry Ltd as the buyer were on the basis that Cornberry Ltd was the sole buyer.

[24] Mr Patel says further that, if he was under any personal liability, he was entitled to an abatement of the bid price by reason of damages payable by Englewood for its breach of duty as trustee in respect of the property. Cornberry Ltd's defence was that it was entitled to an abatement of the bid price for the same reason.

[25] The breach of duty as trustee was said in the defences of Mr Patel and Cornberry Ltd (respectively paras 18 and 17) to be the failure to insert any covenant or condition in the agreements of sale relating to lots 12 to 16 that would protect (or seek to protect) the buyer of the property (who on completion would become Woolworths' landlord) from action by Woolworths if the primary business of one of the re-sold properties was contrary to cl 5(c) of the October 1939 lease. Englewood's reply to each of the defences was that there was no such duty, and that in any event (inter alia) the covenant in cl 5(c) ought to be deemed obsolete, and that it did not secure any practical benefits to Woolworths.

[26] On 9 June 2004 Englewood applied for summary judgment. By order of 20 August 2004 Master Moncaster ordered that judgment be entered against the defendants for specific performance. His reasoning was as follows: (1) on the sale of lots 10, and 12 to 16, Englewood, in breach of cl 5(c) of the October 1939 lease and therefore in breach of its covenant with Woolworths in the November 1991 underlease, did not insert an appropriate covenant against competition with Woolworths as required by the October 1939 lease, and by that failure and breach of covenant Englewood had made themselves liable to Woolworths for damages, should Woolworths choose to sue them; (2) although Englewood was liable to Woolworths, he was very doubtful

whether the defendants after completion of their contract could be under any liability to Woolworths for that one-off breach by their predecessor landlord, and they were not liable for any future breaches by reason of the limitation in the covenant of liability to the period of ownership of the burdened premises; (3) but because that point was not fully explored, he proceeded on the basis that there was a possible liability on the defendants if they completed the contract; (4) if the effect of the sales of the other shops in the parade without the imposition of the covenant was to expose the buyer to potential liability for future breaches of contract, then to do that on a separate sale after the date of the contract would be a breach of the seller's duty to manage and preserve the property up to the date of completion; and that duty was not limited to preserving the physical state of the property but extended to matters which affected the value of the property, eg the withdrawal of a planning permission which reduced the value, or the re-letting of the property; such cases could not be distinguished from a case where the seller between contract and completion committed a breach of the lease, subject to and with the benefit of which the property was sold, if that breach diminished the value of the reversion sold. Where the subject matter of the sale was a reversion on a lease, a deliberate breach of the covenants in the lease must be a breach of the seller's duty, whether the breach related to the demised premises or to adjoining premises; (5) if there had been a separate sale subsequently of the other properties in the parade there would have been a breach of duty and an abatement of the purchase price would be necessary, but it was wholly artificial and unreal to apply that analysis to the facts of the present case, since the whole parade of shops was included in the auction in seven lots, and the transaction could not be sensibly analysed as being a series of separate sales in temporal order because a minute or two separated the sale of each of the lots. The reality was that all the shops were being put up simultaneously for sale, and it was fortuitous that the property was the second lot rather than the first lot or (say) the seventh lot. There was therefore no breach of the duty of Englewood as a trustee for its purchaser; (6) the terms of the common auction conditions and notices to prospective buyers made it impossible for Mr Patel to escape from personal liability under the contract. It did not matter that all of the auctioneers at Allsop & Co knew that he was an agent and did not purchase properties on his own account.

[27] Master Moncaster gave permission to appeal (although he said that he did not consider that the agency point permitted of any doubt). Englewood has put in a respondent's notice challenging the master's view that if there had been a separate sale subsequently of the other properties in the parade there would have been a breach of duty and an abatement of the purchase price would have been necessary. The master should have held that the seller's duty as trustee for the buyer during the period between contract and completion only extended to dealings with the properties sold and did not cover dealings with the seller's adjoining or neighbouring properties.

[28] On this appeal, the defendants seek to uphold the master's view that if there had been a separate sale, Englewood would have been in breach of duty, and say that there was no principled reason why the sales of lots 12 to 16 were not separate sales. Englewood chose to divide the parade into different parcels or lots, rather than to sell them as one parcel. Even if individual property

transactions are to be regarded as 'artificial' or as carried out to circumvent a statute, provided that those transactions are not shams, they will be regarded as effective (see *Snook v London & West Riding Investments Ltd* [1967] 1 All ER 518 at 528–529, [1967] 2 QB 786 at 802; *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1996] 1 All ER 312, [1997] QB 858). The court should treat the transactions as separate and not aggregate them. Once it is recognised (as it must be) that different lots were the subject of separate contracts then effect must given to the consequences of this. The reasoning of the master creates uncertainty which, in a property context, the courts should strive to avoid.

[29] Englewood emphasises that the terms of the agreements for the sale of the re-sold properties had already been determined before the auction and were fully documented in the auction literature, which was available for inspection by Mr Patel before he bid for the property. Englewood had already contracted to sell lot 10 on terms which omitted any protective covenant or condition prior to the property being knocked down to Mr Patel. Mr Patel successfully bid for the property on terms (as set out in the auction literature) which contained no provision for the insertion of any protective covenant or condition in any of the sale agreements relating to the re-sold properties. The master was correct to reject an analysis of the transaction as being a series of separate sales in temporal order.

[30] In any event the duties of the seller as trustee only extended to dealings with the property and did not cover any dealings with the seller's adjoining or neighbouring properties. The vendor is a trustee of the property sold and any physical accretions thereto only, and is not a trustee of financial benefits not expressly included in the sale (see *Re Hamilton-Snowball's Conveyance* [1958] 2 All ER 319, [1959] Ch 308). The vendor is not under a duty to abstain from dealing with other properties of his in the interval between contract and completion if such dealing would not constitute a breach of any obligation owed to the purchaser if effected after completion. The master was right to be troubled by an anomaly he identified in his judgment, namely how or why the seller should be under a liability to his buyer during the period between contract and completion for such an alleged breach of duty when, after completion, he would be free to sell the adjoining properties without the buyer having any redress.

[31] The defendants argue that Englewood had covenanted with Woolworths to take action if the owner of the adjoining shops sold or let any of them to a proscribed company, or that owner sold or let such a shop without inserting a covenant preventing a sale or letting to a proscribed company. If the landlord of one of those shops sold or let one of them without inserting a covenant preventing sale or letting to a proscribed company Englewood (and any successor in title) would be liable in damages to Woolworths. When Cornberry Ltd becomes Woolworths' landlord on completion of the contract, then Cornberry Ltd will become subject to cl 5.4 of the November 1991 underlease, but will not be in a position to 'enforce' cl 5(c) of the October 1939 lease. Englewood was obliged as trustee to protect Cornberry Ltd's interest in the property by complying with cl 5(c) of the October 1939 lease. In view of cl 5(c), cl 5.4 of the November 1991 underlease affected the dealing of the landlord in respect of the property with its interest in other properties, namely the other lots.

[32] The principal issue is, therefore, whether as a matter of law the duty of a vendor could extend to a duty to impose covenants on purchasers of adjoining properties even though that duty is not imposed by the contract of sale of the property in question. Both Mr Mark Warwick and Mr David Hodge QC accepted that it was appropriate for the matter to be finally determined on the application for summary judgment, and that there were no matters of fact which might require investigation. I was taken to several authorities, and I looked at some additional authorities on which I gave the parties the opportunity to comment. I then circulated a draft judgment dismissing the appeal, in which, in addition, I quoted from a Law Commission report (see below, at [43]), which in turn referred to a decision (*Dowson v Solomon* (1859) 1 Drew & Sm 1, 62 ER 278) which had not been cited to me. Mr Mark Warwick then indicated, in a skeleton argument for a stay of execution pending appeal, that he would be relying on this decision on any appeal. Since this decision had not been the subject of argument, I decided that I would hear oral submissions on the relevance of this decision before handing down my judgment, and this judgment is given following those submissions.

[33] On the personal liability aspect, Mr Patel's case is that he acted only as agent, or alternatively Englewood is estopped by convention from asserting that he was the buyer or a joint buyer. His evidence is that he carries on business as a property consultant and agent and that he attended the auction in that capacity. The auctioneer (Mr Moir) was aware of his business and also was aware that when he made bids for lot 11 he was doing so as agent. Allsop & Co would have known that Mr Patel (as was his custom) would notify Allsop & Co soon after the auction of the name of his principal. As from the receipt of the letter the identity of the principal was known and thereafter all Englewood's dealings with respect to the property were on the basis that Cornberry Ltd was the sole buyer. A contract of sale of a property at public auction is not written (see s 2(5)(b) of the Law of Property (Miscellaneous Provisions) Act 1989). The contract is effected by the fall of the auctioneer's hammer. The fact that the auctioneers at Allsop & Co knew that Mr Patel was an agent and never understood at any time that he was acting on his own account is equivalent to an agreement that he was not personally liable, or there was an estoppel by convention because it would be unfair to hold Mr Patel liable pursuant to the contract.

[34] Englewood's case is that if Mr Patel was acting as the agent of Cornberry Ltd, an unknown principal, when he successfully bid for the property, by virtue of terms of the notices to prospective buyers and the conduct of the auction section of the common auction conditions, Mr Patel is jointly and severally liable with Cornberry Ltd under the auction contract and personally liable to buy the property at the bid price, and to indemnify Englewood in respect of any loss. Englewood says that there was no attempt to vary or exclude the provisions in the auction conditions imposing personal liability on Mr Patel, and so far as estoppel by convention was concerned there was no evidence of any common underlying assumption that only Cornberry Ltd was the buyer.

VII CONCLUSIONS

[35] This is an appeal on an application for summary judgment, and I have to consider whether there is a realistic, as opposed to a fanciful, prospect of Mr Patel succeeding on the agency point, and of both defendants succeeding on the trust point.

The agency issue

[36] I did not call upon Mr David Hodge to respond on behalf of Englewood to the appeal on the question of the personal liability of Mr Patel. The notices to prospective buyers and the common auction conditions, on the basis of which Mr Patel bid, are absolutely clear in emphasising his personal liability.

[37] Of the allegation that Englewood was estopped by convention from asserting that Mr Patel was either the buyer of the property or a joint buyer, Mr Patel was asked to give particulars of all specific facts and matters relied upon in support of the alleged (a) estoppel and (b) convention. His answer was that after the auction he and Englewood (and Cornberry Ltd) proceeded on the basis of the assumption that Cornberry Ltd was the sole buyer of the property and it would be unfair or unjust to allow Englewood to go back on this assumption. The facts and matters set out in paras 6.5 and 6.6 of the defence were relied upon. Paragraphs 6.5 and 6.6 were:

> '6.5 The day after the Auction (on 4th December 2003) Alan Ross & Partners ("Alan Ross") wrote to Neil MacKilligan. The letter began *"Dear Neil"* and identified the Second Defendant as the Buyer of the property and enclosed a solicitor's cheque in respect of the deposit. No one at Allsops had asked the First Defendant for any deposit because they were aware he was only acting as agent and the deposit would be provided by his principal.
>
> 6.6 As and from the receipt of the said letter from Alan Ross the identity of the First Defendant's principal was known (namely the Second Defendant) and thereafter all the Claimant's dealings with respect to the property (prior to this case being begun) were on the basis that the Second Defendant was the sole Buyer.'

[38] There is nothing in this which is any way inconsistent with the auction conditions. The whole point of them is to make an agent liable even if the auctioneer knows that he is an agent and even if the principal's identity becomes known. There is nothing inconsistent with those documents in Allsop & Co knowing that he was acting as agent, or in Englewood's advisers or Allsop & Co dealing with respect to the property on the basis that Cornberry Ltd was the buyer. There is no suggestion, still less any evidence, that there was conduct on the part of Englewood's advisers or on the part of Allsop & Co, which amounted, or could reasonably be thought to amount, to a waiver or variation of the terms.

The breach of duty issue

[39] On the main issue, I will proceed on the basis that the sales of the different lots were separate sales, as indeed they were. Although very little time separated the sale of the separate lots, they were genuine separate sales. Consequently in my judgment the issue is whether it is arguable that Englewood was in breach of duty in not imposing the covenant on the

purchasers of the other lots. On this point the difference between the parties was on the scope of the duty of a vendor to a purchaser between contract and completion. For Englewood, Mr David Hodge argued that it did not extend to properties other than that which was the subject of the sale. All the authorities were concerned with duties in respect of that property. For the defendants, Mr Warwick argued that there is no limitation of the duty of a trustee to the property sold. The question depended on the facts, and there was no reason to suppose, for example, that a vendor could do anything he wished with his adjoining land even if it diminished the value of, or damaged, the property which he had agreed to sell.

The vendor as trustee

[40] It has long been said that after contract, and until completion, the vendor becomes in equity a trustee for the purchaser. Some of the more characteristic statements in the period in which the principle was settled include these:

(a) In *Lysaght v Edwards* (1876) 2 Ch D 499 at 506 Sir George Jessel MR said:

> 'It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.'

and (at 510): 'It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.'

(b) In *Earl of Egmont v Smith* (1877) 6 Ch D 469 at 475 Sir George Jessel MR said:

> 'He is certainly a trustee for the purchaser, a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee. For that I have the decision of the House of Lords in [*Shaw v Foster* (1872) LR 5 HL 321], which only re-stated what had been the well-known law of the Court of Chancery for centuries.'

(c) In *Shaw v Foster* (1872) LR 5 HL 321 at 338, [1861–73] All ER Rep Ext 1220 at 1226, (in which Sir George Jessel appeared as Solicitor-General), Lord Cairns had said:

> '... there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was

a the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it.'

b

(d) In *Clarke v Ramuz* [1891] 2 QB 456 at 459–460, [1891–4] All ER Rep 502 at 503–504 Lord Coleridge CJ said:

c '... in the case of a contract for the sale and purchase of land, although the legal property does not pass until the execution of the conveyance, during the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract d was made.'

[41] The principle has been re-stated in more modern times on several occasions, of which the following are perhaps the most helpful:

e (a) In *Berkley v Poulett* [1977] 1 EGLR 86 at 93 Stamp LJ said:

'These duties and rights [of a purchaser] arise from the contract of sale and it is because of their existence that the vendor is said to be a constructive trustee, or a trustee *sub modo*, of the estate for the purchaser from the time f when the contract is constituted. But to say that it is the duty of the vendor as *trustee for the purchaser* to care for the property is to put the cart before the horse and may lead you into error. He is said to be a trustee because of the duties which he has, and the duties do not arise because he is a trustee but because he has agreed to sell the land to the purchaser and the purchaser on tendering the price is entitled to have the contract specifically performed g according to its terms. Nor does the relationship in the meantime have all the incidents of the relationship of trustee and cestui que trust. That this is so is sufficiently illustrated by the fact that *prima facie* the vendor is until the date fixed for the completion entitled to receive and retain the rents and profits and that as from that date the purchaser is bound to pay interest. And h you may search the Trustee Act 1925 without obtaining much that is relevant to the relationship of vendor and purchaser. Thus, although the vendor because of his duties to the purchaser is called a trustee, it is wrong to argue that because he is so called he has all the duties of or holds the land on a trust which has all the incidents associated with the relationship of a j trustee and his cestui que trust.'

(b) In *Heronsgate Enterprises Ltd v Harman (Chesham) Ltd* (21 January 1993, unreported) Sir Donald Nicholls V-C said:

'It is well-established law that, subject always to the terms of the particular contract, a seller of property under a specifically enforceable contract is to be

regarded after the contract has been made as holding the property as a trustee for the buyer. However, he is not a bare trustee. His trust obligations are limited in certain respects. For example, if, as is usually the case, he is entitled to remain in possession for the period after the contract has been made pending the date fixed for completion, he is entitled to keep and retain for his own benefit the rents and profits of the land arising during that period ... The seller must take care not to damage the property or to prejudice the buyer's interest in the property of which, on completion, he will become the legal owner. But in general, within those limits he is entitled to the ordinary rents and profits, and for him to take steps to obtain them after contract and before the date fixed for completion, either by occupying and using the property himself or by permitting another to occupy and work the property in return for a rent, is not a breach of his duties as seller under a contract for sale.'

[42] Thus the position of the vendor as trustee has been variously described as: (1) 'something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, possession of the estate' (see *Lysaght v Edwards* (1876) 2 Ch D 499 at 506, per Sir George Jessel); (2) 'a constructive trustee' (see *Lysaght v Edwards* (1876) 2 Ch D 499 at 510, per Sir George Jessel MR); or 'constructively a trustee' (see *Shaw v Foster* (1872 MR) LR 5 HL 321 at 349, [1861–73] All ER Rep Ext 1220 at 1233, per Lord O'Hagan); (3) 'a trustee, no doubt, with peculiar duties and liabilities' (see *Earl of Egmont v Smith* (1877) 6 Ch D 469 at 475, per Sir George Jessel); (4) 'a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold ...' (see *Rayner v Preston* (1881) 18 Ch D 1 at 6, [1881–5] All ER Rep Ext 1795 at 1797, per Cotton LJ); (5) having duties 'not exactly the same as in the case of other trustees' (see *Clarke v Ramuz* [1891] 2 QB 456 at 459, [1891–4] All ER Rep 502 at 503, per Lord Coleridge CJ); and (6) 'a quasi-trustee' (see *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 All ER 284 at 286, [1946] KB 264 at 269, per Lord Greene MR).

[43] In the High Court of Australia Deane J said:

'... it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser ... [T]he ordinary unpaid vendor of land is not a trustee of the land for the purchaser. Nor is it accurate to refer to such a vendor as a "trustee *sub modo*" unless the disarming mystique of the added Latin is treated as a warrant for essential misdescription.' (See *Kern Corp Ltd v Walter Reid Trading Pty Ltd* (1987) 71 ALR 417 at 435, 163 CLR 164 at 191.)

But in its report on *Transfer of Land: Risk of Damage After Contract for Sale* (Law Com no 191) (1990), at paras 2.7 and 2.8, the Law Commission said:

'2.7 The trust concept has been particularly valuable in imposing duties on the vendor in the interim period between the date the contract is made and the date it is completed. He is liable for physical damage resulting from his not exercising reasonable care [citing *Lucie-Smith v Gorman* [1981] CLY 2866], including such damage inflicted by trespassers [citing *Davron Estates Ltd v Turnshire Ltd* (1982) 133 NLJ 937]. His responsibility also extends beyond physical damage. For example, he must continue to perform lease covenants [citing *Dowson v Solomon* (1859) 1 Drew & Sm 1] and must not relet in a way which would prejudice the purchaser [citing *Abdulla v Shah* [1959] AC 124].

2.8 While the application of the term "trustee" to describe the vendor's position may sometimes be a cause of confusion, because some rules applicable to trustees have no application here, there is clearly a need for some restraint on the vendor's exercising the powers of a legal owner and for the imposition for the benefit of the purchaser of some positive duty of care. The trust concept which has developed is a useful, flexible tool enabling a degree of control over the vendor to be exercised in the very varied situations which arise. The possible option of abolishing this trust was put forward in the working paper [Law Commission, *Transfer of Land: Passing of Risk from Vendor to Purchaser*, Working Paper no 109 (1988)] although we did not favour it. None of those who responded supported the suggestion. We therefore conclude that the trust should remain undisturbed.'

The consequences

[44] Although there is some overlap, the cases can be divided into two broad categories. The first is where the existence of the trust, or the identification of the trust property, is in question.

[45] Thus in *Lysaght v Edwards* the testator agreed to sell a farm, and died before completion. It was held that the farm passed under a devise of 'all the real estate which at my death might be vested in me as trustee'.

[46] In the well-known decision in *Rayner v Preston* the vendors agreed to sell a house which they had insured against fire risk. The house was damaged by fire after contract but before completion, and the issue was whether the purchaser was entitled to the benefit of the insurance. It was held by a majority that the purchaser was not entitled to the insurance proceeds. On the trust aspect, Cotton LJ held that the vendors were trustees in a qualified sense only, and only in respect of the property contracted to be sold, of which the policy was not a part. Brett LJ considered that it was a misnomer to describe the vendors as trustees of the house, but even if they were trustees the contract of insurance did not run with the land. James LJ, dissenting, considered that the vendors were trustees and held the insurance money for the purchaser because any benefit which accrued to a trustee by reason of his legal ownership was taken as trustee for the beneficial owner. Section 47 of the Law of Property Act 1925 was intended to reverse the effect of this decision, but did not achieve its object (see Megarry and Wade, *Law of Real Property* (6th edn, 2000), p 681 (para 12-057)).

[47] But it remains clear that the nature of the trust is not of the kind which (in the absence of agreement to the contrary) requires the trustee to account for benefits received from the trust property. In *Re Hamilton-Snowball's Conveyance* [1958] 2 All ER 319, [1959] Ch 308 the vendor had received, between contract

and completion, compensation for the requisition of the premises. Upjohn J held that the vendor under a contract for sale is only a qualified trustee for the purchaser of the premises with vacant possession, together with any physical accretions thereto, and not of any right to compensation moneys payable to him under an Act of Parliament which did not, in the absence of express provision in the contract, form part of the subject matter of the sale. So also a vendor of a house was entitled to retain the benefits of payments from a tenant made between contract and completion, because the vendor had sold the house and not also the benefit of the lease (see *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch 472; cf *Musselwhite v CH Musselwhite & Son Ltd* [1962] 1 All ER 201 at 208, [1962] Ch 964 at 987 (sale of shares)).

[48] The second category of cases, which is relevant to the question on this appeal, relates to the scope of the duty of the vendor as trustee. The following duties have been held to exist: (1) to keep the property in a proper state of cultivation, reasonable regard being had to incurring a liability on his part (see *Earl of Egmont v Smith* (1877) 6 Ch D 469); (2) to use reasonable care to keep the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made (see *Clarke v Ramuz* [1891] 2 QB 456 at 459–460, [1891–4] All ER Rep 502 at 503–504; *Raffety v Schofield* [1897] 1 Ch 937 at 944); (3) to take care to prevent removal of the soil by a trespasser (see *Clarke v Ramuz*, where Kay LJ also put the decision on the ground that the purchaser had not got the whole of what he had contracted to buy); (4) to keep the property in its then condition and state, and at any rate, to take reasonable care of it and see that its condition did not deteriorate during that time (see *Davron Estates Ltd v Turnshire Ltd* (1982) 133 NLJ 937 (failure to prevent damage by squatters)); (5) not to abandon rubbish on the property (see *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 All ER 284, [1946] KB 264); (6) in a case where there was a contract for the sale of premises together with the goodwill of the business carried on from the premises, not to let the business lapse, and to inform the purchaser with reasonable promptitude of what he was doing (see *Golden Bread Co Ltd v Hemmings* [1922] 1 Ch 162, [1921] All ER Rep 569).

[49] The Law Commission report mentioned above (at [43]) states (para 2.7) that the vendor must continue to perform lease covenants, citing *Dowson v Solomon* (1859) 1 Drew & Sm 1, 62 ER 278, and it was this reference which led to the further argument on this decision. The defendant had agreed at auction to buy a leasehold house from the trustees for sale under a will. The lease contained a covenant on the lessee to keep the premises insured against fire, with a clause for forfeiture in the event of non-performance of any of the covenants. The auction was in June 1858, and completion was fixed for 20 July 1858, but was delayed until 26 August 1858. The trustee who was acting for all the trustees, anticipating completion in July, renewed the insurance policy for one month only, and the policy expired on 24 July 1858. On the completion date the purchaser refused to complete on the ground that the lease was forfeited by reason of the breach of covenant ((1859) 1 Drew & Sm 1 at 4, 62 ER 278 at 279). The vendors refused to obtain a waiver of the forfeiture from the lessors (Dulwich College) as a condition of completion. The purchaser then gave notice that the contract of purchase was at an end, and demanded the return of his deposit.

[50] The defendants' case was that the failure to insure resulted in the title becoming defective (see (1859) 1 Drew & Sm 1 at 8, 62 ER 278 at 280–281). The question was posed (see (1859) 1 Drew & Sm 1 at 10, 62 ER 278 at 281–282) 'how long did it continue to be the duty of the vendors ... to keep up the insurance and to perform the other covenants in the lease so as to prevent a forfeiture?' There was, it seems, an express covenant to clear all outgoings (including the insurance) until the date fixed for completion, which carried with it the implication that the vendors were not responsible thereafter ((1859) 1 Drew & Sm 1 at 11, 62 ER 278 at 282). The question was whether the failure to inform the purchaser that the insurance lapsed, and the dropping of the insurance, entitled the purchaser to rescind the contract, and that 'question must be tried upon the same grounds as if upon the dropping of the insurance the lessors had actually entered for the forfeiture and avoided the lease' (see (1859) 1 Drew & Sm 1 at 12, 62 ER 278 at 282). In the 'special and peculiar circumstances' (see (1859) 1 Drew & Sm 1 at 14, 62 ER 278 at 283) specific performance was not decreed: the conduct of the trustee operated as a trap and caused great risk to the purchaser, and a court of equity would not lend the vendors its assistance.

[51] I am satisfied that the ratio of this decision is that in the case of a sale of leasehold interests the vendor is under a duty to give good title, and therefore (subject to the express terms of the contract) to take care not to take steps which may result in forfeiture, and that the statement by the Law Commission is a compressed version of this principle. This same judge also decided precisely that in *Palmer v Goren* (1856) 25 LJ Ch 841, another case on failure to insure, where he said (at 842):

> 'It is, in fact, the duty of the vendor so to act that nothing done by him prior to the completion of the contract shall constitute a forfeiture of the lease. The policy of insurance not having in this case been kept up till the completion of the contract,—so rendering the property liable to a forfeiture, that was not done by the vendors that which they should have done, and therefore, I think, the purchaser ought to be discharged from his contract.'

[52] A vendor who has given, at the request of the purchaser, notices to tenants to determine their tenancies is under a duty to consult the purchaser before re-letting (see *Earl of Egmont v Smith* (1877) 6 Ch D 469). *Abdulla v Shah* [1959] AC 124, [1959] 2 WLR 12 was an appeal from the Court of Appeal for Eastern Africa. The Indian Transfer of Property Act 1882 applied in Kenya. It provided that a contract of sale did not create any interest, but also provided that the seller was bound to take as much care of the property as an owner of ordinary prudence would take. It was accepted that this standard was the same as that of a trustee under the Indian Trusts Act 1882, which in turn (said Lord Somervell of Harrow) was substantially that of a trustee under English law. A vendor of rent-restricted property which had become vacant between the dates of the contract and of completion was under a duty to consult the purchaser before re-letting (at controlled rents) prior to completion of the contract. The vendors had no right without consultation with the purchasers to diminish the value of the property as it was after the surrender by re-letting.

[53] Mr David Hodge for Englewood relied on statements in the authorities to support his argument that the duty of the vendor related only to the land to

be sold. In particular he relied on the passage in the judgment of Cotton LJ in *Rayner v Preston* (1881) 18 Ch D 1 at 6, [1881–5] All ER Rep Ext 1795 at 1797, that the trustee is 'so only in respect of the property contracted to be sold', and on other references in cases such as *Lysaght v Edwards* (1876) 2 Ch D 499 and *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch 472 to trusteeship of the property sold. So also in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 All ER 284 at 286, [1946] KB 264 at 269 the breach of duty (abandoning rubbish on the property sold) was said to be 'something in relation to the land which was detrimental to the land'.

[54] But I consider that the answer is to be found in wider considerations of the purpose of the imposition of the trust and its rationale. In my judgment all of the cases, with one possible exception, can be regarded as falling into the category of imposing a duty to preserve the property in its state as at the time of the contract. The reason is that equity imposes duties on the vendor to protect, pending completion, the interest which the purchaser has acquired under the contract. The preservation may be in a physical sense, so that a vendor may have to keep property in a proper state of cultivation (see *Earl of Egmont v Smith*; or prevent trespassers from removing soil (see *Clarke v Ramuz* [1891] 2 QB 456, [1891–4] All ER Rep 502); or prevent trespassers from damaging the floors (see *Davron Estates Ltd v Turnshire Ltd* (1982) 133 NLJ 937). The vendor of a leasehold interest may not take steps which will lead to forfeiture (see *Dowson v Solomon; Palmer v Goren*). The vendor of a business may not cease to carry it on without consulting the purchaser (see *Golden Bread Co Ltd v Hemmings* [1922] 1 Ch 162, [1921] All ER Rep 569), since to do so would destroy the subject matter of the sale. So also the vendor should not re-let the premises without consulting the purchaser (see *Earl of Egmont v Smith; Abdulla v Shah*), since to do so would present the purchaser on completion with property in a legal state different from that which he contracted to buy.

[55] By contrast, in *Heronsgate Enterprises Ltd v Harman (Chesham) Ltd* (21 January 1993, unreported) the release of a tipper from an indemnity agreement was not a matter of which a purchaser could complain, since the benefit of the agreement was not part of the property being sold: it was not annexed to the land, and was a benefit vested in the vendor under an agreement which, on completion, would not survive to bind or to benefit the purchaser as the new owner. If the purchaser could not compel the vendor to assign that benefit, then the purchaser could not complain if the vendor chose not to do so.

[56] The only decision which goes considerably wider, and is not in my judgment consistent with the rationale of the trusteeship rule is *Sinclair-Hill v Sothcott* (1973) 26 P & CR 490. In that case there was an unconditional sale of a property to a developer for which the vendor was seeking planning permission. The vendor withdrew his application for planning permission after the contract. It was held that the principle of the vendor's trusteeship extended to prohibit withdrawal of a planning application in such circumstances. Graham J said (at 495–496):

> 'It was not ... suggested that a term to keep [the planning application] in being ought to be implied in the contract ... On the one hand a planning application cannot properly be regarded as part of property passing on sale in the same way and for the same reasons as the roses in the front garden

a ... If it was, the principle of trusteeship on the part of the vendor could be applied without any hesitation. ... Under modern conditions where all potential building land is subject to planning consents of various kinds, and where local authorities are likely to have large numbers of such applications before them, it is obvious that a high rather than a low place in the queue was of value to a speculative bidder ... It follows that the b vendor in such circumstances is in my judgment under an obligation after the contract has been signed, not to withdraw a planning application which must be assumed to be of value to the purchaser, without at any rate obtaining his consent to such withdrawal.'

c [57] This decision goes to the very limits of the principle, and it is supportable, if at all, only on the basis that the vendor had a duty to preserve the property in its existing state, and the existence of the planning application was part of that existing state. It is to be contrasted with the case where the vendor pre-empts the purchaser by applying for planning permission after contract and before completion, with the result that the permission was given d subject to conditions to which the purchaser could reasonably have taken exception (see *Heronsgate Enterprises Ltd v Harman (Chesham) Ltd*). The imposition of conditions affects the legal state of the property.

[58] My conclusion is that it is not arguable that, in the absence of an agreement to the contrary, Englewood had a duty to require the purchasers of e the lots sold subsequently to the property to comply with the covenant in cl 5(c) of the October 1939 lease. The rationale of the case law is that equity imposes duties on the vendor to protect, pending completion, the interest which the purchaser has acquired under the contract. This is a case of a lessor's covenant, and is not a case where the actions of the vendor could have led to a forfeiture of the interest which was the subject matter of the sale. For present f purposes, if the most relevant obligations which equity imposes on the vendor are to take reasonable care to preserve the property in question, not to damage the property nor to prejudice the purchaser's interest in the property pending completion, the obligations do not extend to a lessor's duty to impose covenants on purchasers of adjoining properties unless that duty is imposed by g the contract of sale of the property in question.

[59] The appeal will therefore be dismissed.

Appeal dismissed.

Celia Fox Barrister.

Director of Public Prosecutions v Collins

[2005] EWHC 1308 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

SEDLEY LJ AND MITTING J

6 MAY, 23 JUNE 2005

Criminal law – Public electronic communications network – Message or other matter – Sending grossly offensive message or other matter – Test for determining whether grossly offensive – Communications Act 2003, s 127(1).

The defendant telephoned the constituency office of his member of Parliament on a number of occasions to express various grievances. He spoke to members of staff if they answered the telephone or to an answering machine if they did not. On a number of those occasions he referred to people to whom he objected as 'wogs', 'Pakis' and 'black bastards'. Of those who heard the messages, one had found the language upsetting, one had not done so, and one had found it depressing. None of those people were members of an ethnic minority. The defendant was charged under s 127(1)[a] of the Communications Act 2003 which provided, inter alia, that a person was guilty of an offence if he sent by means of a public electronic communications network a message or other matter that was grossly offensive. The justices acquitted him on the ground that, while his messages had been offensive, a reasonable person would not consider them grossly so. The prosecution appealed by way of case stated.

Held – For the purposes of s 127(1) of the 2003 Act what was an offensive message, and thus what was a grossly offensive message, had to be judged by the standards of an open and just multi-racial society Whether a telephone message fell into the category of grossly offensive depended on its content, on the circumstances in which the message had been sent and, at least as background, on the objective of Parliament of protecting people from being involuntarily subjected to messages which they might find seriously objectionable. In the instant case, the defendant had had no idea, and had not cared, whether the person he was addressing or who would pick up his recorded message would be personally grossly offended by his abusive and intemperate language. It was his good fortune that none had been so offended, but that was nevertheless a fact which the justices had been entitled to take into account, as had been the fact that it was his member of Parliament to whom he was trying to address his opinions. Accordingly, the appeal would be dismissed (see [11]–[14], below).

Notes

For improper use of public electronic communications network, see 45(1) *Halsbury's Laws* (4th edn) (2005 reissue) para 196.

For the Communications Act 2003, s 127, see 45 *Halsbury's Statutes* (4th edn) (2003 reissue) 1101.

a Section 127, so far as material, is set out at [7], below

Case referred to in judgments

Brutus v Cozens [1972] 2 All ER 1297, [1973] AC 854, [1972] 3 WLR 521, HL.

Appeal by way of case stated

The Director of Public Prosecutions appealed by way of case stated against the acquittal of the respondent, Leslie George Collins, by the Leicester Justices on 4 October 2004 on a charge that between 1 January 2002 and 6 January 2004 he had sent, by means of a public telecommunications system, messages that were grossly offensive or of an obscene or menacing character contrary to s 127 of the Communications Act 2003. The question for the consideration of the court is set out at [3], below. The facts are set out in the judgment of Sedley LJ.

John Lloyd-Jones (instructed by the *Crown Prosecution Service*, Leicester) for the Director of Public Prosecutions.

Esther Harrison (instructed by *Mander Cruickshank*, Coalville) for the respondent.

Cur adv vult

23 June 2005. The following judgments were delivered.

SEDLEY LJ.

[1] On an unspecified number of occasions between 1 January 2002 and 6 January 2004, the respondent telephoned the constituency office of David Taylor MP to give vent to various financial and political grievances. If a member of the staff answered the telephone, that was who he spoke to; if not, he spoke to the answering machine. On a number of these occasions he made reference to people to whom he objected as 'wogs', 'Pakis' and 'black bastards'. Of those who heard the messages, one had found the language upsetting, one had not done so and one had found it depressing. None, at least so far as the evidence went, happened to be a member of an ethnic minority.

[2] This history was incorporated in a single information laid on 20 May 2004 charging that between the two dates I have mentioned (a span of over two years), the respondent had sent, by means of a public telecommunications system, messages that were grossly offensive or of an obscene or menacing character. To send such messages was an offence by virtue of s 43 (1) of the Telecommunications Act 1984, under which the information was laid; but in July 2003 this provision was repealed and replaced by s 127 of the Communications Act 2003. While the wording of the two sections is the same, an information which spans the lifetime of both without differentiating between them, which relies on an uncertain and unspecified number of messages, and which fails to spell out which aspect or aspects of the statutory provision the messages offended against, was wide open to objection. That no objection was taken on any of these grounds either before the justices or before this court, and that no opposition was offered to the enlargement of the prosecutor's time for appealing to this court because the senior prosecutor had gone on holiday and had let time run out, may be regarded by the appellant prosecutor as pure good fortune. It is certainly not an indorsement of the sloppy drafting of the information or of inefficiency within the Crown Prosecution Service.

[3] The outcome, however, is that this court has been able, with the help of counsel, Mr John Lloyd-Jones for the Director of Public Prosecutions and Miss Esther Harrison for the respondent, to focus on the issue of principle. It arises out of the case stated for the opinion of the court by the Leicester Justices who, having found the facts I have summarised, on 4 October 2004 acquitted the respondent on the ground that, while his messages had been offensive, a reasonable person would not consider them grossly offensive. The question they pose, at the prosecutor's request, is whether they were wrong so to find.

[4] I am bound to say that my first reaction to the question was that if these messages were offensive, it was not possible in a decent society to find that they were less than grossly offensive. One has only to visualise having to explain and justify the making of the material distinction to a black person or to one of Asian origin in order to appreciate its invidiousness.

[5] But for much the same reason, I can understand the dilemma in which the justices found themselves. In order to interfere as little as possible with freedom of expression, Parliament has criminalised only grossly offensive messages. To have found the respondent's messages to be inoffensive would have been extraordinary: hence the justices' initial finding. But some added value had to be given to the word 'grossly' and the question is whether the justices, despite what I have said about the character of the respondent's language, were entitled in the particular circumstances of the case to find that this additional criterion was not met.

[6] I have concluded that they were entitled to do so, for the following reasons.

[7] Section 127 (1) of the Communications Act 2003 provides:

> A person is guilty of an offence if he—(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be so sent.

[8] It is a longstanding peculiarity, but not an anomaly, that Parliament has criminalised the use of language which is not otherwise unlawful if it forms part of a message sent by post or by telephone—or, now, by any public electronic communications network: see s 127(1)(a) of the Communications Act 2003. The reason, in essence, is that people are entitled to be protected from unsolicited messages which they may find seriously objectionable. Although neither side's argument has made any reference to the Human Rights Act 1998 or the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act), a balance is clearly being struck here between the respect for private life enjoined by art 8 and the right of free expression protected by art 10.

[9] This is why it is the message, not its content, which is the basic ingredient of the statutory offence. The same content may be menacing or grossly offensive in one message and innocuous in another. As was pointed out in argument, counsel in the present case are unlikely to have exposed themselves to prosecution by discussing its facts on the telephone. A script writer emailing his or her director about dialogue for a new film is not likely to fall foul of the law, however intrinsically menacing or offensive the text they are discussing. In its context, such a message threatens nobody and can offend nobody. Here, as elsewhere, context is everything.

[10] I have left obscene and indecent messages out of these examples because the inclusion of them in the statutory prohibition poses a problem which needs to be noted though not, for present purposes, resolved. The four classes of message which are proscribed are not of the same kind. A menacing message, fairly plainly, is a message which conveys a threat—in other words, which seeks to create a fear in or through the recipient that something unpleasant is going to happen. Here the intended or likely effect on the recipient must ordinarily be a central factor in deciding whether the charge is made out. Obscenity and indecency, too, are generally in the eye of the beholder; but the law has historically treated them as a matter of objective fact to be determined by contemporary standards of decency.

[11] If (as I will assume) these are the respective meanings of menacing, obscene and indecent messages in the communications legislation, the category of grossly offensive messages can be seen to lie somewhere near the centre of the spectrum. What is offensive has to be judged (very much as the justices, by considering the reaction of reasonable people, judged it) by the standards of an open and just multiracial society. So too, therefore, what is grossly offensive, an ordinary English phrase with no special legal content, which on first principles (see *Brutus v Cozens* [1972] 2 All ER 1297, [1973] AC 854) it is for the justices to apply to the facts as they find them. Whether a telephone message falls into this category has to depend not only on its content but on the circumstances in which the message has been sent and, at least as background, on Parliament's objective in making the sending of certain messages a crime.

[12] The respondent had no idea, and evidently did not care, whether the person he was addressing or who would pick up his recorded message would be personally offended—grossly offended—by his abusive and intemperate language. It was his good fortune that none was, but this was nevertheless a fact which the justices were entitled to take into account. So was the fact that it was his member of Parliament to whom he was trying to address his opinions. Had the respondent nevertheless found himself speaking on any of his calls to a member of an ethnic minority, it might well have been impossible, however stoically the hearer might have brushed it aside, to avoid the conclusion that the message was grossly offensive: Miss Harrison concedes as much. Such a conclusion would be loyal to Parliament's essential objective of protecting people from being involuntarily subjected to grossly offensive messages. It would also have to take account, however, of the fact that it is not every transmission of grossly offensive language which is punishable, but only messages which, in their particular circumstances and context, are to be regarded in the wider society which the justices represent as grossly offensive.

[13] I do not consider that the approach of the Leicester justices transgressed these principles, and I would accordingly dismiss this appeal.

MITTING J.

[14] I agree.

Appeal dismissed.

Dilys Tausz Barrister

Ayliffe and others v Director of Public Prosecutions

Swain v Director of Public Prosecutions

Percy v Director of Public Prosecutions

[2005] EWHC 684 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
WALLER LJ AND JACK J
15, 16 FEBRUARY, 21 APRIL 2005

Criminal law – Trespass – Aggravated trespass – Defence – Disrupting lawful activity – Protestors disrupting activities at military bases – Whether disrupting lawful activity – Criminal Law Act 1967, s 3 – Criminal Justice and Public Order Act 1994, s 68.

The defendants in three cases were charged with offences of aggravated trespass contrary to s 68[a] of the Criminal Justice and Public Order Act 1994, or criminal damage contrary to s 1[b] of the Criminal Damage Act 1971 having been involved in action at military bases by way of protest against the Iraq war which they considered to be illegal. A person committed the offence of aggravated trespass if he trespassed on land and in relation to any 'lawful activity' which persons were engaging in did anything which was intended to have the effect of obstructing or disrupting that activity. Under s 68(2) of the 1994 Act activity was 'lawful' for the purposes of s 68 if the person or persons 'may engage on the activity on the land on that occasion without committing an offence or trespassing on the land'. Under s 1 of the 1971 Act a person was guilty of an offence if he without lawful excuse destroyed or damaged any property. In relation to the criminal damage the defendants submitted that their actions had fallen within s 3[c] of the Criminal Law Act 1967 which provided that a person could use such force as was reasonable in the circumstances in the prevention of crime. In relation to aggravated trespass the defendants submitted inter alia (i) that the activities being carried on at the bases were unlawful in that the war in Iraq was an unlawful war of aggression; and (ii) that the activities being carried on at the bases were unlawful because they might constitute war crimes, which were offences under the International Criminal Court Act 2001. The defendants sought extensive disclosure. That led to the district judges making preliminary rulings that the issue of whether the war in Iraq was unlawful was not justiciable before them. All further ruled that the question of whether war crimes might be being committed was not justiciable by them. At trial the district judges relied on, and in effect repeated, their preliminary rulings. The defendants were convicted and appealed by way of case stated. It being conceded that the issue of the non-justiciability of whether the war in Iraq was illegal was governed by authority of the Court of

a Section 68, so far as material, is set out at [1], below
b Section 1, so far as material, is set out at [2], below
c Section 3, so far as material, is set out at [3], below

Appeal relating to the effect in domestic law of international rules as to crimes against peace and crimes of aggression, the defendants sought a ruling on the question of whether those crimes were within s 68(2) of the 1994 Act. The Divisional Court considered whether, in relation to war crimes, and in relation to s 3 of the 1967 Act, issues had been raised which should have led to an order for greater disclosure or to consideration of points as part of the defence which had not been considered. In relation to aggravated trespass, the Crown contended, inter alia, (i) that it followed from the definition of lawful activity in s 68(2) of the 1994 Act that if an activity engaged in a particular moment were unlawful, provided that it could have been engaged in lawfully, the activity would be lawful; and (ii) that it would be possible to pick an activity taking place on the land which was lawful, and to charge the defendant with disrupting that activity and so exclude any consideration of the unlawful activities that might be taking place on the land.

Held – (1) Conduct which might amount to crimes against peace or to crimes of aggression was not unlawful activity within s 68 of the 1994 Act. In that respect the district judges had been correct to rule that the issue of the legality of the war was non-justiciable (see [12], [13], [49], [57], [66], [76], [82], below); *R v Jones* [2004] 4 All ER 955 applied.

(2) In so far as the defendants had sought to raise the issue of war crimes contrary to the 2001 Act the general allegations made by them had not raised any issue requiring consideration by the district judges in connection with the lawfulness of the activities at the military establishments (see [57], [67], [69], [80], [82], below).

(3) On the true construction of s 68(2) of the 1994 Act words 'he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land' simply meant that the activity was permitted, that is, that it was lawful when it was being carried out. However, if a defendant raised an issue that his or her intention had been to disrupt an unlawful activity, it would not assist the prosecution to limit the description in the charge to some lawful aspect of what was occurring on the land (see [52], [53], [68], [82], below).

(4) Section 3 of the 1967 Act provided no defence where no issue had been raised that any war crime had been committed. Moreover, even if activities on the military bases might have eventuated in some war crime, there had been no nexus between the damage and the preventing of such an activity. Accordingly, the appeals would be dismissed (see [56], [70], [82], below).

Notes

For aggravated trespass, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 165B, and for reasonable force, see 11(1) *Halsbury's Laws* (4th edn reissue) para 455.

For the Criminal Law Act 1967, s 3, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 313.

For the Criminal Justice and Public Order Act 1994, s 68, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1205.

Section 68(1) of the 1994 Act was partially repealed by the Anti-social Behaviour Act 2003, ss 59(1), (2), 92, Sch 3, with effect from 20 January 2004.

Cases referred to in judgments

DPP v Barnard [2000] Crim LR 371, DC.

Hutchinson v Newbury Magistrates' Court (2000) 122 ILR 499, DC.

Johnson v Youden [1950] 1 All ER 300, [1950] 1 KB 544, DC.

Nelder v DPP (1998) Times, 11 June, DC.

R v Baker [1997] Crim LR 497, CA.

R v Jones [2004] EWCA Crim 1981, [2004] 4 All ER 955, [2005] QB 259, [2004] 3 WLR 1362; *affg* (12 May 2004, unreported), Bristol Crown Ct.

R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2777 (Admin), [2003] 3 LRC 335, DC.

Appeals by way of case stated

Ayliffe and others v Director of Public Prosecutions

Benjamin Ayliffe, Natalie Duck, Belinda Fletcher, James Footner, Janice Harron, Oliver Knowles, Jens Lowe, Rachel Murray, Robin Oakley, Ashby Smith, Graham Thompson, Helen Wallace, Richard Watson and Laura Yates appealed by way of case stated against the decision of District Judge Woollard, sitting in the Southampton Magistrates' Court, on 16 March 2004, to convict them of offences of aggravated trespass contrary to s 68 of the Criminal Justice and Public Order Act 1994 and to also convict Knowles, Smith, Thompson, and Watson of offences of criminal damage contrary to s 1 of the Criminal Damage Act 1971. The facts are set out in the judgment of Waller LJ.

Swain v Director of Public Prosecutions

Valerie Swain appealed by way of case stated against the decision of District Judge Clark, sitting in the Cirencester Magistrates' Court, on 25 February 2004, to convict her of offences of aggravated trespass contrary to s 68 of the Criminal Justice and Public Order Act 1994 and criminal damage contrary to s 1 of the Criminal Damage Act 1971. The facts are set out in the judgment of Waller LJ.

Percy v Director of Public Prosecutions

Lindis Percy appealed by way of case stated against the decision of District Judge Holland, on 12 December 2003, to convict her of an offence of aggravated trespass contrary to s 68 of the Criminal Justice and Public Order Act 1994. The facts are set out in the judgment of Waller LJ.

Maurice Mendelson QC, *James Hines* and *Charlotte Kilroy* (instructed by *Bindman & Partners*) for Ayliffe, Duck, Fletcher, Footner, Harron, Knowles, Lowe, Murray, Oakley, Smith, Thompson, Wallace, Watson and Yates.

Charlotte Kilroy (instructed by *Bindman & Partners*) for Swain.

Nicholas Blake QC and *Raza Husain* (instructed by *Birnberg Peirce & Partners*) for Percy.

Hugo Keith (instructed by the *Crown Prosecution Service*, Eastleigh) for the Crown in the case of Ayliffe and others.

Peter Blair (instructed by the *Crown Prosecution Service*, Gloucestershire) for the Crown in the case of Swain, and (instructed by the *Crown Prosecution Service*, Northampton) for the Crown in the case of Percy.

Cur adv vult

21 April 2005. The following judgments were delivered.

WALLER LJ.

INTRODUCTION AND OVERVIEW

[1] This judgment is concerned with three appeals by way of case stated by district judges in the magistrates' court. Each appeal is concerned with actions taken at military bases by way of protest against the Iraq war, which commenced on 20 March 2003. They each raise questions arising from the prosecution of the appellants for offences of aggravated trespass contrary to s 68 of the Criminal Justice and Public Order Act 1994, or criminal damage contrary to s 1 of the Criminal Damage Act 1971. Section 68(1) and (2) as then in force provide:

> '(1) A person commits the offence of aggravated trespass if he trespasses on land in the open air and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land in the open air, does there anything which is intended by him to have the effect—(a) ... (b) of obstructing that activity, or (c) of disrupting that activity.
>
> (2) Activity on any occasion on the part of a person or persons on land is "lawful" for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.'

[2] Section 1(1) of the 1971 Act provides:

> 'A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.'

[3] Section 3 of the Criminal Law Act 1967 provides as follows:

> '(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large ...'

[4] The first appeal (the Ayliffe appeal) is concerned with events on 4 February 2003 at the Sea Mounting Centre, Marchwood, Southampton Water. By his decision dated 16 March 2004 District Judge Woollard, sitting at the Southampton Magistrates' Court found 14 defendants guilty of aggravated trespass on the basis that they had obstructed a lawful activity, namely the port operations. He also found four of the defendants guilty of criminal damage. All of the defendants appeal.

[5] The second appeal (the Swain appeal) is concerned with events which took place on 9 March 2003 at RAF Fairford in Gloucestershire. By his decision dated 25 February 2004, District Judge Clark, sitting at Cirencester Magistrates' Court, found, amongst nine others, Valerie Swain guilty of aggravated trespass, on the basis that she had disrupted or obstructed a lawful activity, namely the maintenance of security of the base. He also found her guilty of criminal damage, holding, inter alia, that she was not acting so as to prevent a crime. She alone appeals.

[6] The third appeal (the Percy appeal) is concerned with events on 26 March 2003 at RAF Croughton in Northamptonshire. On 12 December 2003 District Judge Holland convicted Lindis Percy of aggravated trespass, on the basis that she had disrupted a lawful activity, namely security activities on the base. She appeals.

[7] The appeals have the following features in common. First, the appellants did not challenge any of the facts alleged against them. Their challenges in relation to s 68 of the 1994 Act and aggravated trespass are concerned with how the district judges dealt with issues, in particular disclosure, relating to the lawfulness of the activities at the different bases. So far as criminal damage is concerned, the key issue is as to whether the appellants were using reasonable force to prevent a crime. Second, the defence statements in the Ayliffe and Swain cases asserted that the defence was to be found in a skeleton argument prepared by lawyers, and in the Percy case, although not referred to in the defence statement, the defence relied on was contained in the skeleton argument prepared by lawyers. The skeletons are in similar form in all three cases. The skeleton arguments each contain the following submissions. (1) Submissions relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), not pursued before us (issue 1). We need say no more about that issue. (2) A submission that the war against Iraq was an illegal war, and the activities at the different bases were unlawful being carried out in pursuit of 'an unlawful war of aggression' (issue 2). (3) A submission that there was a 'strong possibility' that the activities being carried on at the bases were unlawful because they constituted war crimes and constituted offences under s 51 and/or s 52 (the latter being the ancillary offences section) of the International Criminal Court Act 2001 (issue 3). (4) In two of the cases where defendants had been charged with criminal damage contrary to s 1 of the 1971 Act, the skeleton contained submissions on necessity and duress (issue 4) and a submission that the defendants were using reasonable force to prevent a crime relying on s 3 of the 1967 Act (issue 5).

[8] A further common feature was that in all cases issues arose as to the prosecution's obligation as to disclosure. The defendants or those advising them sought disclosure of documents as to what was occurring on the particular bases, and sought in addition documents from amongst others the highest echelons of government, including the opinion of the Attorney General dated on or about 17 March 2003. The disclosure aspect led the district judges to make preliminary rulings in all cases. All ruled that the issue whether the war in Iraq was illegal was not justiciable before them. All further ruled that the question whether war crimes might be being committed was not justiciable by them.

[9] At the trial of the various appellants the district judges relied on and in effect repeated their preliminary rulings as appears from the statements of case.

[10] The appellants seek to challenge the rulings, but so far as the non-justiciability of whether the war in Iraq was illegal (issue 2) and thus on the question whether under s 68 the appellants could argue on that basis that what they were seeking to disrupt was an unlawful activity, they are faced with the Court of Appeal decision in *R v Jones* [2004] EWCA Crim 1981, [2004] 4 All ER 955, [2005] QB 259. The Court of Appeal was there concerned with s 3 of the 1967 Act and s 5(2)(b) of the 1971 Act. But it is accepted before us that the same reasoning applies with equal force to offences of aggravated trespass contrary to s 68 of the 1994 Act. The Court of Appeal in *R v Jones* held:

> '[42] ... The question that we have to determine is whether or not the relevant rules [of international law] have effect so as to create a crime of aggression in English law ...
>
> [43] ... It is difficult to see in these circumstances how it can be said that there is ... a firmly established rule of international law, which establishes a crime of aggression which can be translated into domestic law as a crime in domestic law, where there is no consensus as to an essential element of the crime. It follows that, whatever other effects the international rules as to the crime of aggression may have, they cannot constitute a crime for the purposes of s 3 of the 1967 Act, and the judge was right to rule accordingly.'

[11] The appellants do not argue that *R v Jones* can be distinguished. They submit that the decision of the Court of Appeal was wrong in *R v Jones*, but recognise that it is not open to them to do so in this court. Leave to appeal has been granted to the appellants in *R v Jones* by the House of Lords on the following question, which was certified by the Court of Appeal as being of general public importance:

> 'Is the crime against peace and/or crime of aggression capable of being a "crime" within the meaning of s 3 of the Criminal Law Act 1967, and if so is the issue justiciable in a criminal trial?'

[12] The certified question in *R v Jones* is confined to s 3 of the 1967 Act. It is accepted by the appellants that the ratio in *R v Jones* must apply to offences under s 68 of the 1994 Act. If the Court of Appeal in *R v Jones* were held to have been wrong, it would follow that the district judges in the present appeals were likewise wrong to have ruled that crimes against peace (or crimes of aggression) were not justiciable, and it would follow that they should have investigated whether such crimes might have provided the appellants with defences.

[13] It is in the above circumstances that the appellants seek a ruling from this court on the question of whether crimes against peace or crimes of aggression are within s 68(2), so that leave to appeal may be sought to the House of Lords if appropriate. Clearly in the light of *R v Jones* we must rule that conduct which may amount to crimes against peace or crimes of aggression is not unlawful activity within s 68. Issue 2 was not further argued before us.

[14] The position so far as war crimes (issue 3) and reasonable force to prevent crime (issue 5) is, however, different. In *R v Jones*, in his judgment at first instance

(12 May 2004), Grigson J on the preparatory hearing which gave rise to the appeal held (at para 43) that: *a*

> 'Under the International Criminal Court Act 2001 certain war crimes committed by individuals are triable in the domestic courts. If a defendant believes that in the context of the use of force against Iraq an identifiable individual or individuals or group were going to commit specific offences *b* (conduct war crimes) he would not be acting unlawfully if he used reasonable force to prevent such an offence or offences being committed.'

[15] As the Court of Appeal recorded ([2004] 4 All ER 955 at [8]) the prosecution did not appeal in *R v Jones* against the judge's ruling that the jury was *c* entitled to consider a defence based on the prevention of alleged offences under the 2001 Act. It was submitted to us on behalf of the appellants that this ruling, if correct in relation to s 3 of the 1967 Act, will also apply to the lawfulness or otherwise of an activity under s 68 of the 1994 Act. This was not contested before us, and both Mr Keith and Mr Blair on behalf of the respondent accepted that the question whether a war crime arising under the 2001 Act had been committed *d* would be justiciable. It follows they also must accept that the district judges in the instant cases were wrong to rule otherwise. So the questions posed to the court by the respective district judges in relation to this aspect must be answered to the effect that the district judges were wrong in their rulings.

[16] That does not however dispose of the appeals on issue 3 or issue 5. For *e* even if the issue were justiciable, if no issue was raised before the district judges fit to be considered by them that war crimes were being committed, then disclosure in relation to it should not in any event have been ordered and the convictions were in any event safe. It would serve no useful purpose to remit any of these matters to the district judges for rehearing if no issue was raised.

[17] Mr Keith and Mr Blair argued on issue 3 and issue 5 either that the district *f* judges had in effect ruled in addition to non-justiciability that nothing in the defence statements or in the skeleton arguments raised in an issue fit to be considered by them that war crimes were being committed, or, if the district judges had not so ruled, that this court should take the view that no issue had been sufficiently raised that war crimes had been committed. *g*

[18] Even if the district judges' rulings could not be construed as ruling that no issue had been raised that war crimes were being committed, we took the view (and did not understand there to be any objection) that we should look at the skeleton arguments and the defence statements and rule ourselves on that point. Although the appellants were, it seems, very properly given a free rein as to *h* anything they wished to say in evidence, there was no suggestion that any evidence had been given by the appellants at their trial, which went beyond the assertions made in the skeleton arguments. We thus have before us the material on which it is possible to take a view as to whether any issue was sufficiently.

[19] Having examined the statements of case and the reasoning of the district *j* judges, although it may be arguable in the Ayliffe and Swain appeals that the district judges ruled that no issue was raised, in my view the proper course for this court to take on issue 3 and issue 5 is to consider whether, on the appellants' defence statements and skeleton arguments, issues were sufficiently raised which would have entitled the appellants to disclosure that they did not have and/or

which the appellants were entitled to have considered as part of their defences but which were not considered.

[20] In those cases in which the issues of duress and necessity were raised in the skeleton arguments (Ayliffe and Swain), the appellants accept that the findings of fact of the district judges preclude any argument. No more thus needs to be said about issue 4.

[21] So, in all three appeals this court is concerned with issue 3, the war crimes issue, and in the Ayliffe and Swain appeals with issue 5, the application of s 3 of the 1967 Act. The key question is whether in either instance issues had been raised which should have led to an order for greater disclosure or to consideration of points as part of the defence which were not considered.

[22] In the appeal of Lindis Percy there is a further more discrete point as to whether the charge alleged facts which could constitute an offence of aggravated trespass.

[23] In relation to issues 3 and 5 the skeleton arguments relied on before the magistrates were in each case in identical form save for changing the name of the base and some minor alterations to take account of the slightly different facts in each case. It is convenient, however, to consider each appeal separately but the similarity of argument will enable points in the second and third appeals to be considered more shortly.

THE AYLIFFE APPEAL

The events of 4 February 2003

[24] The prosecution arises out of events which took place at the Sea Mounting Centre, Marchwood, Southampton on 4 February 2003. On that date the Ministry of Defence (MoD) or those acting on its behalf were engaged on loading tanks, weapons and other equipment onto ships in order to transport them to the Middle East for use in Iraq.

[25] The appellants arrived at Marchwood on the morning of 4 February. Three of the appellants (Belinda Fletcher, Janice Harron and Rachel Murray) chained themselves to the gates of the port and 11 of them (Benjamin Ayliffe, Natalie Duck, James Footner, Oliver Knowles, Jens Lowe, Robin Oakley, Ashby Smith, Graham Thompson, Helen Wallace, Richard Watson and Laura Yates) attached themselves to tanks, which were in the Marchwood Centre awaiting loading. Oliver Knowles and Richard Watson had cut the fence. Ashby Smith and Graham Thompson each applied paint to a tank.

[26] These activities were carried out entirely peacefully. Officers of the MoD police arrived swiftly. Each of the appellants was unwilling to remove themselves from the gate or tank to which they were attached. The officers then removed the appellants from their positions and arrested them. In accordance with Greenpeace's principles, the appellants proffered only passive resistance to their removal.

The charges

[27] It is only necessary to give an example of the charges. Ayliffe was charged with having—

'trespassed on land in the open air, namely the Sea Mounting Centre, Marchwood Military Port, and in relation to a lawful activity, namely port operations which persons were engaged in on that land, did an act, namely chained and padlocked himself [yourself] to a tank, which he [you] intended to have the effect of obstructing that activity.' a

[28] So far as criminal damage was concerned, Watson and Knowles were charged with: b

'Without lawful excuse damaging a section of perimeter fence at Marchwood Military Port to the value of £820·32 belonging to the Ministry of Defence and intending to destroy or damage such property or being reckless as to whether such property would be destroyed or damaged.' c

The appellants' defence

[29] The appellants all submitted defence statements pursuant to the Criminal Procedure and Investigations Act 1996. Their defence statements simply said this: d

'1. This document is served in pursuance to the provisions of s 5 of the Criminal Procedure Investigations Act 1996.

2. My defence is set out in the skeleton argument prepared by my lawyers and already provided to the court and Crown. e

3. I seek disclosure of all relevant material from the Crown or its agents.'

[30] I have already stated what, in general terms, was covered by the skeleton argument but so far as issues 3 and 5 are concerned, it is necessary to set out in a little more detail what was contained in the skeleton. Having set out in the skeleton what the defendants admitted they had done in terms of attaching themselves to gates and tanks the skeleton then went on to say (para 11): f

'The defendants intended the actions outlined above to be acts of peaceful direct action in opposition to the activities being carried out at Marchwood. They considered those activities to be acts preparatory to a war which the United Kingdom was determined to carry out regardless of whether it was expressly authorised by a further United Nations Security Council resolution, and which would kill and maim numerous Iraqi people. The defendants' objections to the war are outlined in greater detail below. The reasons for the protest are mentioned at this stage to emphasise (1) the sincerity of the defendants' political and ethical convictions; (2) the seriousness of the issue which they sought to highlight and challenge through peaceful protest.' g h

j

[31] The skeleton then set out the legislative framework. It quoted s 68 of the 1994 Act and s 1(1) of the 1971 Act. It also referred to s 5(2), which defined lawful excuse. It referred to s 3 of 1967 Act.

[32] The following paragraphs of the skeleton are material to s 68:

'21. The defendants emphasise that it is for the prosecution to prove each and every element of the offence in s 68. It is for the prosecution to prove that each of the defendants was trespassing, and that each defendant did an action which was intended to have one of the three effects specified in s 68(1)(a)–(c).

22. The defendants place particular emphasis on the prosecution's need to define the "activity" which it is said was being carried out at the port, and to prove the legality of that activity. On the charge sheets, the relevant activity is defined as "port operations". This is a vague and generalised term. It is clear that at the relevant time the port was engaged in loading tanks and weapons onto ships with the purpose of transporting them to the Middle East. The defendants submit that the prosecution must define precisely what the "port operations" consisted of. The prosecution must then demonstrate for each type of equipment being loaded the legislation, regulations and other relevant orders or authorisations which are said to give legal authority to those activities. It is not sufficient to say that the MoD and its contractors were operating a port. Loading equipment for an imminent war is quite different from the everyday functions of a port. The critical issue for this case is what legal authority existed for the very specialised functions being carried out on 4 February 2003.

23. The need for specificity is inherent in the wording of s 68, which requires the prosecution to demonstrate that the activity was able to be carried out on the land *on that occasion* without committing an offence or trespassing on the land. It is therefore insufficient to show the general framework of rules which establish the Marchwood Military Port. The prosecution must go further, showing what activities were being carried out on that occasion, and the precise legal basis for those activities.

24. The defendants place particular emphasis on the context of the activities. The loading of the relevant equipment on 4 February 2003 was not, it is submitted, a neutral act. Rather, the defendants submit that it may amount to an offence under the International Criminal Court Act 2001. This submission is developed in detail below. For present purposes the argument is raised in order to emphasise the defendants' duty to satisfy the court of the legal basis for those activities.

25. Accordingly the defendants submit that the prosecution must disclose all documents relevant to each element of the offence, including the nature of the activities and their legality, and in particular must show: [there are then set out specified documents of which the defendants claimed disclosure].'

[33] There then followed paras 26 to 54 dealing with the human rights issue, issue 1.

[34] Paragraphs 55 to 80 contained submissions as to why it was argued that the war itself was 'an unlawful war of aggression', the justiciability of this is covered by *R v Jones* [2004] 4 All ER 955, [2005] QB 259.

[35] The aspect of war crimes contrary to s 51 of the 2001 Act is covered by paras 81 to 96. The submission in the skeleton is to the following effect. First (para 81), the United States and United Kingdom were implicated in certain acts,

which included the bombing of civilians. Second, a recognition by para 82 that the conduct alleged in para 81 had not been found to be a war crime by any court.

[36] The skeleton then sets out the circumstances in which the 2001 Act came into force and sets out ss 50–52. Section 50(1) provides that a 'war crime' means a war crime as defined in art 8(2) of the Statute of the International Criminal Court (the Rome Statute) (Rome, 17 July 1998, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court). By ss 52 and 55 it is an offence to 'aid and abet' the commission of an offence under s 51 which states at sub-s (1): 'It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.'

[37] The skeleton thereafter, at para 90, sets out a number of war crimes specified by art 8(2) of the Rome Statute. It included for example:

> 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated ...'

It also included: 'Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' and: 'Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives ...'

[38] The skeleton then refers to various authorities relating to aiding, abetting, counselling and procuring, in particular the dictum of Lord Goddard CJ in *Johnson v Youden* [1950] 1 KB 544 at 546, where that judge said:

> 'Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence ...'

[39] There then follow paras 95 and 96 which I must quote in full:

> '95. The defendants submit, given the evidence which has come to light about the behaviour of the allied forces in the last Gulf War in 1991, the behaviour of the US forces and the allies in Afghanistan, and the emerging information as to the coalition's conduct in the present conflict, as set out above, there is a strong possibility that the activities being carried on at Marchwood Military Port were unlawful, in the sense intended by s 68(1) of the Criminal Justice and Public Order Act 1994, because they constituted offences under s 51 and/or s 52 of the International Criminal Court Act 2001. Questions are already being raised about the conduct of the war in Iraq. On 26 March 2003 Kofi Annan, the Secretary General of the United Nations

stated that: "I must say that I am getting increasingly concerned by the humanitarian casualties in this conflict. We have just heard reports that a missile struck a market in Baghdad and I would like to remind all belligerents that they should respect international humanitarian law and take all necessary steps to protect civilians." (New York, 26 March 2003, Secretary General's press encounter upon arrival at UNHQ).

96. Without further disclosure and investigation into the events of this war in Iraq and the activities of the Ministry of Defence at Marchwood, the defendants are unable to elaborate further on this point at this juncture, but reserve the right to do so following disclosures. In any event, the burden of proving that the activities with which the defendants are alleged to have interfered were lawful lies on the prosecution. The defendants submit that in order to do so the prosecution will be required to show that the activities carried out at Marchwood either could not or did not constitute offences under the International Criminal Court Act 2001.'

[40] In this case there was a preliminary hearing before the district judge on 22 July 2003 at which extensive argument on justiciability occurred. It suffices to say that the district judge on that occasion ruled certain aspects non-justiciable. That led to the prosecution disclosing details of the materials being loaded onto the ships at Marchwood on the relevant date. At this stage they also contacted the relevant government departments in order to ascertain whether any relevant material was available which should be disclosed.

[41] By letter dated 17 September 2003 the Crown made clear that whatever their attitude to disclosure had been prior to that time, they were not prepared to make further disclosure 'as the departments will not hold relevant material that bears on the issue of the lawfulness of the activity being engaged in at Marchwood on that date ...'.

[42] In the light of that letter, on 1 October 2003 the appellants made an application for disclosure pursuant to s 8 of the 1996 Act, in which they applied for full disclosure of relevant material, and by way of a list indicated that certain matters should be disclosed including the advice of the Attorney General to the Cabinet on or about 17 March 2003. That led to an exchange of skeleton arguments and to a ruling by the district judge on 28 November 2003 that:

'Having considered the arguments on both sides, I am satisfied that I am bound by the decision in *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335. It is not for this court to decide whether the government's foreign and defence policies are lawful or not. If the Crown are able to show that the land in question was being used for the furtherance of government policy then it is not for this court to question that in the context of these proceedings. There seems to me to be nothing in the defence which is being advanced, and assuming for the sake of argument that I have the power within s 8 to order the Crown to explore a particular avenue of inquiry concerning disclosure they have declined to pursue, I am not prepared to make any such order. So far as the prevention of crime argument is concerned, the defence have failed to show me any crime which it is alleged to have been committed. The only basis of that assertion is that government policy

amounted to the commission of an offence under the International Criminal Court Act 2001. Lawful government foreign and defence policy is not a matter for the courts to second guess, and for that reason I see no prospect of success for that line of defence, and accordingly I am not prepared to make any order on the appellants' application.'

[43] On 30 January 2004 the appellants lodged an application for permission to apply for a judicial review of the decisions contained in the district judge's ruling on disclosure. That application was refused by Moses J on 24 February 2004 on the basis that the application was premature, the matter should proceed to trial with the appellants raising all of their defences, and that if those defences were unsuccessful as a matter of law, as the district judge's rulings indicated they would be, then no evidence was relevant and no disclosure was necessary and an appeal should be brought by way of case stated.

[44] On the first day of the hearing the appellants made an application under s 8 of the 1996 Act for disclosure of the Attorney General's advices on the then proposed invasion of Iraq. The district judge refused that application.

[45] The appellants assert in their skeleton before us that:

'31. ... in the light of the district judge's previous rulings on the question of whether the prosecution were required to prove that the activities at Marchwood did not constitute offences under the International Criminal Court Act 2001 and/or crimes of aggression and on the question of whether the appellants were entitled to rely on the defence contained in s 3 of the Criminal Law Act 1967, namely that they acted to prevent crimes under the 2001 Act, and/or crimes of aggression, *the appellants raised in their closing submissions*, but did not argue or present evidence on, their arguments and defences based on crimes against peace and crimes under the 2001 Act. This course was adopted in the light of the observations of Moses J [see above].

32. In his judgment given on 16 March 2003 the district judge: (1) Repeated his ... rulings ... [at] the hearings ... [relating to disclosure]. (2) In relation to the question of whether the prosecution were required to prove that the activities at Marchwood were not crimes under the 2001 Act, he remarked that this would leave him with the startling task of having to form an opinion on the legality of military action engaged in by the government to decide whether it had been party to genocide or war crimes. He continued: "It would mean that I would have to ignore the caution with which courts have always approached the question of whether they should be engaged in questioning the foreign or defence policy of the elected government, touched on by Buxton LJ in *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499 at 511, as to whether the court should pass judgment on the reasonableness or propriety of governmental policy."' (My emphasis.)

[46] His conclusion was that all the Crown had to prove therefore under s 68(2) of the 1994 Act was that the dock workers and others were employed by the MoD to load ships with military cargoes and that this was what they doing.

[47] The appellants' skeleton before us makes certain points on issue 3, which I understood Mr Keith to accept on behalf of the respondent. It makes the point that the district judge has not grasped the distinction between crimes against

peace, the so-called jus ad bellum, and war crimes which are concerned with the conduct of warfare, ie the jus in bello. He also did not appreciate that *R on the application of the Campaign for Nuclear Disarmament v Prime Minister* [2003] 3 LRC 335 on which he relied was concerned with the legality of the decision to go to war and thus had no bearing on war crimes for the purposes of English law. By s 51 of the 2001 Act war crimes, as there defined, are offences under English law and thus, if the activity which the appellants disrupted was the commission of a war crime, or if, by the use of reasonable force, the appellants' conduct was preventing a war crime, then there would be no offence committed under s 68(2) and no offence committed under s 1(1) of the 1971 Act.

[48] By the case stated the district judge posed the following five questions for the opinion of this court:

> '(1) Was I correct to rule for the purposes of s 68(2) ... the word "offence" means an offence contrary to the law of England and Wales, and that an act of aggression or crime against peace is not such an offence? (2) Was I correct to rule that in order to prove that the activity obstructed or disputed at the Sea Mounting Centre was lawful within the meaning of s 68(2) ... it was sufficient for the prosecution to prove that the actual activity engaged in by those obstructed or disrupted was lawful (eg the loading of ships) and that I was not required to consider the legality of the foreign policy of, or the deployment of armed forces by, the elected government? (3) Was I correct ... that I was bound by the decision in *R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister*? (4) Was my finding that there was no evidence that raised necessity as a defence reasonable? (5) Was my finding that there was no evidence upon which I could base a finding that the fence or tanks were damaged in order to protect property belonging to another reasonable?'

[49] Questions 4 and 5 have for reasons already explained not been contested and thus can be answered, 'Yes'. Question 1 can be answered 'Yes' in the light of *R v Jones*. For reasons already explained questions 2 and 3 cannot be answered in such a straightforward fashion, having regard to the concession by the prosecution that, in so far as the district judge was ruling that the issue in relation to war crimes contrary to s 51 of the 2001 Act was non-justiciable, he was in error.

More detailed consideration of s 68

[50] What the district judge found is that at the time of the trespass the Sea Mounting Centre was being used for the purpose of loading a number of ships with supplies for onward transportation to the Gulf in anticipation of the potential conflict in Iraq. He also held that the appellants' activities disrupted the work of the port. Putting to one side the appellants' arguments in relation to crimes of aggression (see the ruling on the impact of *R v Jones* above) there is no suggestion that that work was other than lawful apart from an assertion contained in the skeleton arguments that 'there is a strong possibility that the activities being carried on at Marchwood Military Port were unlawful'. That assertion was itself based on an assertion that certain activities had been carried out by the United States and the United Kingdom in previous conflicts, which no court had ever ruled as war crimes. The above assertions provide no basis for

saying that any activity being engaged in by persons at the Sea Mounting Centre was not an activity in which they might engage without committing an offence—I choose my words to reflect those of s 68(2). It is plain that a prosecutor does not have to rebut every possible illegality: it is enough that he shows that the activity is apparently lawful. It is then for the defendant to raise any issue to the contrary. It was accepted by Mr Mendelson QC on behalf of the appellants that in order to obtain disclosure in the context of the legality of activities and s 68 the appellants had to raise an issue as to whether or not an offence was being committed. That must mean a specific offence, or specific offences, by the persons who were engaged in the activities on the land in question. There was nothing put forward by the appellants to raise such an issue. In fact, para 11 of the appellants' skeleton argument before the district judge, which is quoted in [30] above, indicates the contrary.

[51] Two subsidiary arguments were addressed to us as to the proper construction of s 68, with which I should deal. Mr Keith sought to argue that because s 68(2) defined activity on land as 'lawful' if 'he or they *may* engage in the activity on the land on that occasion without committing an offence or trespassing on the land' (my emphasis), it followed that, if the activity engaged in at a particular moment were unlawful, provided it might have been engaged in lawfully, the activity would be lawful. Mr Mendelson for the appellants in Ayliffe submitted that the construction of 'may engage' simply meant that the activity 'was permitted', ie was lawful when it was being carried out.

[52] In my view Mr Mendelson's construction is clearly right. Parliament cannot be presumed to have intended to make it an offence for a person to disrupt an activity being carried on unlawfully, simply because, if carried on in another way, the activity could be carried on lawfully.

[53] Second, Mr Keith, and with him Mr Blair in the Percy appeal, also appeared to submit that it would be possible to pick an activity taking place on the land which was lawful, and to charge the defendant with disrupting that activity and so exclude any consideration of other unlawful activities that may be taking place on the land. If the defendant raises an issue that his or her intention was to disrupt an unlawful activity, it will not in my view have assisted the prosecution to limit the description to some lawful aspect of what was occurring on the land. The key is that s 68(1) of the 1994 Act refers to a lawful activity, in relation to which the person does something which is intended by him to have the effect of, inter alia, disrupting the activity: the person must intend to disrupt the specified activity. *Nelder v DPP* (1998) Times, 11 June, of which we have a transcript dated 3 June 1998, seems to me to support the above. In that case the charge related to disrupting a hunt. The argument of the defendant was that two of the whippers-in were trespassing on Railtrack's land in relation to which they had no permission. The magistrate had approached the matter on the basis that the intention had been to interrupt the hunt's lawful activity in areas where they were hunting lawfully. The approach of the magistrate was upheld. In the course of his judgment, Simon Brown LJ said:

> 'Clearly, if the hunt's central objective had been, for example, to hunt land over which they had no permission to go or upon which hunting was banned, then the mere fact that they proposed also to engage in some lawful hunting in the vicinity would not make their activity, as a whole, lawful.

> That, however, was not this case. Equally, had the protesters confined their protest to the period whilst a significant part of the hunt was trespassing, then too no offence here could properly be found established. That, too, however, was not the case.'

[54] Here it is plain that the object of the appellants was to mount a protest and disrupt the normal activity of the port, which the charges appropriately defined as 'port operations'.

[55] The position with regard to s 3 of the 1967 Act is more plain. As Brooke LJ said in *R v Baker* [1997] Crim LR 497:

> 'This defence is available if a person's honest but mistaken belief (however unreasonable) is that a factual situation exists or is apprehended which would in law constitute a crime. But it does not extend to a mistaken belief about the criminal law if those facts do not in law amount to a crime.'

[56] The force that the appellants in this case used was the cutting of a fence and then the minimal damage to two tanks. In addition to the lack of any basis for asserting that any war crime was being committed by anyone, there is simply no nexus or connection between the cutting of the perimeter fence and the speculated possibility. There is furthermore no nexus or connection between writing on a tank and the speculative possibility that the tank might in some circumstances once in Iraq be used to commit a war crime. The purpose of these actions was to effect a protest, not to prevent a crime.

[57] I return to questions (2) and (3) posed by the district judge and set out in [48] above. I would answer them in this way. The district judge was right to rule that the activity of port operations was lawful. He was not required to consider the legality of the operations because: (a) in so far as the appellants sought to raise crimes of peace or crimes of aggression, they were not justiciable (*R v Jones* [2004] 4 All ER 955); (b) in so far as the appellants sought to raise war crimes contrary to s 51 of the 2001 Act, the general allegations made by them did not raise any issue requiring disclosure by the prosecution, or consideration by the district judge in connection with the lawfulness of the activity at the port. The district judge was wrong in holding that the *Campaign for Nuclear Disarmament* case precluded him from considering war crimes contrary to s 51, but for the reasons stated that did not in the circumstances affect the proper outcome of the case.

THE SWAIN APPEAL

[58] The Swain case related to activities at RAF Fairford. The appellant, a peace campaigner, accepted that on 9 March 2003 as part of a protest against the war in Iraq she had cut through the perimeter fence of the RAF Fairford airbase, entered the base and disrupted activities there. She was charged initially with having trespassed on land in the open air, namely RAF Fairford airbase and in relation to a lawful activity, namely an operational RAF airfield which persons were engaged in on that land, that she had done an act, namely trespass, within the perimeter area which she intended to have the effect of intimidating those persons or any of them so as to deter them or any of them in engaging in that activity. She was also charged, on the same date, with causing criminal damage by damaging a perimeter fence without lawful excuse.

[59] That aggravated trespass charge was withdrawn and she was charged with trespass at RAF Fairford airbase and— a

> 'in relation to a lawful activity, namely the general operation, maintenance and security of the base, you did an act, namely, cut a hole in the perimeter fence which you intended to have the effect of obstructing or disrupting that activity.' b

Even that charge was amended on 5 February 2004 to take out the words 'the general operation' and to vary the activity to 'the maintenance of security of the base'.

[60] Her defence statement was slightly fuller than those in the Ayliffe case. c She stated by para 1:

> 'The defendant would rely on the following in her defence: (a) the defendant accepts that she cut the fence and entered the grounds of RAF Fairford; (b) the defendant accepts that she disrupted war preparation activities being carried out at RAF Fairford on the day of her arrest; (c) the d defendant does not accept that the activity she disrupted was lawful; (d) the defendant asserts that she acted with lawful excuse; (e) the defendant was acting in accordance with section 3 of the Criminal Law Act 1967 in that she was acting to prevent the imminent commission of a criminal offence; (f) the defendant was acting out of necessity (duress of circumstance); (g) the e prosecution is an unjustifiable interference of her art 10 and 11 rights for freedom of expression and association.'

[61] The defence statement then also stated: 'The defendant refers the court and the prosecution to the skeleton argument served by the defence, where these points are given full amplification.' f

[62] The defence further asked for extensive disclosure of documents.

[63] The skeleton was in identical form to that which I have quoted above in relation to the Ayliffe appeal, save that RAF Fairford is substituted for the Marchwood Military Port. The district judge again had to rule on the question of disclosure and by a ruling he made on 15 January 2004 he ruled that: g

> 'In my view having heard the extensive arguments from counsel I should not allow this case to develop in terms of ordering the disclosure sought because to do so would inevitably trespass into areas that are not permissible. In my judgment the decision whether the conflict was justified h or not is one that I cannot and should not undertake and I should therefore decline to order further disclosure of any information which simply bears on that issue on the ground that it is irrelevant to any matter in this case. I have considered first of all the question of whether war crimes were going to be or were being committed. The defence say that this issue is relevant because j the question of the commission of war crimes is incorporated into domestic law by the International Criminal Court Act 2001, Sch 8 ... which covers genocide, crimes against humanity and war crimes. I have also been referred to a number of press releases which Miss Kilroy says show that "reputable organisations are concerned that the war may be illegal and that war crimes

a may have been committed" for example the deliberate bombing of a civilian market at Al Nasar. Further the use of cluster bombs as indiscriminate weapons is also illegal it is contended. It seems to me that it would be quite unrealistic to expect this court to allow the sort of inquiry into these matters that it is contended for. These are not clear matters but controversial ones. To take them into account the court would have to at least consider where b the truth lies, for example about the market bombing. Was it deliberate, was it a mistake? That is the sort of inquiry that this court in my view is simply not competent to undertake. In any event, even if it were established beyond doubt that someone had done it deliberately, the defendants could not have known what would occur when they acted as they did. Furthermore, whilst I accept that the concept of war crimes are part of our domestic law as a c result of the 2001 Act it does not follow that if a United Kingdom combatant commits one the decision to go to war or its continuance becomes "per se" unlawful. A war crime could be an isolated incident for which the state is not accountable. The justification for interfering with an otherwise lawful activity, that there is a fear that it might be an activity ancillary to a war crime d which might be committed in the future is not to my mind a lawful justification at all.'

[64] He then continued dealing with the question of justiciability, and as already indicated above he did so in terms which could arguably be said to be e ruling on relevance as well as justiciability, but the safe course is to adopt the approach that he was limiting his views at this stage to justiciability.

[65] A case was stated and the questions posed for the court were the following:

f '1. Was I correct to rule as a preliminary matter that: (a) the legitimacy or lawfulness of HM government's decision to go to war; and (b) the conduct of war; were not matters that the court could consider when determining the extent of the Crown's duty of disclosure to the defence under the Criminal Procedure and Investigations Act 1996 for the reasons given in my ruling dated 14 and 15 January 2004.

g 2. Having heard the evidence, did I err in law when I rejected the defendant's defences which were: (a) the activity she disrupted was unlawful because the activities carried out at the base were (i) war crimes, (ii) crimes against peace; (b) that she had a lawful excuse because she had a genuine belief that her actions were necessary to prevent an imminent war; (c) she h was acting in accordance with s 3 of the Criminal Law Act 1967 by preventing the imminent commission of a criminal offence, namely the commission of war crimes under the International Criminal Court Act 2001, and/or crimes against peace; (d) that she was acting out of necessity (duress of circumstances).'

j

[66] In the light of *R v Jones* it is accepted that the first question must be answered 'Yes' in so far as it relates to the legitimacy or lawfulness of the government's decision to go to war. But in so far as it may be suggesting that war crimes contrary to s 51 of the 2001 Act were not justiciable, then the answer is 'No'. So far as question 2 is concerned, the question raises two aspects, both

justiciability and the question whether an issue has been raised. The question is however clearly directed at the justiciability aspect. But, as already indicated, if no issue has been raised in relation to war crimes, or no issue has been raised which provides a defence under s 3 of the 1967 Act, then the answer to the question will still be that the district judge was right to reject the defendant's defences.

[67] As already indicated, the skeleton argument in this case was no different from that in the Ayliffe case. For the reasons given in the Ayliffe appeal, the speculative assertions set out in the skeleton argument did not provide a sufficient basis for the raising of an issue as to whether the operation of the airbase was being carried on by those on it without the commission of any offence.

[68] It does not assist the prosecution to have sought to have cut down the nature of the activities to security activities in order to provide an answer to the case. If it had been established that the normal activities at the airbase involved the commission of war crimes or the aiding or abetting of war crimes, and that it was the intention of Valerie Swain to disrupt those unlawful activities, then the charge against her must have failed.

[69] But the normal activities of the airbase are lawful and there is no sufficient raising of any issue that any unlawful activity was taking place. There was not a scintilla of evidence that persons on the base had it in contemplation to commit or aid and abet some conduct which was a war crime. Bare assertions relating to the possible use to which aircraft might be put by some unidentified person at some future date provide no evidence that any unlawful activity was being carried on. Such assertions formed no basis for the disclosure of documents sought on behalf of the appellant. Nor did they provide any basis for holding that the Crown had not discharged the burden of showing that the activities at the base were lawful. That disposes of the appeal in relation to s 68 of the 1994 Act.

[70] For the same reasons given in the Ayliffe appeal, s 3 of the 1967 Act simply provides no defence to cutting the perimeter fence. Firstly, once again, there is no sufficient raising of any issue that any war crime was being committed. Secondly, even if, on speculation upon speculation, aircraft taking off from the airbase might, when they got to Iraq, commit some war crime, there is no nexus between the cutting of the perimeter fence and the preventing of such an activity.

THE PERCY APPEAL

[71] It is not in issue that on 26 March 2003 at about 8.30 pm Lindis Percy gained access to the airbase and subsequently to the perimeter fence at the United States Embassy annexe within the airbase, and hung on the annexe fence a United States flag upside down with the words 'War on Iraq is immoral, unlawful madness' written on it.

[72] She was charged that:

> 'On Wednesday 26 March 2003 at Croughton in Northamptonshire, having trespassed on land in the open air, namely RAF Croughton and in relation to lawful activity, namely the routine security activities on the base which persons were engaged in and on that land, did an act, namely enter a secure and restricted area, and attach a flag to the interior fencing on the base causing a security alert and closure of the base, which you intended to have the effect of disrupting security activities on that base.'

[73] Lindis Percy's defence was again slightly fuller than those in the Ayliffe appeal. She asserted:

> '2. In relation to the allegation of aggravated trespass to section 68(1) ... the defendant takes issue with the following: (a) the assertion that the activity conducted at RAF Croughton was lawful; (b) the allegation that she intended to disrupt the security activity at the base by attaching a flag to the interior fencing on the base;
>
> 3. The defendant will say that she entered the base to protest against the war taking place in Iraq at that time;
>
> 4. The personnel at RAF Croughton are part of the United States military, which at the time of her protest was engaged in an illegal war in Iraq;
>
> 5. It is not considered the activity on the base was disrupted but if there was disruption the defendant did not intend this as a consequence of her protest;
>
> 6. By reason of matters aforesaid the defendant seeks the disclosure of material which might reasonably assist his defence and/or may undermine the prosecution case.'

[74] Although no reference was made to a skeleton argument in this instance, a substantial skeleton argument was put in, drafted by counsel, Mr Raza Husain. Since no charge of criminal damage was made, the sections which in other skeletons had dealt with necessity, duress and s 3 of the 1967 Act, were not in this skeleton. Otherwise it was in almost identical terms to the skeletons in Ayliffe and in Swain, save for the fact that where necessary RAF Croughton replaced Marchwood or Fairford. In particular, the section on war crimes, paras 75–90, was in identical terms to the paragraphs in the other skeletons, save for the minor alteration of the name of the base.

[75] The questions posed for the opinion of the High Court were:

> '(1) Was I correct to rule that the legality of the war in Iraq was not justiciable in the proceedings before me? [and]
>
> (2) Was I correct to make my decision on the basis that there is no defence of de minimis (ie either a duty or discretion to dismiss a prosecution on the basis of minimal or negligible seriousness) as such in English law? and alternatively
>
> (3) If there is such a defence, was I right, having regard to all the facts found, and upon finding particularly that the appellant intended, by the placing of a flag on an internal fence on a secure base, to cause disruption of routine security activities, to find that that was of more than minimal or negligible seriousness and so convict?'

[76] Question (1) must in the context of *R v Jones* be answered 'Yes', but it was common ground that, by that question, was also raised the war crimes issue. So far as the district judge was ruling that the question of war crimes was not justiciable, the answer would have to be 'No', but as in the other appeals that does not deal finally with Percy's appeal relating to the charge under s 68 of the 1994 Act. I will return to that question having dealt with questions (2) and (3).

[77] Questions (2) and (3) relate to a separate point taken on this appeal. It is made by reference to *DPP v Barnard* [2000] Crim LR 371 and the judgment of

Laws LJ in that case. He identified the following elements of an offence under s 68: (1) trespass on land in the open air; (2) the doing of some act which is a distinct and overt act beyond the act of trespass itself; and (3) the intention by the second act to intimidate, obstruct or disrupt as provided by s 68(1)(a)–(c). *a*

[78] Mr Blake QC, who argued Miss Percy's appeal with great skill, submitted that there is in reality no distinct second act relied on in the information laid in this case. He asserted that the second act must be something which is not the trespass itself. He asserted that the placing of a flag on the fence does no more than state that the person trespassing is there and thus it cannot amount to a distinct second act, separate from the act of trespass itself. *b*

[79] The difficulty for Mr Blake is that when one looks at the information in this case the allegation goes well beyond simply waving a flag to assert that one was present. The act alleged is that Miss Percy attached a flag 'to the interior fencing'. As we know the flag was upside down and contained the words which I have quoted above. In my view there was a distinct act separate from the act of trespass, namely entering the base. Thus the point argued by Mr Blake fails. The reference in question (2) to 'de minimis' apparently derives from the manner in which the point was put before the district judge, namely that if there was any act in addition to the act of trespass, it was 'de minimis'. Here there was a separate act and it was not such that the law should ignore it. I would not want to embark on discussion of any defence in English law of 'de minimis'. That was rightly not how the appeal was presented to us. *c d e*

[80] So far as s 68 of the 1994 Act is concerned, for the reasons given in the previous appeals, the assertions in this skeleton do not provide any basis for alleging that war crimes were being committed or contemplated. There was not a scintilla of evidence that persons on the RAF Croughton base had it in contemplation to commit or aid and abet some conduct which was a war crime. Bare assertions relating to the possibility that activities at RAF Croughton by persons unidentified might possibly amount to a war crime or the aiding and abetting of a war crime provide no evidence that war crimes were being committed or that there was any aiding and abetting of war crimes. Such assertions simply provide no basis for the disclosure sought and no basis for holding that the Crown had not discharged the burden of showing that the activities at the base were lawful. *f g*

CONCLUSION

[81] For the reasons I have given, the convictions of the appellants in all these cases should be upheld. The appeals therefore must be dismissed. *h*

JACK J.

[82] I agree. The reality is that these were protests and they were not attempts to prevent crimes. *j*

Appeals dismissed.

Dilys Tausz Barrister.

Government of the Republic of Albania v Bleta and another

[2005] EWHC 475 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

PILL LJ AND COX J

1 FEBRUARY, 23 MARCH 2005

Extradition – Hearing – Case where person has been convicted – Person not convicted in his presence – Person deliberately absenting himself from his trial – Right to fair trial – Meaning of 'deliberately absented himself from his trial' – Human Rights Act 1998, Sch 1, Pt I, art 6(3) – Extradition Act 2003, s 85(3).

The government of Albania sought the extradition of the respondent in connection with his conduct in Albania in September 1998. The respondent had left Albania in late 1998 for the United Kingdom. For the purposes of the Extradition Act 2003 Albania had been designated as a territory which was not required to provide prima facie evidence to support a request for extradition. The respondent had been convicted in Albania in his absence of premeditated murder and illegal possession of military weapons and sentenced to 13 year's imprisonment. Under s 85(3)[a] of the 2003 Act, at the extradition hearing, the judge had to decide, where the person whose extradition was sought had not been convicted in his presence, whether the person had deliberately absented himself from his trial. If the answer to that question were in the negative, and the person would not be entitled to a retrial or (on appeal) to a review amounting to a retrial, the judge had to order the person's discharge. At the extradition hearing the government conceded that the respondent would not be entitled to a retrial. The district judge considered that there was no evidence to show that the respondent had known the existence of the proceedings against him or that he knew or should have known of the date and place of his trial. He concluded that it could not be said that the respondent had deliberately absented himself from his trial and, accordingly discharged him. The government appealed contending that the respondent had committed a crime and then evaded arrest by leaving Albania, so deliberately absenting himself from the criminal legal process and thus his trial. It also withdrew its concession that no retrial would be available. The respondent contended that in order to have absented himself deliberately, he would need to have been informed of the essential facts of the legal proceedings, and that the right to a fair trial (which included in relation to a criminal offence the right to be informed of the nature and cause of the accusation against him), provided by art 6[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) threw light upon the construction to be given to s 85(3) of the 2003 Act.

a Section 85 is set out at [16], below

b Article 6, so far as material, provides: '(3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him …'

Held – On the true construction of s 85(3) of the 2003 Act the expression 'his trial' contemplated a specific event and not the entire legal process. Parliament had adopted the expression 'deliberately absented himself from his trial' and consideration had to be given to the concept of deliberate absence and to the concept of a trial. The word 'trial' had been adopted by Parliament in the context of the presence of art 6 of the convention with its use of the word 'hearing' and its reference to a right to a hearing and a right to be informed of the nature and cause of the accusation. Article 6 conferred the right to a fair trial and 'trial' would not have been used in s 85(3) if a wider view of absence had been intended. Parliament could have used an expression such as 'deliberately absenting himself from legal process' which could include leaving a jurisdiction to avoid arrest, but it had not done so, and the subsection could not be construed as if it had. In the instant case the respondent had deliberately absented himself from Albania, but it had not been established that the respondent had left that jurisdiction, or had remained in the United Kingdom, with the intention expressed in the subsection. The words of s 85(3) could not be construed as covering those circumstances and, as there was no sufficient assurance that the respondent would receive the retrial or review required, the appeal would, accordingly, be dismissed (see [26], [47], [48], [50], [51], below).

R v Hayward, R v Jones, R v Purvis [2001] 3 WLR 125, *Re Spinnato* [2001] All ER (D) 327 (Dec), *R v Jones* [2002] 2 All ER 113 and *Cartwright v Superintendent of HM Prison* [2004] 3 LRC 151 considered.

Notes

For extradition hearing: case where person has been convicted, see Supp to 17(2) *Halsbury's Laws* (4th edn reissue) para 1413, and for the right to be informed of criminal charges, see 8(2) *Halsbury's Laws* (4th edn reissue) para 143.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 706.

For the Extradition Act 2003, s 85, see 18 *Halsbury's Statutes* (4th edn) (2005 reissue) 875.

Cases referred to in judgments

Antonis P Lemos, The [1985] 1 All ER 695, sub nom *Samick Lines Co Ltd v Owners of the Antonis P Lemos* [1985] AC 711, 2 WLR 468, HL.

Cartwright v Superintendent of HM Prison [2004] UKPC 10, [2004] 3 LRC 151, [2004] 1 WLR 902.

Colozza v Italy [1985] ECHR 9024/80, (1985) 7 EHRR 516, ECt HR.

Government of Belgium v Postlethwaite [1987] 2 All ER 985, sub nom *R v Governor of Ashford Remand Centre, ex p Postlethwaite* [1988] AC 924, [1987] 3 WLR 365, HL.

Hellenic Republic v Tzatzimakis [2003] FCAFC 4, Aus FC.

Ismail, Re [1998] 3 All ER 1007, [1999] 1 AC 320, [1998] 3 WLR 495, HL.

Kamasinski v Austria (1991) 13 EHRR 36, [1989] ECHR 9783/82, ECt HR.

Peci, Re [1999] All ER (D) 1230, DC.

Pelissier and Sassi v France [1999] ECHR 25444/94, ECt HR.

R v Jones [2002] UKHL 5, [2002] 2 All ER 113, [2003] 1 AC 1, [2002] 2 WLR 524; *affg* sub nom *R v Hayward, R v Jones, R v Purvis* [2001] EWCA Crim 168, [2001] 3 WLR 125.

R v Tonner, R v Evans, R v Harding [1985] 1 All ER 807, [1985] 1 WLR 344, CA.
Rey v Government of Switzerland [1999] 1 AC 54, [1998] 3 WLR 1, PC.
Spinnato, Re [2001] EWHC Admin 1124, [2001] All ER (D) 327 (Dec).

Cases referred to in skeleton arguments

Crosby v US (1993) 506 US 255, US SC.
Kiriakos, Re (7 November 1996, unreported), DC.
Kirkwood v UK (1984) 37 DR 158, E Com HR.
Migliorelli v Government of Italy (28 July 2000, unreported), DC.
Migliorelli, Re [2001] EWHC Admin 861, [2001] All ER (D) 423 (Oct).
R (Guisto) v Governor of Brixton Prison [2002] EWHC 1441 (Admin), [2004] 1 AC 101, [2003] 2 WLR 157; *rvsd* [2003] UKHL 19, [2003] 2 All ER 647, [2004] 1 AC 101, [2003] 2 WLR 1089.
R (on the application of Ullah) v *Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 2 AC 323, [2004] 3 All ER 785, [2004] 3 WLR 23.
Rees v Secretary of State for the Home Dept [1986] 2 All ER 321, [1986] AC 937, [1986] 2 WLR 1024, HL.
Royal Government of Greece v Governor of Brixton Prison [1969] 3 All ER 1337, [1971] AC 250, [1969] 3 WLR 1107, HL.
Schtraks v Government of Israel [1962] 3 All ER 529, [1964] AC 556, [1962] 3 WLR 1013, HL.

Appeal

The government of the Republic of Albania appealed, under s 105 of the Extradition Act 2003, from the decision of Senior District Judge Workman in the Bow Street Magistrates' Court on 28 October 2004 by which, following a hearing in which the government sought the extradition of the respondent, Fatmir Bleta, in respect of conduct within Albania on 15 September 1998, he discharged the respondent under s 85(7) of the 2003 Act. Bow Street Magistrates' Court, the second respondent, did not appear. The facts are set out in the judgment of Pill LJ.

Mark Summers and *Rosemary Fernandes* (solicitor advocate) (instructed by the *Crown Prosecution Service*) for the government.
Robin Pearse Wheatley (instructed by *Arora Lodhi Heath*) for the respondent.

Cur adv vult

23 March 2005. The following judgments were delivered.

PILL LJ.

[1] This is an appeal by the government of the Republic of Albania (the government) against a decision of Senior District Judge Workman given in a reserved judgment handed down on 28 October 2004, following a hearing on 12 October 2004. The government seek the extradition of Fatmir Bleta (the respondent) in respect of conduct within their territory on 15 September 1998. The respondent left Albania in late 1998, he says in November. He has been in the United Kingdom since then.

[2] Following an extradition hearing, the judge exercised his power under s 85(7) of the Extradition Act 2003 to discharge the respondent. The appeal is brought under s 105 of the 2003 Act. Extension of time of 19 days within which to serve the notice of appeal is granted to the government. The second respondent did not appear at the hearing.

[3] Albania has been designated a category 2 territory pursuant to s 69 of the 2003 Act (The Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/3334). Category 2 territories which are additionally designated under s 84 by virtue of para 3 of the 2003 Order (such as Albania), are not required to provide prima facie evidence to support a request for extradition. Part 2 of the 2003 Act, ss 69–141, deals with extradition to category 2 territories. Two points arise; one on the wording of s 85(3) and one on the wording of 85(5) of the 2003 Act.

[4] On 19 August 2004 the Secretary of State issued a certificate under s 70 of the 2003 Act that the request from Albania 'being a territory designated for the purposes of Pt 2 of that Act for the extradition of Fatmir Bleta is valid and has been made in the approved way'. On 9 August 2004 Crane J had quashed an earlier certificate issued by the Secretary of State (see [2004] EWHC 2034 (Admin), [2005] 1 All ER 810). No challenge is made to the validity of the present certificate. The request for extradition is dated 11 May 2004.

THE FACTS

[5] It is alleged that the respondent had been charged with conduct which, had it occurred within the jurisdiction of the United Kingdom, would have constituted offences of murder, unlawful killing and firearms offences on 15 September 1998. The request included a narrative which, in translation, provided:

> 'This citizen, subject to extradition, on 15.09.1998, about 6.15 hrs, together with the citizen Abedin Zenuni were on duty during the night shift close to the drinkable water reservoir of Tirane, village of Selite. To the water reservoir went the victim Lulezim Duka, who knew the two guards. Since the witness Zenuni went to make a check round the building, the defendant and the victim stayed talking with each-other. At this moment there was heard a shot from the weapon in the possession of the defendant and due to this the victim Lulezim Duka got a lethal blow. In reliance to the evidence submitted to the judicial hearing, First Instance Court, Tirane, through its decision no 302 dated 19.05.1999, decided: Convicting the citizen Fatmir Bleta and sentencing him to 13 years imprisonment for the criminal offence of "murder" and "illegal weapon possession" committed on 15.09.1998.'

[6] That summary was accompanied by a record of the hearing before the first instance court in Tirane on 19 May 1999. The respondent was convicted in his absence. All relevant documents have been supplied in translation. The findings of the court were stated:

> 'That the defendant Fatmir Bleta was employed as a guard at the drinking reservoir in Tirane, located in the village of Selite. On 15.09.1998 the defendant was on his night shift together with the citizen

Abedin Zenuni and the latter was employed as guard. About 6 15 hrs am, of the same day, at the check point came the victim Lulezim Duka who was homeless and knew both guards earlier. Referring to the explanation of the witness Abedin Zenuni, the victim stayed with them even at other occasions. As the moment for changing the shift was coming, Abedin Zenuni left for a moment to check the building leaving the defendant Fatmir Bleta and the victim alone. At this moment the witness Abedin saw the defendant playing with the victim, pointing the automatic weapon Kalashnikov at him, and said to him not to play with the weapon, since he could kill him. In the meantime, the defendant who was still pointing his weapon at the victim, pulled the trigger making a single shot. As a result of this shot, the victim got a bullet in his head and his death was caused immediately. The forensic expertise defines that the cause of the death of the citizen Lulezim Duka was the piercing wound he had in the head. In this way the defendant consumed the criminal offence of premeditated murder. Concerning the form of guilt, it was indirectly premeditated, since although the defendant did not wish the death of the citizen Lulezim, he saw the possibility of the criminal consequence, since making use of a military weapon and pointing it at the victim, the real [risk?] of causing the consequence was real.'

[7] The respondent was convicted of premeditated murder and of illegal possession of military weapons and sentenced to a total of 13 years' imprisonment.

[8] The request was accompanied by a record of the decision of the court on 9 December 1998 to 'impose the security measure of arrest in prison' and a document signed by the prosecutor dated 15 December 1998:

> 'There have been performed all the searches for him, but he is hiding from the police authorities and investigation. Under these circumstances, in order to continue with the procedures of prosecuting the defendant in absentia, we request to have his escape declared.'

[9] Also submitted was a much later document dated 28 April 2004, signed by a district deputy prosecutor, in which the events of 15 September 1998 are again described though with the damning additional allegation that the respondent said to Lulezim 'I am going to get rid of you'. In the 2004 document, it was also stated that a case had on 21 September 1998 been registered as 'criminal prosecution case no. 2122' by the prosecution office at the Tirane court.

[10] A substantial bundle of further documents was submitted to the Secretary of State by the government with a letter dated 12 October 2004, that is the date of the hearing before the judge. The witness statement on behalf of the government states that the documents were before the judge. He did not refer to them in his judgment. The bundle included a document bearing the date 1 October 1998 from the Office of Judicial Police in which it was stated:

> '... there have been before many searches in the house, as well as in other places where it is said he [the respondent] was staying and at his workplace, but his apprehension has not been made possible. Since the

searches were comprehensive and the person cannot be found, this protocol is sent to the competent court to decide the escape of the person.' a

[11] A further document dated 15 December 1998, and signed by a judge at the Tirane district court declared 'the escape of defendant Fatmir Bleta in accordance with Article 247 of the Criminal Procedure Code'. The court's findings included a finding that: b

'After committing this criminal offence, the defendant Fatmir Bleta escaped to an unknown direction hiding from the investigation. Under these circumstances, we think that the request of the Prosecution Office of Tirane for declaring the escape of this person is fair and paves the way for the investigation and adjudication procedure in absentia.' c

The decision of 15 December 1998 is stated to be 'in reliance on Articles 245 and 247 of the Criminal Procedure Code'. These articles are not with the papers supplied to me.

[12] The judge also considered whether the appellant would be entitled to a retrial (s 85(5) of the 2003 Act). The judge stated: d

'It is clear from the judgment of the court and it is conceded by the government that the time limits for the appeal have expired and that the defendant would not be entitled to a retrial (or a review amounting to a retrial) in respect of these charges.' e

Following the discharge of the respondent, the government have provided further information in relation to retrial. No objection has been made on behalf of the respondent to the court considering it. A letter from the government's Minister of Justice, dated 10 November 2004 stated: f

'Ministry of Justice of the Republic of Albania in response to your request provides official guarantee for the retrial of the citizen Fatmir Bleta upon the occasion of the extradition of this citizen to Albania with reference to the present Albanian criminal legislation ...' g

Articles of the criminal code are then cited.

[13] The letter of 10 November 2004 continues:

h

'It comes out of the interpretation of Article 48, 141 and 410/2 of the Republic of Albania that the defence can be realized by the lawyer appointed by the person facing the charge, or by his relatives through power of attorney. If the person cannot be found, his representation shall be made by the lawyer appointed *ex officio* by the court.

In reliance to Article 410/2 and to Article 147 of the Criminal Procedure Code, the powers of this defence lawyer are limited only at the First Instance Court. So he cannot represent the defendant at higher instances without being provided with a representation act issued in the forms provided for by law. j

a In these cases, even if the decisions has become final, because of the missing appeal within the ten day period, in accordance with Article 147, the entitlement to file an appeal can be restored with this legal provision.

In accordance with this legal provision:

1. The prosecutor, defendant, private parties and defence lawyers can be restored in the former legal position as long as b they prove that they were not capable of observing the time period because of the accident or major forces.

2. If the decision has been announced in absentia, the defendant can request the restoration in the original legal position for filing an appeal if he proves that he was not informed about the c decision.

3. The request for restoration in the former legal position shall be filed within 10 days since the disappearance of the fact which consisted an accident or major force, while in the cases provided for in paragraph 2, from the day when the defendant is informed effectively about the act.

d Thus, interpreting the above provisions, there is foreseen the possibility that the law recognises to the citizens for requesting the restoration in the original legal position of the right to file an appeal, as long as the conditions foreseen by law have been met. We highlight that the right to file a complaint is a right foreseen also in the European Convention "For the e protection of fundamental human rights and freedoms", and the Republic of Albania is a party to it, and as such this can be denied to no one. At the same time, in accordance with Article 122 of the Constitution of the Republic of Albania, the ratified international acts are part of the domestic legal system and are applied directly. In reliance to Article 3, part 1 of the Second Additional Protocol to European Convention on Extradition, you f are kindly asked to take in consideration the request for the extradition of the Albanian citizen Fatmir Bleta, upon the presentation of the legal guarantee mentioned above.'

[14] Further clarification was sought by the Home Office and the g government supplied yet further information on 10 December 2004:

'Ministry of Justice forwards, in response to your request for confirmation on the four points made by your authority relating to the extradition of the Albanian citizen Fatmir Bleta from the United Kingdom h to Albania, as follows:

Regarding Point 1, concerning the start of time periods provided for in Article 147/3 of the Criminal Procedure Code, we provide the following explanation:

Considering Article 3, par 2 of the Second Additional Protocol of j European Convention on Extradition, under which "if the requested party notifies the person whose extradition is requested for the proceedings held at his absence, the requesting party is not going to consider this communication as an official notification for the purposes of the criminal procedure in this state", the notification done by your authorities is not going to be considered within the time period.

Consequently, considering Article 147/3 of the Albanian Criminal Procedure Code, that the request for the restoration in the former legal position shall be filed within ten days from the day when the defendant has effectively been notified about the act, and Article 464, par 3 of the Albanian Criminal Procedure Code, according to which if the convicted person is in remand imprisonment, the order for the enforcement of the imprisonment sentence shall be sent to the state authority which administers the prisons and shall be notified to the interested person, while if the defendant is not in remand imprisonment, there shall be ordered his imprisonment, we explain that the time periods start when the convicted person has received official notification from the competent authorities in accordance with Article 464/3 of the Albanian Criminal Procedure Code.

With regard to point 2, through which there was requested confirmation whether the restored right for appeal has to do with a full retrial, we explain as follows:

In reliance to Article 425 of the Albanian Criminal Procedure Code, "Appeal Court hears the case in its entirety and it is not restricted only within the grounds contained in the complaint."

In addition to this, Article 427 of the Albanian Criminal Procedure Code provides for:

> "1. If a party requests the re-hearing of the evidence administered in the judicial proceedings of first instance or hearing of other evidence, the court, if it is of the opinion that such thing is necessary, decides to hold partial or complete judicial proceedings.
>
> 2. Concerning the evidence disclosed after the first instance proceedings or those which are disclosed on the spot, the court decides, as appropriate, whether they should be taken or not.
>
> 3. Repetition of judicial proceedings shall be decided even ex officio, if the court thinks it is reasonable.
>
> 4. The court decides repetition of judicial proceedings if it is proven that the defendant has not attended the first instance, because he was not informed or he could not attend for legal reasons."

In reliance to Article 428 of the Albanian Criminal Procedure Code, the Appeal Court decides:

> a) upholding the decision
>
> b) changing the decision
>
> c) overruling the decision and termination of the proceedings, if it is the case that does not allow the institution and continuation of the proceedings, or if the guilt of the defendant is not proven.
>
> d) Overruling the decision and sending the acts back to the first instance, if the provisions regulating the conditions for being a judge or lay-judge in the said case, the number of judges or lay-judges which is indispensable for making up the panels foreseen in this code, performance of the criminal prosecution by the prosecutor and his participation in the proceedings, participation of the representative of the accusing injured party and of the representative of the defendant, violation of the provisions for raising new charges have not been observed, as

well as in every case when invalidity of the decision has been provided for in separate provisions.

With regard to point 3, we explain that Albania has signed the European Convention for Human Rights and Fundamental Freedoms as well as the International Pact for Civil and Political rights, and in reliance to Article 122 of the Constitution of the Republic of Albania "international acts are part of the domestic legal system and are implemented directly", and consequently Article 6/3 (e) and (d) of European Convention of Human Rights and Fundamental Freedoms are applied directly.

Confirming the implementation of the Albanian criminal legislation as well as of the international acts in which Albania is a party, we forward the above information in response to your request and we remain expecting your answer regarding the extradition of Fatmir Bleta from United Kingdom to Albania.'

References are made in this letter to several articles in the Albanian Criminal Procedure Code which had not been mentioned in the earlier letter.

[15] The respondent was arrested in Derby on 21 April 2004. The court has not been told how he was traced. At interview on that day, Constable Couzens says that the respondent told him, through an interpreter, that he worked as a security man at the factory and that the gun went off accidentally. In a statement made much later, the respondent denied that he made that admission and claimed that he did not work at the factory. He now seeks to produce supporting evidence that he did not work at the factory and that he was at work away from Tirane on the relevant day. He claims that he left Albania in November 1998. No one from the Albanian authorities had visited his home or told him that he was wanted in connection with murder. Permission to introduce that evidence at the present hearing was refused.

THE STATUTE

[16] The appeal turns on the construction of s 85 of the Extradition Act 2003 which has the subheading 'Case where person has been convicted':

'(1) If the judge is required to proceed under this section he must decide whether the person was convicted in his presence.

(2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 87.

(3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.

(4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 87.

(5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

(6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 86.

(7) If the judge decides that question in the negative he must order the person's discharge.

(8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a

retrial or a review amounting to a retrial, the person would have these rights—(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required; (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

[17] Section 86 is headed 'Conviction in person's absence' but its operative subsections do not apply in this case because of the designation of Albania mentioned above. By virtue of s 86(7), the requirement in s 85(6) to proceed under s 86 would become in this case a requirement to proceed under s 87. The judge's duty under s 87, which did not arise on his decision to discharge under s 85, is 'to decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998'.

THE HEARING BELOW

[18] Three points were taken on behalf of the respondent before the judge. The judge rejected the first submission which was that the second proceedings following the discharge of the first s 70 certificate amounted to an abuse of process. The second point, which did not in the event arise, was that the respondent was entitled to discharge under s 87. The third point was that the respondent was convicted in his absence and had not 'deliberately absented himself from his trial' within the meaning of s 85(3). The judge also considered whether s 85(5) applied.

[19] The judge dealt with the facts briefly stating:

'The government's case is that the defendant was in possession of an unauthorised automatic rifle and shot a man once in the head. The defendant left the scene and in due course made his way to England. He was never arrested. The government maintains that he must have known that the shot was fatal and that a trial was inevitable. In leaving the country in those circumstances he was waiving his right to be present at the trial and was deliberately absenting himself from that trial.'

[20] The judge's conclusions were:

'In the present case I am satisfied that the defendant was never arrested and that he was never the subject of the equivalent of our charging process. There is no material before me to show that he knew of the existence of the proceedings, and certainly no material to show that he knew, or should have known, of the date and place of his trial and that the trial might proceed in his absence. It seems to me that on a proper construction of s 85(3) it cannot be said that the defendant deliberately absented himself from his trial where he was unaware of the commencement or existence of the proceedings, or of the date and place of his trial. Having concluded that the defendant did not deliberately absent himself from his trial, I then have to consider whether under s 85(5) he would be entitled to a retrial. It is clear from the judgment of the court and it is conceded by the government that the time limits for the appeal have expired and that the defendant

would not be entitled to a retrial (or a review amounting to a retrial) in respect of these changes. On these grounds I am obliged under s 85(7) to discharge the defendant.'

SECTION 85(5)

[21] The first point taken by Mr Summers on behalf of the government is the point under s 85(5) which was conceded before the judge. Reliance is placed on the material submitted by the government after the hearing with the letter of 10 November 2004. Somewhat to my surprise, no objection was made to the point being taken before this court. If the point was to be taken, it should have been taken before the judge and the material now relied on submitted to him.

[22] The government rely on the 'official guarantee for the retrial of the citizen Fatmir Bleta upon the occasion of the extradition of this citizen to Albania ... ' contained in the first paragraph of the Minister of Justice's letter of 10 November 2004. The court is permitted to act upon an assurance (see *Re Peci* [1999] All ER (D) 1230). The court should not go behind the guarantee given, it is submitted. There was a right to legal representation just as the respondent had been legally represented, in his absence, by a court appointed lawyer, at the hearings on 15 December 1998 and 19 May 1999. The government's reliance on art 3(1) of the Second Additional Protocol to the European Convention on Extradition (Paris, 13 December 1957; TS 97 (1991); Cmnd 1762) with its reference to 'an assurance considered sufficient to guarantee to the person the right to a retrial which safeguards the rights of the defence' demonstrates the government's awareness of what is involved. The fact that art 3 has not been accepted by the United Kingdom is immaterial for the purpose of assessing what has been offered. The court should accept the guarantee given, it is submitted. As Moses J put it in *Re Peci*, extradition law is founded upon the principles of international comity between those nations who are signatories to the treaties in question.

[23] For the respondent, Mr Pearse Wheatley submits that it is open to the court, as recognised in *Re Peci*, to test the assertion contained in the letter against the constitutional provisions produced to support the assertion made. There is a lack of clarity and certainty about the provisions, it is submitted, which is not cured by the explanations in the letters.

[24] The court has not been supplied with information as to when the Constitution and Criminal Procedure Code were adopted, the relationship between them, decisions of the Albanian courts applying their provisions or expert evidence. Counsel submits that the effect of art 147 is far from clear and the attempt in the letter to explain it is not reassuring. In art 147 it is stated, 'there is foreseen the possibility that the law recognises to the citizens for requesting the restoration of the original legal position of the right to file an appeal, as long as the conditions foreseen by law have been met'. Only the possibility of an appeal is mentioned. That itself is conditional and is short of the required entitlement to a review amounting to a retrial. Similarly, art 427 of the new Code, set out in the December letter, falls far short of providing an entitlement to a retrial. Partial or complete legal proceedings may be held if the court is 'of the opinion that such a thing is necessary' and there may be 'a repetition of judicial proceedings' 'if the court thinks it is reasonable'.

CONCLUSION ON S 85(5)

[25] It is important to make full allowance for difficulties in translation of the relevant provisions into English. It is also important to give sympathetic consideration to the concepts stated in Albanian law and not to find an entitlement absent because it is not expressed in terms familiar in English law. Moreover, provisions which are unlikely to have been drafted with circumstances such as the present in mind could, on a proper construction, be held to cover them.

[26] However, having made all allowances I properly can, I am unable to conclude that, upon examination of the Albanian provisions and the explanations given for them, I am satisfied that the respondent would be entitled to the required re-trial or (on appeal) review amounting to a retrial in Albania. I do not doubt the good faith in which the 'guarantee' was given but I see considerable force in the submissions of Mr Pearse Wheatley. There are in my judgment too many open ends and insufficient clarity to be able to conclude that the information supplied belatedly and by instalments, following the concession before the judge, provides a sufficient assurance that the respondent would receive in Albania the retrial, or review amounting to re-trial, which the 2003 Act requires if extradition is to be ordered. I do not find signatures of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome 4 November 1950; TS 71 (1953); Cmnd 8969), or the UN Covenants, in themselves amount to sufficient assurance in the circumstances.

SECTION 85(3)

[27] On the second point, Mr Summers submits that the judge erred in law in his construction of the expression 'deliberately absented himself from his trial' in s 85(3) of the 2003 Act. The respondent had the means of knowledge as to when and where his trial was to take place and voluntarily absented himself.

[28] The government submit that the respondent 'deliberately absented himself from his trial' within the meaning of s 85(3) of the 2003 Act. The government accept that the respondent was not informed of the trial process but submit that he had shot someone in the head and no one in his position could have thought other than that he would be the subject of criminal trial. With that knowledge, the respondent fled the scene and, more importantly, left the country, thus evading arrest in Albania. The inference should be drawn that he was evading arrest. The respondent deliberately absented himself from the criminal process and thus his trial. The judge erred in his reliance on procedural criteria such as the formal charge and the moment of fixing date and place of trial.

[29] Mr Summers submits that the approach adopted by the courts of England and Wales as to when a defendant may be tried in his absence supports the government's construction of the subsection. He also submits that, even if trial in the absence of the defendant would not be permissible on the present facts in England and Wales, the expression 'deliberately absented himself from his trial' requires a broad construction in an extradition statute. The more flexible approach to trials in the absence of a defendant in civil law jurisdictions should be taken into consideration along with the need to give extradition treaties and extradition statutes 'a broad and generous construction so far as the text permits it in order to facilitate extradition' (per Lord Steyn in *Re Ismail*

[1998] 3 All ER 1007 at 1011, [1999] 1 AC 320 at 327). There will be a large gap in extradition arrangements, it is submitted, if a person leaving a jurisdiction immediately after the commission of a crime and before proceedings against him have commenced can escape extradition.

[30] It is also submitted that Albania is a civil law jurisdiction and in such jurisdictions trial in the absence of a defendant is permissible in circumstances where the accused is deemed to be evading arrest. For this proposition reliance is placed, not on expert evidence, but on a review of procedures in West European jurisdictions in the Federal Court of Australia in *Hellenic Republic v Tzatzimakis* [2003] FCAFC 4, at paras 73–86 (per Finkelstein J).

[31] As to what the position would have been had the alleged offences been committed in this jurisdiction, Mr Summers refers to the decision of the Court of Appeal Criminal Division in *R v Hayward, R v Jones, R v Purvis* [2001] EWCA Crim 168, [2001] 3 WLR 125. The court considered the extent of a judge's discretion to conduct a trial in the absence of a defendant. Three cases were considered. In *H*, a retrial had been ordered and a trial date fixed before the defendant absconded. In *J*, a trial date had been fixed and the defendant did not appear. In *P*, trial dates were adjourned because of the defendant's ill-health. When he was discharged from hospital, he disappeared. The appeal of *H* was allowed, that of *J* was dismissed, and *P*'s application for leave to appeal was refused.

[32] Giving the judgment of the court, Rose LJ referred ([2001] 3 WLR 125 at [10]) to the decision of the European Court of Human Rights in *Colozza v Italy* (1985) 7 EHRR 516 at 524 (para 28). It had not been shown in *Colozza*'s case that the defendant had waived his right to appear and defend himself or that he was seeking to evade justice. The court accepted that 'the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings'. The court's conclusion (at 525 (para 30)) was:

> 'The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6(1) in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved.'

[33] Rose LJ set out the principles which would guide the English courts in relation to the trial of a defendant in his absence:

> '(1) A defendant has, in general, a right to be present at his trial and a right to be legally represented. (2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him. (3) The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives. (4) That discretion must

be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented. (5) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account ...' (See [2001] 3 WLR 125 at [22]).

Rose LJ then set out a checklist of circumstances which should be considered. He added that at a trial in the absence of an unrepresented defendant the judge must ensure that the trial is as fair as the circumstances permit.

[34] *R v Hayward* was applied in this court in the context of the differently worded Extradition Act 1989 in *Re Spinnato* [2001] EWHC Admin 1124, [2001] All ER (D) 327 (Dec). Citing principles (1) and (2) stated by Rose LJ, Kennedy LJ stated (at [13]) that it seemed clear that 'had the trial taken place in England the Court of Appeal Criminal Division would not now interfere'. The circumstances were, however, very different from those now under consideration:

'[12] In the present case the conviction was undoubtedly obtained in the absence of the applicant, so the requirement of s 6(2)(a) of the 1989 Act is satisfied, and the only question therefore is whether it can be said that it would not be in the interests of justice to return him. I would not so find for three main reasons: (1) in my judgment it is clear that when the applicant left Sicily he knew that a criminal trial was imminent, and having been seen by the investigating magistrate he knew what the charges were going to be. Having regard to the time scale the probability is that he had received the relevant documentation, and information as to the date of trial, whether or not he personally signed the receipt of 10 November 1990. Similarly, whether or not he actually signed the application for an abbreviated trial on 4 January 1991 it seems to me overwhelming likely that he agreed to that application being made on his behalf. So, as it seems to me, the applicant simply chose to leave Sicily a matter of days before his trial in full knowledge of what was about to take place. (2) At the trial he was legally represented by a lawyer who was clearly active on his behalf, and as to whose competence no complaint is made. The evidence against him was, it seems, confined to the evidence of accomplices, but he chose not to be present to contest that evidence. (3) He was aware of his conviction, and could if he chose to have returned to Sicily and taken an active part in his appeal. He chose not to do so, whoever signed the notice of appeal.'

[35] The decision in relation to *J* in *R v Hayward, R v Jones, R v Purvis* [2001] 3 WLR 125 was affirmed in *R v Jones* [2002] UKHL 5, [2002] 2 All ER 113, [2003] 1 AC 1. The appeal was based on the proposition that the commencement of a trial in the voluntary absence of the accused contravened art 6 of the convention. Lord Bingham of Cornhill considered the jurisprudence of the European Court of Human Rights which had 'repeatedly made clear that it regards the appearance of a criminal defendant at his trial as a matter of capital importance' and that 'a fair hearing requires a defendant to be notified of

proceedings against him (see [2002] 2 All ER 113 at [8], [2003] 1 AC 1 at [8]). He stated (at [9]) that:

> 'But the European Court of Human Rights have never found a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) where a defendant, fully informed of a forthcoming trial, has voluntarily chosen not to attend and the trial has continued.'

Lord Bingham concluded (at [9]) that 'there is nothing in the Strasbourg jurisprudence to suggest that a trial of a criminal defendant held in his absence is inconsistent with the convention'.

[36] Lord Bingham's conclusion was:

> '[10] ... The law of England and Wales, while conferring a right and imposing an obligation on the defendant to be present at a trial on indictment, has never been held to include any comparable rule. If a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is apprehended.'

Lord Bingham added ' ... the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution'. He approved, with reservations on points which for present purposes need not be considered, the Court of Appeal's checklist in *R v Hayward*.

[37] The other members of the Appeal Committee agreed with Lord Bingham's conclusion although they were divided as to whether there had been an unequivocal waiver of the right to be present at any trial. Lord Hutton stated (at [23]):

> 'I consider that the authorities make it clear that a court has power to proceed with a trial when the defendant has deliberately absconded before the commencement of the proceedings to avoid trial, although it is clear that the power to proceed in such circumstances should be exercised by the trial judge with great care.'

[38] The question whether a trial in the absence of defendant involves a breach of art 6 is of course a different question from whether a defendant has deliberately absented himself from his trial, the statutory expression which is to be construed in this case. A purposive construction is required, submits Mr Summers, and not one based solely on English concepts of criminal procedure. Construing the statutory expression 'convicted in the person's absence' in the Federal Court of Australia, (s 10(1) of the Extradition Act 1988, an Australian statute), in *Hellenik Republic v Tzatzimakis* [2003] FCAFC 4 (para 29), Black CJ stated:

'The diverse circumstances in which s 10(1) might have effect, as regulations are made applying the Act in relation to the many countries with which Australia has concluded, or may conclude, treaties on extradition—countries with widely differing legal systems—suggests that s 10(1) has a broad general object of removing previously relevant distinctions between different types of convictions in a person's absence. No object emerges that would suggest that a special or technical meaning was intended. Rather, the potentially diverse circumstances under which s 10(1) might operate point the other way, to an intention that the expression in question should be interpreted according to ordinary English usage.'

[39] In *Re Ismail* [1998] 3 All ER 1007, [1999] 1 AC 320, the House of Lords construed the expression 'accused of an extradition crime' in s 1(1) of the Extradition Act 1989. The relevance of the case is in the analysis of the approach to be adopted to the construction of statutes dealing with extradition.

[40] No criminal charge had been made against the defendant in Germany. He was merely a suspect and wanted for pre-trial investigations. It was held that, since the warrant of arrest stated at length the criminal conduct of which the applicant was accused and the statutory provisions under which the charges were brought and the German judge who had issued it and the public prosecutor who had applied for it had been satisfied that there was sufficient evidence to justify criminal proceedings against him, the defendant was an 'accused' person for the purposes of the section and not merely a suspect.

[41] The principles to be applied were stated in the opinion of Lord Steyn ([1998] 3 All ER 1007 at 1011–1012, [1999] 1 AC 320 at 326–327), with which the other members of the Appeal Committee agreed:

'The meaning of "accused" person

It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of "accused" persons. It is also common ground that it is not enough that he is in the traditional phrase "wanted by the police to help them with their inquiries". Something more is required. What more is needed to make a suspect an "accused" person? There is no statutory definition. Given the divergent systems of law involved, and notably the difference between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition. For the same reason it would be unwise for the House to attempt to define the word "accused" within the meaning of the 1989 Act. It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in s 1 of the 1989 Act is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: see *Government of Belgium v Postlethwaite* [1987] 2 All ER 985 at

991–992, [1988] AC 924 at 946–947. That approach has been applied by the Privy Council to the meaning of "accused" in an extradition treaty: *Rey v Government of Switzerland*, [1998] 3 WLR 1 at 7. It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring an indictment. Moreover, it is important to note that in England a prosecution may also be commenced if a custody officer decides that there is sufficient evidence to charge an arrested person and then proceeds to charge him: s 37(7) of the Police and Criminal Evidence Act 1984; and see generally as to the commencement of prosecution Card, Cross and Jones *Criminal Law* (13th edn, 1995) ch 4. Despite the fact that the prosecuting authorities and the court are not involved at that stage, the charging of an arrested person marks the beginning of a prosecution and the suspect becomes an "accused" person. And that is so even if the police continue to investigate afterwards.

It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied. That such a broad approach to the interpretation of s 1 of the 1989 Act is permissible is reinforced by the provisions of s 20. This provision deals with the reverse position of an extradition of a person "accused" in the United Kingdom and contemplates that "proceedings" against him may not be commenced (begun) for six months after his return. This provides contextual support for a correspondingly broad approach to "accused" in s 1. For my part I am satisfied that the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution. But in the light of the diversity of cases which may come before the courts it is right to emphasise that ultimately the question whether a person is "accused" within the meaning of s 1 of the 1989 Act will require an intense focus on the particular facts of each case.'

[42] In giving the judgment of the majority of the Privy Council in *Cartwright v Superintendent of HM Prison* [2004] UKPC 10, [2004] 3 LRC 151, [2004] 1 WLR 902, Lord Steyn affirmed the principle that extradition treaties 'should be purposively and liberally construed' (see [15]). He added:

'But he [counsel] argued that a different approach is necessary in regard to domestic extradition legislation. He made a comparison with criminal statutes and submitted that an approach of strict construction is necessary. The Board would reject this submission. Even in regard to criminal statutes the presumption in favour of strict construction is nowadays rarely applied. There has been a shift to purposive construction of penal statues: see Cross *Statutory Interpretation* (3rd edn, 1995)

pp 172–175. In any event, it is a well settled principle "that a domestic statute designed to give effect to an international convention should, in general, be given a broad and liberal construction": *Samick Lines Co Ltd v Antonis P Lemos (Owners)* [1985] 1 All ER 695 at 703 ([1985] AC 711 at 731).'

[43] The minority opinion of Lord Hoffmann and Lord Rodger of Earlsferry in *Cartwright*'s case is also important, in my view, as a general guide to statutory construction:

'[42] We repeat that in our opinion the requesting state made out a strong case for extradition and it is therefore with genuine regret that we find ourselves unable to agree with the majority in thinking that the judge's error can be corrected. The "war on drugs" is important, although not everyone would agree with the means employed towards it or even with the military metaphor. But equally, if not more important, is the rule of law. People facing extradition, however unmeritorious they may be, are entitled to the law. If Parliament has made no provision for appeal against an erroneous order for their release, they are entitled to the benefit of that order. It is not the function of judges to become legislators and remedy what they perceive as a defect in the law by giving a far-fetched construction to what we are bound to say are the extremely plain and simple words of s 17(3) [of the Bahamas Court of Appeal Act, as amended].'

[44] Mr Pearse Wheatley seeks to uphold the approach, already cited, of the learned district judge to the expression 'deliberately absented himself from his trial' in s 85(3). In order to have absented himself deliberately from his trial, he must have been informed of the essential facts of the legal proceedings. He must know that a trial is going to take place. He must be told, it is submitted, what he is accused of, that he is to be tried, when and where he is to be tried and also that he had the right to attend and be represented. While different jurisdictions will have different means by which a defendant is made aware of the essential facts of criminal procedure, some form of official notification is required, it is submitted.

[45] The right to a fair and public hearing, provided by art 6, is fundamental, it is submitted. In relation to a criminal offence, it includes the right to be informed promptly, in a language which the defendant understands and in detail, of the nature and cause of the accusation against him (art 6(3)(a)). The wording of art 6 and the nature of the right protected throws light on the construction to be given to s 85(3). Mr Pearse Wheatley refers to para 51 of the judgment of the European Court of Human Rights in *Pelissier and Sassi v France* [1999] ECHR 25444/94:

'The court observes that the provision of para 3(a) of art 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him (see *Kamasinski v Austria* judgment of 19 December 1989, Series A no 168, pp 36–37, 79).'

[46] Counsel draws attention to the differences between the facts in all the cases cited and those in the present case. I have summarised the facts in *R v Hayward* and *Spinnato*'s case. Lord Bingham summarised the facts in *R v Jones* ([2002] 2 All ER 113 at [5], [2003] 1 AC 1 at [5]) in this way:

> 'The certified question raises a question of principle, but it falls to be answered in the factual context of this case. It is particularly important to note that the appellant was arraigned and pleaded not guilty in January 1998, but that his trial did not then commence (see *R v Tonner* [1985] 1 All ER 807, [1985] 1 WLR 344). He was bailed to appear at his trial on 1 June 1998. He had the benefit of legal aid to instruct, and did instruct, solicitors and counsel to represent him at his trial. He knew the date of the trial and of his obligation to attend and deliberately decided to absent himself for reasons of his own. He had no reason to believe that the trial would not proceed in his absence or that his legal representative would be able to represent him if he did not appear.'

None of the cases cited from this jurisdiction have permitted a trial in the absence of the defendant in circumstances such as the present.

CONCLUSIONS ON s 85(5)

[47] The following propositions emerge from the authorities and the evidence: (a) None of the domestic cases cited have permitted a trial of a defendant in his absence in circumstances such as the present. They have all involved a deliberate absence much later in the legal process. (b) I accept that when construing words in a United Kingdom extradition statute, it may be necessary to look beyond technical English law concepts. Lord Steyn's strongly expressed opinions in *Re Ismail* [1998] 3 All ER 1007, [1999] 1 AC 320 and in *Cartwright v Superintendent of HM Prison* [2004] 3 LRC 151 [2004] 1 WLR 902 require a broader approach. That is reflected in the approach to the word 'accused' in *Re Ismail*. The approach should have regard to substance rather than form. (c) There is no evidence that the word 'trial' is given a broader meaning in other jurisdictions than it is in England and Wales. (d) While Albania is not a common law jurisdiction, there is no evidence to suggest that it should be classified, for any relevant purpose, as a civil jurisdiction. We have no evidence as to the origin or classification of the present Albanian legal system. It is not doubted that it seeks to achieve the rule of law. (e) However, I am prepared to assume, for the purpose of deciding the present issue, that the Albanian system has much in common with civil law jurisdictions. I also assume that some civil jurisdictions take a more relaxed view of trials in the absence of defendants, though there is no substantial evidence to that effect before the court. (f) In this jurisdiction, the appearance of a criminal defendant at his trial remains a matter of 'capital importance' as does the requirement that a defendant be notified of the proceedings against him (see *R v Jones* [2002] 2 All ER 113 at [8]). (g) Statutes must be construed in the context of the existence of art 6 rights, as stated in the European Court of Human Rights and domestic courts.

[48] I reach the following conclusions: (a) In s 85(3) Parliament has adopted the expression 'deliberately absented himself from his trial'. Consideration must be given to the concept of deliberate absence and to the concept of a trial.

The respondent has deliberately absented himself from Albania but there is no evidence that he knew of the existence of a trial or of any proceedings which might lead to a trial. (b) The word 'trial' was adopted by Parliament in the context of the presence of art 6 with its use of the word 'hearing' and its reference to a right to a hearing and a right to be informed of the nature and cause of the accusation. Article 6 confers the right to a fair trial and the word 'trial' would not have been used by Parliament in s 85(3) if a wider view of absence had been intended. (c) The subsection must be construed in a context in which capital importance is attached to the appearance of a defendant at his trial. The focus is on a specific event at which the respondent could expect to be present. Other factors, as well as the need to facilitate extradition, are at work. (d) Parliament could have used an expression such as 'deliberately absenting himself from legal process' which could, on appropriate findings of fact, include leaving a jurisdiction to avoid arrest but Parliament has not done so and the sub-section cannot be construed as if it had. The expression 'his trial' contemplates a specific event and not the entire legal process. (e) In the result, I am unable to construe the words of s 85(3) as covering the present circumstances. While the absence from the jurisdiction of Albania is established, it is not established that the respondent left that jurisdiction, or remained in the United Kingdom, with the intention expressed in the subsection.

[49] Had I reached a different conclusion on this issue, I would have remitted the case to the judge under s 106(6)(b) of the 2003 Act for further consideration of the events which followed 15 September 1998 and of the circumstances in which the respondent left Albania. The judge did not consider these matters in his judgment and it appears that detailed submissions on the facts were not addressed to him. There is no reference in his decision to the bundle of documents supplied with the letter dated 12 October 2004, which was the date of the hearing before the judge. The government relied, as they did in this court, on the general submissions summarised at [27] and [28], above. On the judge's view of s 85(3), further scrutiny of the facts was not required. If the government's view were to be correct there was insufficient factual inquiry before the judge.

[50] I would dismiss this appeal.

COX J.

[51] I agree.

Appeal dismissed.

Dilys Tausz Barrister

Attorney General for Jersey v Holley

[2005] UKPC 23

PRIVY COUNCIL

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND AND LORD CARSWELL

15, 16, 17 MARCH, 15 JUNE 2005

Criminal law – Murder – Provocation – Self control of reasonable man – Characteristics of accused – Accused suffering from chronic alcoholism – Whether accused's alcoholism eligible for consideration by jury in determining whether reasonable person having characteristics of accused would have lost control – Homicide Act 1957, s 3 – Homicide (Jersey) Law 1986, art 4.

The defendant, a chronic alcoholic, was charged with the murder of his long-standing girlfriend. He admitted killing her with an axe while under the influence of alcohol and the sole issue at his trial was provocation. He was convicted of murder. He appealed and the Court of Appeal of Jersey allowed his appeal on the ground of misdirection on the defence of provocation. A retrial was ordered, and the defendant was again convicted of murder. He appealed and the Court of Appeal again allowed the appeal on the ground of misdirection. It held that the Deputy Bailiff, when directing the jury on provocation, should have drawn a distinction between the defendant being drunk, which gave rise to no arguable ground of provocation, and his disease of alcoholism, which was a matter to be taken into account when deciding whether or not the defendant had been provoked. The Attorney General of Jersey appealed. The relevant Jersey law in the Homicide (Jersey) Law 1986 reproduced s 3[a] of the Homicide Act 1957, which provided that where on a charge of murder there was evidence on which the jury could find that the person charged was provoked to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he had done was to be left to be determined by the jury, and in determining that question the jury was to take into account everything both done and said according to the effect which, in their opinion, it would have had on a reasonable man.

Held – (Lord Bingham, Lord Hoffmann and Lord Carswell dissenting) For the purposes of the defence of provocation, a defendant was to be judged by the standard of a person having ordinary powers of control. The standard was a constant, objective standard in all cases. The jury had to assess the gravity of the provocation to the defendant and, in that respect, the jury had to take the defendant as they found him. But having assessed the gravity of the provocation to the defendant, the standard of self-control by which his conduct was to be evaluated for the purpose of the defence of provocation was the external standard of a person having and exercising ordinary powers of self-control. A more flexible standard, where the jury applied the standard of control to be expected of the particular defendant, departed from the law as declared in s 3 of the 1957 Act and involved a significant relaxation of the uniform, objective standard adopted by

a Section 3 is set out at [4], below

Parliament. The 1957 Act did not leave each jury free to set whatever standard they considered appropriate in the circumstances by which to judge whether a defendant's conduct was excusable. In the instant case, evidence that the defendant was suffering from chronic alcoholism had not been a matter to be taken into account by the jury when considering whether in their opinion, having regard to the actual provocation and their view of its gravity, a person having ordinary powers of self-control would have done what the defendant did. Accordingly, the appeal would be allowed (see [17], [18], [21]–[23], [37], [41], below).

Luc Thiet Thuan v R [1996] 2 All ER 1033 applied.

R v Smith (Morgan James) [2000] 4 All ER 289 not followed.

Notes

For provocation as defence to murder charge, and for the criterion of the reasonable man, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 438, 439.

For the Homicide Act 1957, s 3, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 270.

Cases referred to in judgment and opinions

Bedder v DPP [1954] 2 All ER 801, [1954] 1 WLR 1119, HL.
DPP v Camplin [1978] 2 All ER 168, [1978] AC 705, [1978] 2 WLR 679, HL.
Holmes v DPP [1946] 2 All ER 124, [1946] AC 588, HL.
Luc Thiet Thuan v R [1996] 2 All ER 1033, [1997] AC 131, [1996] 3 WLR 45, PC.
Mancini v DPP [1941] 3 All ER 272, [1942] AC 1, HL.
Phillips v R [1969] 2 AC 130, [1969] 2 WLR 581, PC.
R (on the application of Farnell) v Criminal Cases Review Commission [2003] EWHC 835 (Admin), [2003] All ER (D) 267 (Apr), (2003) Times, 2 June.
R v Ahluwalia [1992] 4 All ER 889, CA.
R v Alexander (1913) 9 Cr App R 139, CCA.
R v Baillie [1995] 2 Cr App R 31, CA.
R v Doughty (1986) 83 Cr App R 319, CA.
R v Dryden [1995] 4 All ER 987, CA.
R v Duffy [1949] 1 All ER 932, CCA.
R v Fenton (1975) 61 Cr App R 261, CA.
R v Hayward (1833) 6 C & P 157, 172 ER 1188.
R v Humphreys [1995] 4 All ER 1008, CA.
R v Kirkham (1837) 8 C & P 115, 173 ER 422.
R v Lesbini [1914] 3 KB 1116, CCA.
R v Mawgridge (1707) Kel 119, 84 ER 1107.
R v McCarthy [1954] 2 All ER 262, [1954] 2 QB 105, [1954] 2 WLR 1044, CCA.
R v McCarthy [1992] 2 NZLR 550, NZ CA.
R v McGregor [1962] NZLR 1069, NZ CA.
R v Morhall [1995] 3 All ER 659, [1996] AC 90, [1995] 3 WLR 330, HL; *rvsg* [1993] 4 All ER 888, CA.
R v Newell (1980) 71 Cr App R 331, CA.
R v Raven [1982] Crim LR 51, CCC.
R v Rongonui [2000] 2 NZLR 385, NZ CA.
R v Selten (1871) 11 Cox CC 674.
R v Smith (Morgan James) [2000] 4 All ER 289, [2001] 1 AC 146, [2000] 3 WLR 654, HL.
R v Tandy [1989] 1 All ER 267, [1989] 1 WLR 350, CA.
R v Thomas (1837) 7 C & P 817, 173 ER 356.
R v Thornton (No 2) [1996] 2 All ER 1023, [1996] 1 WLR 1174, CA.

R v Weller [2003] EWCA Crim 815, [2004] 1 Cr App R 1, CA.
R v Welsh (1869) 11 Cox CC 336, CCC.
Reyes v R [2002] UKPC 11, (2002) 12 BHRC 219, [2002] 2 AC 235, [2002] 2 WLR 1035.

Appeal

The Attorney General for Jersey appealed from the decision of the Court of Appeal of Jersey (Southwell JA, Carey (Bailiff of Guernsey) and Hodge JA) on 17 January 2003 ([2003] JLR 22) allowing the appeal of the defendant, Dennis Peter Holley, setting aside his conviction of murder following a retrial at the Royal Court on 12 July 2002 and substituting a conviction of manslaughter. The Attorney General's grounds of appeal included the submission that *R v Smith (Morgan James)* [2000] 4 All ER 289 was wrong and should not be followed in Jersey. In the defendant's trials and appeals the prosecution had agreed that *R v Smith* was the proper law for the case and the Attorney General therefore undertook not to seek to restore the defendant's conviction for murder. The facts are set out in the judgment of the Board.

William Bailhache QC A-G for Jersey and *David Perry* (instructed by *Baker & McKenzie*) for the Attorney General.

Peter Thornton QC and *Julian Gollop* (advocate of the Royal Court of Jersey) (instructed by *Simons Muirhead & Burton*) for the defendant.

The Board took time for consideration.

15 June 2005. The following judgment of the Board and opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] This appeal from the Court of Appeal of Jersey calls for examination of the law relating to provocation as a defence or, more precisely, as a partial defence to a charge of murder. Jersey law on this subject is the same as English law. In July 2000 the House of Lords considered the ingredients of this defence in *R v Smith (Morgan James)* [2000] 4 All ER 289, [2001] 1 AC 146. The decision of the House in that case is in direct conflict with the decision of their Lordships' Board in *Luc Thiet Thuan v R* [1996] 2 All ER 1033, [1997] AC 131. And the reasoning of the majority in *R v Smith* is not easy to reconcile with the reasoning of the House of Lords in *DPP v Camplin* [1978] 2 All ER 168, [1978] AC 705 or *R v Morhall* [1995] 3 All ER 659, [1996] AC 90. This appeal, being heard by an enlarged Board of nine members, is concerned to resolve this conflict and clarify definitively the present state of English law, and hence Jersey law, on this important subject.

[2] Following a retrial held at the Royal Court on 12 July 2002 Mr Dennis Peter Holley was convicted of murder. He was a chronic alcoholic. He admitted killing his long-standing girlfriend with an axe while under the influence of alcohol. The sole issue at the trial was provocation. On 17 January 2003 the Court of Appeal, comprising Southwell JA, Carey (Bailiff of Guernsey) and Hodge JA, allowed an appeal by Holley and set aside the conviction of murder, on the ground that the Deputy Bailiff had misdirected the jury on the issue of provocation: see [2003] JLR 22. The Court of Appeal later substituted a conviction of manslaughter. From that decision the Attorney General appealed to their Lordships' Board. It will be convenient to postpone elaboration of the facts of this case until the issue of legal principle has been discussed.

THE LEGAL ISSUE

[3] The legal issue is a little intricate, and an extended introduction is unavoidable. The starting point is to note that, like the law of murder, the partial defence of provocation is of common law origin. It has often been described as a concession to human frailty. For centuries a conviction for murder attracted a mandatory sentence of death. The common law fashioned the defence of provocation in the face of the rigidity of this sentence. The common law thereby recognised that sometimes the extenuating circumstances in which a person commits murder should reduce his conviction to the lesser (but still very serious) offence of manslaughter.

[4] By s 3 of the Homicide Act 1957 Parliament altered some aspects of this common law defence. Jersey law has a corresponding provision in art 4 of the Homicide (Jersey) Law 1986. Section 3 provides:

> 'Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which in their opinion, it would have on a reasonable man.'

[5] Thus, in line with the common law, s 3 envisages that the defence of provocation has two ingredients. The first ingredient, known as the subjective or factual ingredient, is that the defendant was provoked into losing his self-control. This concept is not without its own difficulties, but it is not necessary to pursue them on this occasion. Suffice to say, in deciding whether this ingredient exists in a particular case, all evidence which is probative is admissible. This includes evidence of any mental or other abnormality making it more or less likely that the defendant lost his self-control.

[6] The second ingredient, often called the objective or evaluative ingredient, raises, in the language of the statute, 'the question whether the provocation was enough to make a reasonable man do as he did ... [taking] into account everything both done and said according to the effect ... it would have on a reasonable man'. Broken down, this objective ingredient has two elements. The first element calls for an assessment of the gravity of the provocation. The second element calls for application of an external standard of self-control: 'whether the provocation was enough to make a reasonable man do as he did'.

[7] The statutory reference to a 'reasonable man' in this context is, by common accord, not the best choice of words. It is difficult to conceive of circumstances where it would be 'reasonable' for a person to respond to a taunt by killing his tormentor. Rather, the phrase is intended to refer to an ordinary person, that is, a person of ordinary self-control.

[8] This interpretation is now well-established. In the leading case of *DPP v Camplin* [1978] 2 All ER 168 at 173–174, [1978] AC 705 at 717, Lord Diplock gave a much quoted explanation of the meaning of the phrase 'reasonable man' for the purposes of the law of provocation:

> 'It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.'

Lord Simon of Glaisdale said the same ([1978] 2 All ER 168 at 182, [1978] AC 705 at 726). The reference to 'a reasonable man' at the end of s 3, he said, means 'a man of ordinary self-control'. Similarly in *R v Morhall* [1995] 3 All ER 659 at 665, [1996] AC 90 at 98, Lord Goff of Chieveley commented that, despite the express words of the statute, to speak of the degree of self-control attributable to the ordinary person is 'certainly less likely to mislead' than to do so with reference to the reasonable person.

[9] An external standard of this character, whether expressed in terms of reasonableness or a reasonable man or an ordinary person, has long been an essential element of the defence. In 1837 in *R v Kirkham* (1837) 8 C & P 115 at 119, 173 ER 422 at 424, Coleridge J observed that 'though the law condescends to human frailty' it 'considers man to be a rational being, and requires that he should exercise a reasonable control over his passions'. In 1869 in *R v Welsh* 11 Cox CC 336 at 339, Keating J directed the jury that, in order to reduce the crime to manslaughter, there should have been serious provocation, 'something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act'. In *Mancini v DPP* [1941] 3 All ER 272 at 277, [1942] AC 1 at 9, Viscount Simon LC said:

> 'The test to be applied is that of the effect of the provocation upon a reasonable man ... so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did.'

In *R v Duffy* [1949] 1 All ER 932 the Court of Criminal Appeal approved as 'impeccable' a summing up by Devlin J which described provocation as some act or series of acts done by the deceased to the accused '"which would cause in any reasonable person, and actually caused in the accused"', a sudden and temporary loss of self-control.

[10] Before 1957 loss of self-control had to be brought about by things done. Words would not suffice to constitute provocation. Section 3 extended the scope of the defence by providing that in future loss of self-control could be provoked either by things done or by things said or by both together. This extension had an effect on what evidence was relevant, and therefore admissible, on the issue of the gravity of the provocation, that is, the first element in the objective ingredient. As explained by Lord Diplock in *DPP v Camplin* ([1978] 2 All ER 168 at 174, [1978] AC 705 at 717), when words alone could not amount to provocation the gravity of provocation depended primarily on degrees of violence. Once words could amount to provocation, the gravity of provocation could depend upon 'the particular characteristics or circumstances of the person to whom a taunt or insult is addressed'. Lord Diplock expressed his view on what would be a proper direction to a jury on the question left to their determination by s 3 ([1978] 2 All ER 168 at 175, [1978] AC 705 at 718):

> 'He should ... explain to them that the reasonable man referred to in the question is a person having *the power of self-control to be expected of an ordinary person* of the sex and age of the accused, but *in other respects* sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but would also react to the provocation as the accused did.' (Our emphases.)

[11] Hence if a homosexual man is taunted for his homosexuality it is for the jury to consider whether a homosexual man having ordinary powers of self-control

might, in comparable circumstances, be provoked to lose his self-control and react to the provocation as the defendant did. Authority for this proposition, if needed, is the 'glue-sniffer' case of *R v Morhall* [1995] 3 All ER 659, [1996] AC 90. There the deceased nagged the defendant about his addiction to glue-sniffing. The problem before the House of Lords was whether this addiction should have been taken into account at the defendant's trial as affecting the gravity of the provocation: see [1995] 3 All ER 659 at 665, [1996] AC 90 at 97. Lord Goff of Chieveley, with whose speech all members of the House agreed, said it should. The thrust of his reasoning was that, for this purpose, 'the entire factual situation' was to be taken into account. This includes matters not falling strictly within the description 'characteristics'. It also includes matters which are discreditable to the defendant. Lord Goff said ([1995] 3 All ER 659 at 666, [1996] AC 90 at 99):

> 'suppose that a man who has been in prison for a sexual offence, for example rape, has after his release been taunted by another man with reference to that offence. It is difficult to see why, on ordinary principles, his characteristic or history as an offender of that kind should not be taken into account as going to the gravity of the provocation.'

[12] Of course, assessing the conduct of a glue-sniffing defendant against the standard of a glue-sniffing man having ordinary powers of self-control may mean the defendant is assessed against a standard of self-control he cannot attain. He may be exceptionally excitable or pugnacious. But this is so with every defendant who seeks to rely upon provocation as a defence. The objective standard of self-control is the standard set by the common law and, since 1957, by the statutory reference to a 'reasonable man'. It is of general application. Inherent in the use of this prescribed standard as a uniform standard applicable to all defendants is the possibility that an individual defendant may be temperamentally unable to achieve this standard.

[13] Taking into account the age and sex of a defendant, as mentioned in *DPP v Camplin*, is not an exception to this uniform approach. The powers of self-control possessed by *ordinary* people vary according to their age and, more doubtfully, their sex. These features are to be contrasted with abnormalities, that is, features not found in a person having ordinary powers of self-control. The former are relevant when identifying and applying the objective standard of self-control, the latter are not.

[14] That Lord Diplock intended to draw this distinction in *DPP v Camplin* is plain from the terms of his suggested direction to a jury, quoted above. The statutory reasonable man has the power of self-control to be expected of an ordinary person of like sex and age. In other respects, that is, in respects other than power of self-control, the reasonable man shares such of the defendant's characteristics as the jury think would affect the gravity of the provocation to the defendant. This direction, approved by the other members of the House, was clearly intended to be a model direction, of general application in cases of provocation.

PERSONS OF DIMINISHED RESPONSIBILITY

[15] Before proceeding further it is important to pause and note that when adopting the 'reasonable man' standard in s 3 of the 1957 Act Parliament recognised that, standing alone, this provision might work harshly on defendants suffering from mental abnormality. Accordingly, cheek by jowl with s 3 Parliament introduced into English law the partial defence of diminished responsibility. In short, under s 2 a person is not to be convicted of murder if he shows he was

suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury, as 'substantially impaired' his mental responsibility for his acts and omissions in killing or being a party to the killing. In such a case the defendant is liable to be convicted of manslaughter. The burden of proof rests on the defendant who seeks to rely on this defence.

[16] This provision, which is reproduced in art 3 of the Jersey law, is apt to embrace some cases where it is inappropriate to apply to the defendant the standard of self-control of an ordinary person. Section 3, with its objective standard, is to be read with this in mind. The statutory provision regarding diminished responsibility in s 2 represents the legislature's view on how cases of mental abnormality are to be accommodated in the law of homicide. *R v Raven* [1982] Crim LR 51 appears to be an instance of a case where this defence would have been relevant. There a 22-year old defendant had a mental age of nine years. Similarly in *R v Ahluwalia* [1992] 4 All ER 889, where a defence of provocation failed, the Court of Appeal ordered a retrial on the issue of diminished responsibility. Section 3 should not be distorted to accommodate the types of case for which s 2 was specifically enacted.

THE TWO VIEWS

[17] Against this background their Lordships turn to consider the point where the substantial difference in judicial views has emerged. Exceptional excitability or pugnacity is one thing. But what if the defendant is suffering from serious mental abnormality, as in *R v Smith* where the defendant suffered from severe clinical depression? Is he, for the purposes of the defence of provocation, to be judged by the standard of a person having ordinary powers of self-control?

[18] The view of the minority in *R v Smith* is that he is. The standard is a constant, objective standard in all cases. The jury should assess the gravity of the provocation to the defendant. In that respect, as when considering the subjective ingredient of provocation (did the defendant lose his self-control?), the jury must take the defendant as they find him, 'warts and all', as Lord Millett observed. But having assessed the gravity of the provocation to the defendant, the standard of self-control by which his conduct is to be evaluated for the purpose of the defence of provocation is the external standard of a person having and exercising ordinary powers of self-control. That is the standard the jury should apply when considering whether or not the provocation should be regarded as sufficient to bring about the defendant's response to it: see Lord Millett ([2000] 4 All ER 289 at 348, [2001] 1 AC 146 at 211).

[19] This view accords with the approach applied by their Lordships' Board in *Luc Thiet Thuan v R* [1996] 2 All ER 1033, [1997] AC 131, an appeal from Hong Kong. On a trial for murder the defendant relied on the defences of diminished responsibility and provocation. Medical evidence showed the defendant suffered from brain damage and was prone to respond to minor provocation by losing his self-control and acting explosively. The trial judge directed the jury that this medical evidence was not relevant on the defence of provocation. The jury rejected both defences. The correctness of the judge's direction on provocation was the issue on the appeal. The Board, Lord Steyn dissenting, upheld the judge's direction. Lord Goff of Chieveley noted that mental infirmity of the defendant, if itself the subject of taunts by the deceased, may be taken into account as going to the gravity of the provocation. He continued ([1996] 2 All ER 1033 at 1046, [1997] AC 131 at 146):

'But this is a far cry from the appellant's submission that the mental infirmity of the defendant, impairing his power of self-control, should as such be attributed to the reasonable man for the purposes of the objective test.' a

[20] The majority view expressed in *R v Smith* rejects this approach. According to this view, the standard of self-control required by the common law and by the statute is not the constant standard of a person having and exercising ordinary self-control. The required standard is more flexible. The jury should apply the standard of control to be expected of the particular individual. The jury must ask themselves whether the defendant 'exercised the degree of self-control *to be expected of someone in his situation*' (our emphasis): see Lord Slynn of Hadley ([2000] 4 All ER 289 at 296, [2001] 1 AC 146 at 155). Lord Hoffmann expressed the view ([2000] 4 All ER 289 at 302–303, [2001] 1 AC 146 at 163), that the effect of the change in the law made by s 3 of the 1957 Act was that in future the jury 'were to determine not merely whether the behaviour of the accused complied with some legal standard but could determine for themselves what the standard in the particular case should be'. Lord Hoffmann continued ([2000] 4 All ER 289 at 312, [2001] 1 AC 146 at 173): b c

'The law expects people to exercise control over their emotions. A tendency to violent rages or childish tantrums is a defect in character rather than an excuse. The jury must think that the circumstances were such as to make the loss of self-control sufficiently *excusable* to reduce the gravity of the offence from murder to manslaughter. This is entirely a question for the jury. In deciding what should count as a sufficient excuse, they have to apply what they consider to be appropriate standards of behaviour; on the one hand making allowance for human nature and the power of the emotions but, on the other hand, not allowing someone to rely upon his own violent disposition.' d e

[21] Lord Clyde, expressed the expected standard of self-control in these terms ([2000] 4 All ER 289 at 318, [2001] 1 AC 146 at 179): f

'the standard of reasonableness in this context should refer to a person exercising the ordinary power of self-control over his passions *which someone in his position is able to exercise* and is expected by society to exercise. By position I mean to include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those influences which have been self-induced.' (Our emphasis.) g

[22] This majority view, if their Lordships may respectfully say so, is one model which could be adopted in framing a law relating to provocation. But their Lordships consider there is one compelling, overriding reason why this view cannot be regarded as an accurate statement of English law. It is this. The law of homicide is a highly sensitive and highly controversial area of the criminal law. In 1957 Parliament altered the common law relating to provocation and declared what the law on this subject should thenceforth be. In these circumstances it is not open to judges now to change ('develop') the common law and thereby depart from the law as declared by Parliament. However much the contrary is asserted, the majority view does represent a departure from the law as declared in s 3 of the 1957 Act. It involves a significant relaxation of the uniform, objective standard adopted by Parliament. Under the statute the sufficiency of the provocation ('whether the provocation was enough to make a reasonable man do as [the defendant] did') is to be judged by one standard, not a standard which varies from defendant to defendant. Whether the provocative act or words and the defendant's h j

response met the 'ordinary person' standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable. The statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant's conduct is 'excusable'.

[23] On this short ground their Lordships, respectfully but firmly, consider the majority view expressed in *R v Smith* is erroneous.

POINTS ARISING

[24] Their Lordships mention some ancillary points. The first is relevant to the facts in the present case. It concerns application of the principles discussed above in circumstances where the defendant acted under the influence of alcohol or drugs and, therefore, at a time when his level of self-control may have been reduced. If the defendant was taunted on account of his intoxication, that may be a relevant matter for the jury to take into account when assessing the gravity of the taunt to the defendant. But the defendant's intoxicated state is not a matter to be taken into account by the jury when considering whether the defendant exercised ordinary self-control. The position is the same, so far as provocation is concerned, if the defendant's addiction to alcohol has reached the stage that he is suffering from the disease of alcoholism.

[25] The second point their Lordships wish to mention concerns the three examples given by Lord Steyn in his dissenting opinion in *Luc Thiet Thuan v R* [1996] 2 All ER 1033 at 1048–1049, [1997] AC 131 at 149. Lord Steyn instanced cases of women who are more prone to lose their self-control because they are suffering from postnatal depression, or 'battered woman syndrome', or a personality disorder. Lord Steyn suggested that, on the majority view of the law expressed in that case, in those three instances the judge would have to direct the jury that on the defence of provocation the evidence of the woman's condition was admissible on the 'first and subjective inquiry' but not on the 'second and objective inquiry'. Their Lordships respectfully differ. This is not wholly correct. As explained above, the evidence of the woman's condition may be relevant on two issues: whether she lost her self-control, and the gravity of the provocation for her. The jury will then decide whether in their opinion, having regard to the actual provocation and their view of its gravity for the defendant, a woman of her age having ordinary power of self-control might have done what the defendant did. More importantly, in each of these three cases the defendant will in principle have available to her the defence of diminished responsibility. The potential availability of this defence in these cases underlines the importance of not viewing the defence of provocation in isolation from the defence of diminished responsibility. These two defences must be read together to obtain an overall, balanced view of the law in this field.

[26] Next, in recent years much play has been made of the 'mental gymnastics' required of jurors in having regard to a defendant's 'characteristics' for one purpose of the law of provocation but not another. Their Lordships consider that any difficulties in this regard have been exaggerated. The question is largely one of presentation. It will be noted that their Lordships have eschewed use of the expression 'characteristics', accompanied as that expression now is with much confusing baggage. The better approach is summarised by Lord Hobhouse of Woodborough in *R v Smith* [2000] 4 All ER 289 at 342–343, [2001] 1 AC 146 at 205.

[27] The final point is this. In expressing their conclusion above their Lordships are not to be taken as accepting that the present state of the law is satisfactory. It is

not. The widely held view is that the law relating to provocation is flawed to an extent beyond reform by the courts: see the Law Commission report *Partial Defences to Murder* (2004) (Law Com no 290) (Cm 6301), p 11 (para 2.10). Their Lordships share this view. But the law on provocation cannot be reformulated in isolation from a review of the law of homicide as a whole. In October 2004 the Home Secretary announced the government's intention to review the law of murder. Given the importance of this area of the criminal law it is imperative that a review, of all aspects of the law of murder, should be undertaken as soon as possible.

THE PRESENT CASE

[28] Their Lordships now return to the facts of the present case. The defendant and the deceased, Cherylinn Mullane, were both alcoholics. They lived together for a number of years in a flat on the Elysée estate in St Helier. Their relationship was stormy. They regularly drank to excess. When drunk they had rows and were violent. In the course of their rows the deceased was given to making derogatory comments affecting the defendant's self-esteem.

[29] In the four years before the deceased's death in April 2000 there were many incidents of violence. On several occasions the defendant served sentences of imprisonment in respect of assaults on the deceased. On his release from prison in December 1999 he returned to the flat on the Elysée estate but the deceased did not want him to continue to live there. He became withdrawn and depressed. There were further episodes of mutual violence and rows.

[30] The killing took place on 13 April 2000. In the morning the defendant and the deceased met in St Helier and visited a local public house. They spent an hour drinking heavily and arguing. He returned to the flat mid-afternoon, and spent the remainder of the afternoon chopping wood with an axe and drinking lager. The deceased spent the afternoon in a public house drinking. She returned to the flat at about 5.15 pm. By then the defendant had drunk about eleven cans and three pints of beer or lager. According to the defendant, the deceased was drunk. She entered the flat and told him she had just had sex with another man. He picked up the axe, intending to leave the flat and chop some more wood, when the deceased said 'You haven't got the guts'. Whereupon he lifted the axe and struck the deceased seven or eight times.

[31] The defendant was arrested the following day. His blood then contained 421 mg of alcohol per 100 ml of blood, which is more than five times the permitted level for the purposes of the road traffic legislation.

[32] The defendant's first trial took place before the Royal Court in June 2001. He pleaded not guilty to the charge of murder. He admitted killing the deceased, and the only issue was provocation. He was convicted of murder. He appealed, and the Court of Appeal allowed his appeal on the ground of misdirection on the defence of provocation. The court set aside the defendant's conviction and ordered a retrial.

[33] The retrial took place in July 2002. Again, the only issue was provocation. Dr Wilkins, a consultant psychiatrist, called by the prosecution was of the opinion that the killing was the result solely of the defendant's consumption of alcohol. Professor Eastman, a consultant forensic psychiatrist, considered that the defendant's serious chronic alcoholism was a disease and that his intake of alcohol was involuntary. Both he and Dr Beck, a chartered clinical psychologist also called by the defendant, were of the view that in the absence of alcohol the killing could have occurred as a result of the defendant's other personality traits. These were that he had an avoidant personality, a depressive personality, an anxious personality,

and a dependency on alcohol and women partners. On 12 July the jury returned a unanimous verdict of guilty of murder. He was sentenced to life imprisonment.

[34] The defendant again appealed and, once again, the Court of Appeal allowed the appeal on the ground of misdirection, and set aside the conviction of murder. Given the history of two full trials, one aborted trial and two appeals, the court declined to order a new trial. It was doubtful whether a third trial would be fair. A verdict of manslaughter was entered, and the defendant was sentenced to eight years imprisonment.

[35] The ground of misdirection perceived by the Court of Appeal can be stated shortly. The Deputy Bailiff sought to direct the jury on the legal ingredients of provocation in accordance with the law as expounded by Lord Hoffmann in *R v Smith*. His language closely followed that of Lord Hoffmann. The Deputy Bailiff prefaced his direction on the objective ingredient by pointing out that the defence case was that the defendant was a depressive, that he had strong feelings of worthlessness, that he avoided problems, that he suffered from anxiety, and that he was an alcoholic. The Deputy Bailiff continued by noting that the fact that a person is drunk or under the influence of alcohol at the time of the killing, and as a result he is provoked more easily than if he were sober, is not something to be taken into account in his favour.

[36] The Court of Appeal held that at this point the Deputy Bailiff fell into error. What he said was correct. But he should have drawn a distinction between being drunk, which gives rise to no arguable ground of provocation, and suffering from the disease of alcoholism, which was a matter to be taken into account when deciding whether or not the defendant was provoked so as to satisfy art 4 of the 1986 Law. The Court of Appeal noted that in *R v Smith* the House of Lords by a majority 'went further than before' in holding that a characteristic of the defendant, such as the mental condition consisting of severe clinical depression from which Morgan Smith suffered, was the type of characteristic the jury could take into account. The Deputy Bailiff's summing up amounted to a direction to leave entirely out of account the principal characteristic on which the defendant relied as a sufficient excuse to reduce his offence from murder to manslaughter.

[37] Their Lordships consider that, as an application of the approach approved by the House of Lords in *R v Smith*, the judgment of the Court of Appeal cannot be faulted. Nor can the Court of Appeal be criticised for having adopted this approach. This approach was, after all, in accordance with the majority view of the House of Lords expressed in the most recent decision on this subject. But, for the reasons given above, their Lordships consider the Court of Appeal's approach was wrong. Contrary to the Court of Appeal's view, evidence that the defendant was suffering from chronic alcoholism was not a matter to be taken into account by the jury when considering whether in their opinion, having regard to the actual provocation and their view of its gravity, a person having ordinary powers of self-control would have done what the defendant did.

[38] Indeed, their Lordships consider the Deputy Bailiff's direction to the jury, far from being prejudicial to the defendant, was if anything unduly favourable to him, adopting as it did Lord Hoffmann's looser formulation. The Deputy Bailiff, for example, directed the jury they should consider 'whether there was *anything* about the defendant's own particular characteristics which reduced his power of self-control and, if there was, whether it provides a sufficient excuse for what he did' (our emphasis).

THE OUTCOME

[39] In the ordinary course this conclusion would mean that the order of the Court of Appeal should be set aside and the defendant's conviction for murder reinstated. But there is a complication. When seeking special leave to appeal the Attorney General did not seek to say that the majority view expressed in *R v Smith* was wrong. With some encouragement from the Board when granting special leave, the Attorney General widened his grounds of appeal. In his written case lodged in support of his appeal he submitted that *R v Smith* was wrong and should not be followed in Jersey. The defendant took objection to this course because in both of the defendant's trials and in both of his appeals the prosecution agreed that *R v Smith* was the proper law for this case. It would be unfair, the defendant submitted, to permit the Attorney General to resile from the agreed basis on which the trials and the appeals were conducted. In response the Attorney General undertook not to seek to restore the defendant's conviction for murder. On this basis the appeal was adjourned to be heard by an enlarged Board.

[40] The final twist in this history was that, the Attorney General having given this undertaking, the points of law in issue on the appeal became wholly academic in the sense that, whether the appeal succeeded or failed, the outcome for the defendant would be the same. The order of the Court of Appeal would not be disturbed in either event. This led the defendant to submit that their Lordships' Board should not permit the appeal to continue. Their Lordships rejected this submission. The Attorney General gave his undertaking as a means whereby his appeal could proceed without unfairness to the defendant. It would be strange if an undertaking, given for this purpose, were to have the self-defeating effect for which the defendant contended in the circumstances of this case.

[41] For the reasons given above their Lordships will humbly advise Her Majesty that this appeal should be allowed, but that the order made by the Court of Appeal should stand.

The following dissenting opinions were delivered.

LORD BINGHAM OF CORNHILL AND LORD HOFFMANN.

[42] We regret that we cannot concur in the opinion of the majority of the Board.

[43] The common law of England has for some centuries recognised that there may be circumstances in which a defendant is not justified in killing another but in which the culpability of the defendant is to some extent mitigated because he was provoked to kill that other and would not otherwise have done so. The unjustifiability of such a killing has been reflected in condemning and punishing the defendant for the very serious crime of manslaughter. The element of mitigation is reflected in the reduction of the crime committed from murder to that lesser crime, even where the mental elements necessary for proof of murder have been established.

[44] The reason why provocation was accepted by the judges as a partial defence to a charge of murder has been stated on many occasions over many years. It was a humane concession to human infirmity and imperfection, acknowledgement 'that by reason of the frailty of our nature we cannot always stand upright': see, for example, *R v Hayward* (1833) 6 C & P 157 at 159, 172 ER 1188 at 1189, per Tindal CJ; *R v Thomas* (1837) 7 C & P 817 at 819, 173 ER 356 at 357, per Parke B; *R v Kirkham* (1837) 8 C & P 115 at 117, 119, 173 ER 422 at 423–424, per Coleridge J; *Holmes v DPP* [1946] 2 All ER 124 at 128, [1946] AC 588 at 601, per Viscount Simon; *DPP v Camplin* [1978] 2 All ER 168 at 170, 174, [1978] AC 705 at 713,

717, per Lord Diplock, [1978] 2 All ER 168 at 175, 178, [1978] AC 705 at 719, 722, per Lord Morris of Borth-y-Gest, [1978] 2 All ER 168 at 180, [1978] AC 705 at 725, per Lord Simon of Glaisdale; *R v Baillie* [1995] 2 Cr App R 31 at 37, per Henry LJ. As was said by Coleridge J in *R v Kirkham* (1837) 8 C & P 115 at 117, 173 ER 422 at 423:

> 'The law requires from him [the defendant] and will allow him to show that there were some mitigating circumstances, which alter the presumed character of the act, because it has at once a sacred regard for human life and also a respect for man's failings, and will not require more from an imperfect creature than he can perform.'

We share the opinion, widely expressed, that the law of homicide stands in urgent need of comprehensive and radical reform. But so long as provocation continues to be recognised as a partial defence to a charge of murder it should be applied consistently with its underlying rationale.

[45] The partial defence of provocation has always, as Lord Diplock pointed out in *DPP v Camplin* ([1978] 2 All ER 168 at 170, [1978] AC 705 at 713), represented an anomaly in English law, for the reason which he gave, that if it expressed a general principle of criminal law it could not logically be recognised (as it is) as a defence only to a charge of murder (although it is, in that respect, no more anomalous than the statutory defence of diminished responsibility, to which the same restriction applies). It seems clear that the provocation defence was developed by the judges to mitigate the harshness of the ancient law requiring sentence of death to be passed on every defendant convicted of murder. But for the undiscriminating inflexibility of that rule, it may well be that a provocation defence would not have been recognised. But the abolition of capital punishment in Jersey, as in the United Kingdom, does not mean that the true scope of the provocation defence has become a matter of academic interest and no practical importance. In those jurisdictions which continue to follow English authority and which retain the death penalty, the distinction between conviction of murder and conviction of manslaughter on grounds of provocation may continue to make the difference between life and death. In other jurisdictions, such as Jersey and England and Wales, the penal consequences of conviction of the one crime rather than the other are different, and may be very different. And the rationale of the provocation defence is still the consideration of justice which gave rise to it, that the law should 'not require more from an imperfect creature than he can perform'.

[46] In a number of reported cases it was stipulated that an act, to be recognised in law as provocative and so potentially giving rise to the defence of provocation, must attain a certain degree or level of seriousness and gravity: see, for example, *R v Mawgridge* (1707) Kel 119 at 132, 84 ER 1107 at 1113, per Holt CJ; *R v Welsh* (1869) 11 Cox CC 336 at 338–339, per Keating J; *R v Selten* (1871) 11 Cox CC 674 at 675; *R v Alexander* (1913) 9 Cr App R 139 at 141. This requirement, applied at a time when words and gestures alone could not be recognised in law as provocative (*R v Mawgridge* (1707) Kel 119 at 130–131, 84 ER 1107 at 1112), no doubt provided a salutary safeguard against partial exoneration of the short-tempered and the over-sensitive, those whom Viscount Simon LC was later to describe in *Mancini v DPP* [1941] 3 All ER 272 at 277, [1942] AC 1 at 9, as 'unusually excitable or pugnacious'. The reasonable man was, as Lord Diplock observed in *DPP v Camplin* [1978] 2 All ER 168 at 171, [1978] AC 705 at 714, 'a comparatively late arrival in the law of provocation'. The objective comparison between the defendant and the reasonable man appears to have been first articulated by Keating J, summing up to the jury in *R v Welsh* (1869) 11 Cox CC 336 at 338–339, a case in which, if there was

any provocative conduct at all by the deceased, it was of the slightest, and the emphasis of the judge's direction, understandably enough, was on the need for the provocation to be 'serious'. a

[47] The concept of the reasonable man in this context has been recognised as 'inapt' by Lord Diplock in *DPP v Camplin* [1978] 2 All ER 168 at 173, [1978] AC 705 at 716 and by Lord Goff of Chieveley, for the House of Lords, in *R v Morhall* [1995] 3 All ER 659 at 665, [1996] AC 90 at 97–98, for the reason which they gave, that b powers of ratiocination bear no obvious relationship to powers of self-control. It may no doubt have been recognition of this inaptness which led Viscount Simon LC to refer in *Mancini v DPP* [1941] 3 All ER 272 at 277, [1942] AC 1 at 9, to 'an ordinary person' and Lord Goddard CJ in *R v McCarthy* [1954] 2 All ER 262 at 265, [1954] 2 QB 105 at 112, to 'an average person'. The public policy underlying adoption of the reasonable man test in the common law doctrine of provocation c was to reduce the incidence of fatal violence by preventing a person relying on his own exceptional pugnacity or excitability as an excuse for loss of self-control: see *DPP v Camplin* [1978] 2 All ER 168 at 173, [1978] AC 705 at 716, per Lord Diplock, [1978] 2 All ER 168 at 181–182, [1978] AC 705 at 726, per Lord Simon; *R v Morhall* [1995] 3 All ER 659 at 665, [1996] AC 90 at 98, per Lord Goff. But the reasonable d man test, literally applied, is in our opinion subject to an even more fundamental objection. Whatever the position in earlier days, when hot blood and a violent response to perceived injury could be more readily excused, few judges or jurors could now conceive of any circumstances in which a reasonable or ordinary or average person would be provoked to take the life of another with the intent necessary for murder. e

[48] The rule thus enunciated was literally applied. Thus the Court of Criminal Appeal held in *R v Alexander*, above, that when making the objective comparison with a reasonable man no allowance could be made for a defendant said to be mentally deficient, and in *R v Lesbini* [1914] 3 KB 1116 that no account should be taken of an anti-semitic slur which, it seems, had provoked the defendant but would f not have provoked a reasonable person who was not Jewish. *R v Lesbini* was approved by the House in *Mancin v DPP*, above, a case in which the defendant relied on self-defence and the evidence of provocation appears to have been minimal, if it existed at all. Such was not the case in *Bedder v DPP* [1954] 2 All ER 801, [1954] 1 WLR 1119. In that case the 18-year old defendant was sexually impotent and g stabbed a prostitute who humiliated him both verbally and physically after he had tried, unsuccessfully, to have intercourse with her. It appears to have been accepted that the defendant had in fact been provoked to act as he had, but the trial judge (Sellers J) directed the jury that 'a man who is sexually impotent is not entitled to rely on provocation which would not have led an ordinary person to have acted in the way which was in fact carried out'. This direction was held by the House to be h impeccable ([1954] 2 All ER 801 at 802, [1954] 1 WLR 1119 at 1120), and the submission that 'the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused' was rejected as making nonsense of the test ([1954] 2 All ER 801 at 804, [1954] 1 WLR 1119 at 1123). j So the defendant's conviction of murder and the sentence of death passed upon him were upheld. It cannot be doubted that the decision of the House in *Bedder v DPP* was an orthodox, if uncritical, statement of the law as then understood, and it does not appear to have provoked more than muted academic criticism at the time (but see (1954) 70 LQR 442–445; *Russell on Crime*, (11th edn, 1958), ed JWC Turner, vol 1, pp 605–609). But it would seem plain that a reasonable (or ordinary or

average) person who was not impotent would not have been as deeply wounded and thus provoked as the defendant had (or may have) been. Thus the objective test so interpreted and applied did not involve a comparison of like with like and did not in any way reflect the merciful considerations which had given rise to the rule.

[49] The Royal Commission on Capital Punishment 1949–1953 (Cmnd 8932) reported before the House gave judgment in *Bedder v DPP*. But reliance is placed by the Attorney General in the present appeal on the conclusion of the Royal Commission (in para 145 of the report) that it did not feel justified in recommending any change in the existing law to the test of the reasonable man. The Royal Commission had, however, acknowledged (in para 134) that the 'increasingly strict and narrow tests' laid down by the authorities had in practice been tempered, first, by judges instructing juries in terms more favourable than the letter of the law would allow; secondly, by juries, sometimes with the encouragement of the judge and sometimes in the face of his direction, returning verdicts of manslaughter where, as a matter of law, the most favourable interpretation of the evidence could scarcely justify them in doing so; and thirdly, by the readiness of successive Home Secretaries to recommend the exercise of the prerogative of mercy where the defendant had been convicted of murder but had acted under substantial provocation of a kind or degree insufficient in law to reduce the crime to manslaughter. With genuine respect to that very distinguished Royal Commission, we cannot accept this reasoning. A legal rule cannot be supported by relying on judges and juries to evade it in breach of their clear legal duties. And few would now contend that the injustice of a substantive legal rule can be properly addressed through the exercise of executive clemency: see *Reyes v R* [2002] UKPC 11 at [44], (2002) 12 BHRC 219 at [44], [2002] 2 AC 235.

[50] Article 4 of the Homicide (Jersey) Law 1986 reproduces s 3 of the Homicide Act 1957. That section did not codify the law on the partial defence of provocation but did make two changes. The first was to the first, factual or subjective, limb of the defence: account could now be taken of any provocation, whether by things done or things said or both together. The second was to the second, objective or comparative, limb: the question whether the provocation was enough to make a reasonable man do as the defendant did was to be left to be determined by a jury, and in determining that question the jury were to take into account everything both done and said according to the effect which, in the jury's opinion, it would have on a reasonable man. These were both very significant changes. They had the effect, as Lord Diplock put it in *DPP v Camplin* [1978] 2 All ER 168 at 173, [1978] AC 705 at 716, that the reasonable man test 'falls to be applied now in the context of a law of provocation that is significantly different from what it was before the Act was passed'.

[51] The first of these changes accentuated the distinction between provocation and self-defence, with which in earlier times provocation had had an affinity: see, for example, *R v Mawgridge* (1707) Kel 119 at 135–137, 84 ER 1107 at 1114–1115, per Holt CJ. As Lord Diplock observed in *DPP v Camplin* [1978] 2 All ER 168 at 174, [1978] AC 705 at 717:

> 'A crucial factor in the defence of provocation from earliest times has been the relationship between the gravity of provocation and the way in which the accused retaliated, both being judged by the social standards of the day ... But so long as words unaccompanied by violence could not in common law amount to provocation the relevant proportionality between provocation and retaliation was primarily one of degrees of violence. Words spoken to the accused before

the violence started were not normally to be included in the proportion sum. But now that the law has been changed so as to permit of words being treated as provocation, even though unaccompanied by any other acts, the gravity of verbal provocation may well depend upon the particular characteristics or circumstances of the person to whom a taunt or insult is addressed.' a

[52] The second change is even more significant. Where there was evidence, b
fit for the jury's consideration, of provocative conduct actually leading to loss of self-control by the defendant at the time of the killing, application of the objective reasonable person comparison was now to be a question for the opinion of the jury. That is to put the matter positively, as s 3 of the 1957 Act and art 4 of the 1986 Law do. But the real significance of the change is in the negative impact of the provision. Implicit in the requirement that the matter is to be left to the jury for their opinion c
is a prohibition of judicial directions excluding from the jury's consideration features of the comparison which they consider pertinent. The judge can of course offer guidance, provided he makes clear that the decision is one for the jury and not for him, and as was said in the extreme case of *R v Doughty* (1986) 83 Cr App R 319 at 326, echoing para 151 of the Report of the Royal Commission on Capital d
Punishment, 'the common sense of juries can be relied upon not to bring in perverse verdicts where the facts do not justify the conclusion'. It is, however, clear in our opinion that a trial jury could no longer be directed that the reasonable (or ordinary or average) man should not be treated as a sexually impotent man, as Sellers J had done in *Bedder v DPP*. It is henceforward to be a matter for the jury.

[53] Reference was made in argument to *Phillips v R* [1969] 2 AC 130, [1969] 2 e
WLR 581, in which the Board considered a Jamaican enactment identical in its terms to s 3 of the 1957 Act and art 4 of the 1986 Law. But the defence at trial did not advance a defence based on provocation, and no reliance was placed on any attribute of the defendant rendering him more than ordinarily susceptible to provocation. In our opinion the case throws little if any light on the present f
problem and *Bedder v DPP*, above, was not cited.

[54] The leading case on the modern law of provocation is *DPP v Camplin* [1978] 2 All ER 168, [1978] AC 705. This decision has been the subject of much discussion and analysis, but there has to our knowledge been no judicial challenge to its authority for whatever it decided. The defendant, aged 15, was forcibly g
buggered by a middle-aged man who, after this sexual violation, laughed at him. The defendant claimed that he had been provoked by this conduct to lose his self-control and seize a chapati pan with which he struck and killed his assailant. There appears to have been little or no legal dispute about the first, factual or subjective, limb of the defence. But Boreham J, following *Bedder v DPP*, above, h
directed the jury to consider whether the provocation was enough to make a reasonable man, not a reasonable boy or lad, act as the defendant had done. The jury convicted the defendant of murder, and the Court of Appeal allowed his appeal on a somewhat contrived ground. On appeal to the House, the Crown relied strongly on *Bedder v DPP*, contending that the reasonable man should not be invested with any particular personal characteristics, and did not have any relevant j
age. The question certified by the Court of Appeal for the opinion of the House, quoted by Lord Diplock ([1978] 2 All ER 168 at 170, [1978] AC 705 at 713), was solely directed to the question of age, and it is unsurprising that Lord Diplock, Lord Morris and Lord Simon in their speeches, and Lord Diplock in his suggested jury direction ([1978] 2 All ER 168 at 175, [1978] AC 705 at 718), approved by all members of the Committee including Lord Fraser of Tullybelton and

Lord Scarman, paid particular attention to age, and also gender which is closely linked to age in adolescence. But if the House had intended merely to decide that age and gender could, and should where appropriate, be taken into account when applying the objective comparison, their Lordships' speeches could and in our view would have been shorter, simpler and to different effect. There are four points which are in our opinion of particular significance.

[55] First, their Lordships expressly reminded themselves of the rationale of the provocation defence as a concession to human infirmity and frailty: ([1978] 2 All ER 168 at 170, 174, [1978] AC 705 at 713, 717), per Lord Diplock; ([1978] 2 All ER 168 at 175, 178, [1978] AC 705 at 719, 722), per Lord Morris; ([1978] 2 All ER 168 at 180, [1978] AC 705 at 725), per Lord Simon.

[56] Secondly, their Lordships criticised the decision in *Bedder v DPP* case, above, as harsh and unjust, and held that it was no longer good law following enactment of s 3 of the 1957 Act. Lord Diplock said ([1978] 2 All ER 168 at 171, [1978] AC 705 at 713) that s 3 altered the law as it had been expounded in the cases, including three recent decisions of the House in *Mancini v DPP*, above, *Holmes v DPP*, above, and *Bedder v DPP*, above, and went on to say ([1978] 2 All ER 168 at 173, [1978] AC 705 at 716) that s 3 had been 'intended to mitigate in some degree the harshness of the common law' as developed in those decisions. He referred again ([1978] 2 All ER 168 at 174, [1978] AC 705 at 717) to 'the previous harshness' of the common law in ruling out verbal provocation and concluded ([1978] 2 All ER 168 at 175, [1978] AC 705 at 718) that *Mancini v DPP*, *Holmes v DPP* and *Bedder v DPP* should no longer be treated as authority on the law of provocation. Lord Morris observed ([1978] 2 All ER 168 at 177, [1978] AC 705 at 720–721) that, following enactment of s 3, a jury would not be told that an impotent man could not be a reasonable man. Lord Simon said ([1978] 2 All ER 168 at 179, [1978] AC 705 at 724) that some of the implications of *Bedder v DPP* constituted 'affronts to common sense and any sense of justice' and referred ([1978] 2 All ER 168 at 181, [1978] AC 705 at 725) to 'inconveniences, anomalies and injustices' implicit in that decision. He referred again to the 'anomalies, inconveniences and injustices' liable to flow from *Bedder v DPP* ([1978] 2 All ER 168 at 181, [1978] AC 705 at 726) and concluded that it should no longer be followed ([1978] 2 All ER 168 at 182, [1978] AC 705 at 727).

[57] Thirdly, their Lordships rejected the notion that the objective comparison should be made with an abstract, hypothetical, reasonable man. Lord Diplock posed the question directed to the facts of the case ([1978] 2 All ER 168 at 174, [1978] AC 705 at 717):

> 'If the jury think that the same power of self-control is not to be expected in an ordinary, average or normal boy of 15 as in an older person, are they to treat the lesser powers of self-control possessed by an ordinary, average or normal boy of 15 as the standard of self-control with which the conduct of the accused is to be compared?'

Lord Morris observed ([1978] 2 All ER 168 at 176, [1978] AC 705 at 719–720) that, before *Bedder v DPP*, the courts seemed to have created the conception of the reasonable man as 'a mythical person seemingly not only detached from but also rather remote from the accused person and having certain attributes as laid down by the court'. He continued ([1978] 2 All ER 168 at 176, [1978] AC 705 at 720): 'To consider the mind of some different person, and to consider what his reactions would have been if comparably provoked, could involve an unreal test.' Lord Simon observed ([1978] 2 All ER 168 at 180, [1978] AC 705 at 724) that 'it hardly makes sense to say that an impotent man must be notionally endowed with virility

before he ranks within the law of provocation as a reasonable man ... '. He considered ([1978] 2 All ER 168 at 181, [1978] AC 705 at 724 at 725) that— a

> 'it is one thing to invoke the reasonable man for the standard of self-control which the law requires: it is quite another to substitute some hypothetical being from whom all mental and physical attributes (except perhaps sex) have been abstracted.' b

He pointed out ([1978] 2 All ER 168 at 181, [1978] AC 705 at 726) that '[t]he effect of an insult will often depend entirely on a characteristic of the person to whom the insult is directed'.

[58] Fourthly, their Lordships concluded that the objective comparison should be made with a comparator having such of the relevant characteristics of the defendant as the jury consider to be relevant. Lord Diplock expressed himself in this way ([1978] 2 All ER 168 at 174, [1978] AC 705 at 717–718): c

> 'It may be conceded that in strict logic there is a transition between treating age as a characteristic that may be taken into account in assessing the gravity of the provocation addressed to the accused and treating it as a characteristic d to be taken into account in determining what is the degree of self-control to be expected of the ordinary person with whom the accused's conduct is to be compared. But to require old heads on young shoulders is inconsistent with the law's compassion of human infirmity to which Sir Michael Foster ascribed the doctrine of provocation more than two centuries ago. The distinction as to the purposes for which it is legitimate to take the age of the accused into e account involves considerations of too great nicety to warrant a place in deciding a matter of opinion, which is no longer one to be decided by a judge trained in logical reasoning but by a jury drawing on their experience of how ordinary human beings behave in real life.'

Lord Diplock's idiomatic reference to old heads on young shoulders was, of course, f apt for the particular case, but he was, we think, making the more general point, consonant with the dictates of justice in a context such as this, that like should be compared with like. In his proposed jury direction ([1978] 2 All ER 168 at 175, [1978] AC 705 at 718) he described the comparator as—

> 'a person having the power of self-control to be expected of an ordinary g person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as [the jury] think would affect the gravity of the provocation to him ...'

Lord Morris was of the same opinion ([1978] 2 All ER 168 at 177, [1978] AC 705 at h 721):

> 'In my view it would now be unreal to tell a jury that the notional 'reasonable man' is someone without the characteristics of the accused: it would be to intrude into their province. A few examples may be given. If the accused is of particular colour or particular ethnic origin and things are said j which to him are grossly insulting it would be utterly unreal if the jury had to consider whether the words would have provoked a man of different colour or ethnic origin, or to consider how such a man would have acted or reacted. The question would be whether the accused if he was provoked only reacted as even any reasonable man in his situation would or might have reacted.'

Lord Simon also agreed ([1978] 2 All ER 168 at 182, [1978] AC 705 at 727):

> 'I think that the standard of self-control which the law requires before provocation is held to reduce murder to manslaughter is still that of the reasonable person (hence his invocation in s 3 of the 1957 Act), but that, in determining whether a person of reasonable self-control would lose it in the circumstances, the entire factual situation, which includes the characteristics of the accused, must be considered.'

He added ([1978] 2 All ER 168 at 183, [1978] AC 705 at 727):

> 'The jury would, as ever, use their collective common sense to determine whether the provocation was sufficient to make a person of reasonable self-control in the totality of the circumstances (including personal characteristics) act as the defendant did. I certainly do not think this is beyond the capacity of a jury.'

[59] *R v Newell* (1980) 71 Cr App R 331 is a significant case, first because it was decided relatively shortly after *DPP v Camplin* and secondly, because the Court of Appeal judgment was delivered by Lord Lane CJ, whose experience and authority in this field were unrivalled. The defendant was a chronic alcoholic who at trial advanced unsuccessful defences of diminished responsibility and provocation. It was accepted that he had lost his self-control, and provocation alone was the subject of the appeal. The issue was whether, in making the objective comparison, account could be taken of the defendant's alcoholism. In giving the judgment of the court Lord Lane made detailed reference to *DPP v Camplin*. He then cited a lengthy obiter passage from the judgment of North J, sitting in the New Zealand Court of Appeal, in *R v McGregor*. In this passage North J, having construed s 169 of the New Zealand Crimes Act 1961, the terms of which do not reproduce s 3 of the 1957 Act, made two essential points. The first ([1962] NZLR 1069 at 1081) was that, for purposes of the objective comparison for which the law of New Zealand, like that of Jersey and England and Wales, provided, the defendant should be presumed to possess in general the power of self-control of the ordinary man, save in so far as his power of self-control was weakened because of some particular characteristic possessed by him, such characteristics potentially including not only physical qualities but also mental qualities and such indeterminate attributes as colour, race and creed, the question being whether such characteristic or attribute distinguished the defendant from the ordinary member of the community. The second point (at 1081–1082) was that the provocative words or conduct relied on should relate directly to any particular characteristic or attribute said to distinguish the defendant from ordinary members of the community. Lord Lane and his colleagues dismissed Newell's appeal relying on the second of these points, since it was held ((1980) 71 Cr App R 331 at 340) that the provocation to which Newell reacted had had no reference to his only arguable distinguishing characteristic of chronic alcoholism. In the later New Zealand case of *R v McCarthy* [1992] 2 NZLR 550, the Court of Appeal (in a judgment given by Cooke P) was of opinion (at 558) that this second point made by North J was unsound and had unduly restricted the scope of the provocation defence in New Zealand law. We would for our part accept this criticism of North J's second point, as the Board did in *Luc Thiet Thuan v R* [1996] 2 All ER 1033 at 1047–1048, [1997] AC 131 at 148. But much more significant in the development of English law is Lord Lane's acceptance of North J's first point, described by him ((1980) 71 Cr App R 331 at 339) as 'entirely apt to the situation in the instant case' and as representing 'the law of this country' (at 340). In the

judgment of North J the passage in question was obiter. In that of Lord Lane it was ratio. The Court of Appeal certified a question for the opinion of the House but refused leave to appeal, which was also refused by an appeal committee after an oral hearing (Lord Diplock, Lord Keith of Kinkel and Lord Scarman).

[60] The decision of the Recorder of London in *R v Raven*, briefly reported at [1982] Crim LR 51, appears to us to have been a substantially correct application of the principles laid down in *DPP v Camplin* and *R v Newell*, above. The defendant claimed to have been provoked by sexual attacks made upon him by the victim whom he had killed. It was agreed that the defendant, although aged 22, had a mental age of about nine. The Recorder directed the jury, that, in making the objective comparison, they should consider the reasonable man as having lived the same type of life as the accused for 22 years but with the retarded development and mental age of the accused. In her commentary Professor Birch acknowledged the difficulty of the jury's task, but saw no other plausible solution which allowed compassion to human infirmity. We agree. If the jury concluded that the defendant had indeed been provoked by the sexual attacks upon him to lose his self-control and kill, and also that his powers of self-control were reduced by his retarded mental age, but were precluded by law from taking account of this reduction when making the objective comparison, it would seem clear that the law would be requiring more from an imperfect creature than he could perform.

[61] The defendant in *R v Ahluwalia* [1992] 4 All ER 889 had, on the evidence, suffered cruel treatment at the hands of her husband over a number of years. She advanced a defence of provocation at trial but this did not succeed, rightly so as the Court of Appeal held (at 898) because there had been no evidence to suggest that the defendant suffered from post-traumatic stress disorder or battered woman syndrome or any other specific condition which could amount to a characteristic. But fresh evidence adduced on appeal with reference to diminished responsibility led the court to quash the conviction and order a retrial so that that defence (not raised at trial) could be investigated. Relevant for present purposes is the acceptance by the court (Lord Taylor of Gosforth CJ, Swinton Thomas and Judge JJ), at 898, that for the defence of provocation 'characteristics relating to the mental state or personality of an individual can also be taken into account by the jury, providing they have the necessary degree of permanence'. The court referred to the evidence which would normally be anticipated when special characteristics relating to mental state or personality of a defendant are put forward as matters for the jury to consider. The defendant's appeal in *R v Dryden* [1995] 4 All ER 987 failed because, as the Court of Appeal (Lord Taylor CJ, Macpherson and Steel JJ) held (at 998), he had not lost his self-control. But the court was of opinion (at 998) that there were features of the defendant's character or personality which fell into the category of mental characteristics and which ought to have been specifically left to the jury.

[62] The 17-year old defendant in *R v Humphreys* [1995] 4 All ER 1008 had fatally stabbed a man nearly twice her age who had, over a period, treated her violently and oppressively. There was evidence that she had a seriously abnormal personality, and her main defence at trial was provocation. The trial judge directed the jury as a matter of law (see 1014) not to attribute to the reasonable young woman, in her situation, any of the seriously abnormal characteristics which a medical witness had found in the defendant, and she was convicted of murder. After a very detailed consideration of the authorities, the Court of Appeal (Hirst LJ, Cazalet and Kay JJ) held (at 1022) that the judge should have left for the jury's deliberation two characteristics of the defendant as eligible for attribution to the reasonable woman, it being for them to decide what, if any, weight should be given

to them in all the circumstances. The appeal was allowed, and a conviction of manslaughter substituted for that of murder.

[63] In *R v Morhall* [1993] 4 All ER 888 the Court of Appeal (Lord Taylor CJ, Owen and Blofeld JJ) dismissed an appeal by a defendant whose defence of provocation had been rejected at trial and who had been convicted of murder. The sole ground of appeal related to provocation. He was addicted to glue-sniffing and contended that he had been provoked to lose his self-control and kill a companion who had nagged him about his addiction. The issue concerned the objective comparison test, and the Crown argued (at 893) that characteristics repugnant to the concept of a reasonable man did not qualify for consideration. The court accepted (at 893) that physical deformity, colour, race, creed, impotence and homosexuality were examples of characteristics which were consonant with the concept of a reasonable man and should, where they existed, be left to the jury to consider. But (see 894) a self-induced addiction to glue-sniffing was wholly inconsistent with the concept of a reasonable man: to accept it would stultify the test and result in the so-called reasonable man being a reincarnation of the defendant. On further appeal to the House of Lords ([1995] 3 All ER 659, [1996] AC 90) the defendant succeeded, his conviction of murder was quashed and a conviction of manslaughter substituted. Lord Browne-Wilkinson, Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Steyn all agreed with the leading opinion of Lord Goff. In the course of his opinion Lord Goff pointed out ([1995] 3 All ER 659 at 666, [1996] AC 90 at 98) that in an appropriate case it might be necessary for the trial judge to refer to circumstances affecting the gravity of the provocation to the defendant but not falling within the description 'characteristics', as for example the defendant's history or the circumstances in which he was placed at the relevant time, citing Lord Diplock's reference in *DPP v Camplin* to 'the particular characteristics or circumstances' of the defendant and Lord Simon's reference to '"the entire factual situation", including the characteristics of the defendant'. When directing the jury on the objective comparison, the judge was entitled to say that they must take into account the entire factual situation, and in particular that the provocation was directed at a habitual glue-sniffer taunted with his habit, when considering the question whether the provocation was enough to cause a man possessed of an ordinary man's power of self-control to act as the defendant did. Lord Goff rejected ([1995] 3 All ER 659 at 666, [1996] AC 90 at 98–99) the Court of Appeal's view that discreditable or shameful features of a defendant's personality or history should be excluded from the jury's consideration, and concluded ([1995] 3 All ER 659 at 668, [1996] AC 90 at 100) that the trial judge should have directed the jury to take into account the fact of the defendant's addiction to glue-sniffing when considering whether a person with the ordinary person's power of self-control would have reacted to the provocation as the defendant did. Save for some minor points of terminology, we respectfully agree with the thrust of these observations. It would plainly be meaningless, if not absurd, to consider the likely or possible effect of taunts about glue-sniffing on a person who was not a glue-sniffer.

[64] The decision of the Court of Appeal (Lord Taylor CJ, Hidden and Ebsworth JJ) in *R v Thornton (No 2)* [1996] 2 All ER 1023, [1996] 1 WLR 1174 succeeded that of the House in *R v Morhall*, above. The appellant, who had been violently abused by her husband over a period, fatally stabbed him, was convicted of murder and unsuccessfully challenged her conviction on appeal. At trial she had advanced a defence of diminished responsibility but not provocation, although the trial judge had properly invited the jury to consider that possible defence. The case

was referred to the court by the Secretary of State under s 17 of the Criminal Appeal Act 1968, and detailed consideration was given in the reserved judgment delivered by the Lord Chief Justice to the possible relevance of the battered woman syndrome from which, it was said, the appellant had been suffering at the relevant time. The court held ([1996] 2 All ER 1023 at 1030, [1996] 1 WLR 1174 at 1181–1182) that this was potentially relevant to both the factual or subjective and the objective or comparative limbs of the provocation defence. In the light of fresh evidence the court concluded ([1996] 2 All ER 1023 at 1031, [1996] 1 WLR 1174 at 1183) that two characteristics of the appellant (her personality disorder and the effect of the deceased's abuse over a period upon her mental make-up) were capable of being regarded as relevant characteristics of the appellant for purposes of the objective comparison and that the jury should have been invited to consider them. The appeal was allowed, the conviction quashed and a retrial ordered, at which the appellant was convicted of manslaughter.

[65] The decisions to which we have referred in *R v Newell*, *R v Raven*, *R v Ahluwalia*, *R v Dryden*, *R v Humphreys*, *R v Morhall* and *R v Thornton (No 2)* were, in our respectful opinion, faithful to the principles laid down by the House in *DPP v Camplin*. Importantly, they reflected the rationale of the provocation defence, both in its recognition of the sanctity of human life and its allowance for human imperfection. The effect of the decisions was not to abrogate the important safeguard provided by the objective comparison, and there is nothing in these cases to suggest that short temper or undue pugnacity or excitability could begin to excuse the deliberate taking of a human life. The cases do, however, make clear that the objective comparison is a matter for the opinion of the jury, as Parliament had enacted, with such properly expressed judicial guidance as might be appropriate in the particular case. And they make clear, as *DPP v Camplin* had done, that the question is not whether the defendant showed such self-control as an abstract hypothetical person would have done but such self-control as would reasonably be expected of a person having such of his attributes as the jury thought relevant in the factual situation in which the defendant actually found himself at the relevant time.

[66] We cannot accept that *Luc Thiet Thuan v R* [1996] 2 All ER 1033, [1997] AC 131 was correctly decided by the majority of the Board (Lord Goff, Sir Brian Hutton and Sir Michael Hardie Boys, Lord Steyn dissenting). At trial in Hong Kong the defendant adduced evidence of significant brain damage on which he sought to rely to support defences of provocation and diminished responsibility, contending that this brain damage had impaired his powers of self-control. But the judge rejected the relevance of the evidence to provocation and the jury convicted the defendant of murder, with the inevitable result that he was sentenced to death. The Court of Appeal of Hong Kong dismissed the defendant's appeal, holding that the judge had been right to disregard this evidence for the purpose of provocation. A majority of the Board upheld this decision. While Mr Peter Thornton QC, for the respondent in the present appeal, made a number of apt criticisms of the reasoning of the majority, we would respectfully highlight three major points of disagreement, each of them in our view important:

(1) The majority judgment gives little or no weight to the rationale of the provocation defence, to which, (as in *Bedder v DPP*, above) scant reference was made. It is of course impossible to know what the Hong Kong jury would have made of the medical evidence in the context of provocation had they been allowed to consider it. But if they had considered it, and had concluded that the defendant's brain damage might have impaired his ability to resist provocation in the way that

a person without his brain damage could reasonably have been expected to do, the possibility must exist that he was sentenced to die when a defendant without his mental disability would not have been. If this is so, the harshness of the old law, which s 3 of the 1957 Act (reproduced in Hong Kong) was in Lord Diplock's judgment (*DPP v Camplin* [1978] 2 All ER 168 at 173, [1978] AC 705 at 716) intended to mitigate, has survived.

(2) We cannot reconcile the majority's reading of the speeches in *DPP v Camplin* with what their Lordships said in that case, discussed at some length above. The majority ([1996] 2 All ER 1033 at 1041, [1997] AC 131 140–141) attribute to the House in *DPP v Camplin* acceptance of Professor Ashworth's observation ('The Doctrine of Provocation' [1976] CLJ 292 p 300) that—

> '[t]he proper distinction ... is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not',

leading the majority to conclude ([1996] 2 All ER 1033 at 1044, [1997] AC 131 at 144) that—

> 'there is no basis upon which mental infirmity on the part of the defendant which has the effect of reducing his powers of self-control below that to be expected of an ordinary person can, as such, be attributed to the ordinary person for the purposes of the objective test in provocation'.

There is, however, nothing in the report of argument or the speeches to suggest that the House in *DPP v Camplin* was referred to the article of Professor Ashworth, and consideration of the gravity of the provocation cannot rationally and fairly be divorced from consideration of the effect of the provocation on the particular defendant in relation to both limbs of the defence. Otherwise one is not comparing like with like, and is losing sight of the essential question whether, in all the circumstances, the defendant's conduct was to some degree excusable.

(3) We would not accept that the defences of diminished responsibility and provocation are as sharply demarcated as the majority ([1996] 2 All ER 1033 at 1046, [1997] AC 131 at 146–147) suggest. It is noteworthy that Lord Simon in his speech in *DPP v Camplin* quoted with approval para 53 of a Working Paper of the Criminal Law Revision Committee on Offences Against the Person (HMSO, 1976) (see [1978] 2 All ER 168 at 182, [1978] AC 705 at 726–727):

> 'In this country the law on this matter [provocation] has been indirectly affected by the introduction of the defence of diminished responsibility. It is now possible for a defendant to set up a combined defence of provocation and diminished responsibility, the practical effect being that the jury may return a verdict of manslaughter if they take the view that the defendant suffered from an abnormality of mind *and* was provoked. In practice this may mean that a conviction of murder will be ruled out although the provocation was not such as would have moved a person of normal mentality to kill.'

The neat demarcation favoured by the majority might be persuasive if ss 2 and 3 of the 1957 Act (reproduced in arts 3 and 4 of the Jersey Law) had a common origin, but this is not so: s 2 was based on rules developed in the Scottish courts (not recommended for adoption by the Royal Commission) and s 3 on the recommendation of the Royal Commission already referred to. There is, as Lord Hoffmann pointed out in *R v Smith* [2000] 4 All ER 289 at 308, [2001] 1 AC 146 at 168, nothing to suggest that Parliament considered the possibility of overlap

between the two defences. In practice the defences have routinely been advanced in tandem, as in *R v Newell*, *R v Dryden* and *R v Morhall* above. In *R (on the application of Farnell) v Criminal Cases Review Commission* [2003] EWHC 835 (Admin), [2003] All ER (D) 267 (Apr), (2003) Times, 2 June, Mitchell J considered (at [9]) that the two defences of diminished responsibility and provocation were 'certainly not mutually exclusive'. If the jury conclude that the defendant has not discharged the burden imposed upon him to establish that his responsibility for a killing was substantially diminished by an abnormality of mind from which he was suffering (a test heavily criticised by much expert psychiatric opinion: see pp 92–93 (para 5.44) of the Final Report of the Law Commission on *Partial Defences to Murder* (2004) there is no reason of logic or fairness why the jury should not, on appropriate evidence, consider, with reference to both limbs of the provocation defence, whether the prosecution have excluded the possibility that the mental characteristics or personal history of the defendant may have rendered him susceptible to provocation in a way which a person without those characteristics and that history might not have been, so as to render his conduct to some degree more excusable.

[67] The division of opinion expressed in *Luc Thiet Thuan v R*, above, was repeated in *R v Smith*, above. We would accept the decision of the majority, for the reasons which they gave and which it is unnecessary to repeat. We are of course aware that the majority decision in *R v Smith* has attracted much adverse comment, and we have already recognised (see [44], above) that the law of homicide stands in urgent need of comprehensive and radical reform (see, for example, Blom-Cooper and Morris, *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (2004)). We must however administer the law as it is, and we consider that the reasoning of the majority in *R v Smith* is loyal to the rationale of the provocation defence, faithful to the principles laid down in *DPP v Camplin*, above, and consistent with the correct interpretation of s 3 of the 1957 Act which meant, as Lord Diplock pointed out in *DPP v Camplin* ([1978] 2 All ER 168 at 173, [1978] AC 705 at 716), that the reasonable man test fell to be applied now in the context of a law of provocation significantly different from what it had been before the Act was passed. That the majority reasoning lends itself to clear, sensible and intelligible directions is in our opinion exemplified in the direction of Hallett J quoted by the Court of Appeal in *R v Weller* [2003] EWCA Crim 815 at [20], [2004] 1 Cr App R 1 at [20], and Mantell LJ, giving the judgment of the court, succinctly described what we regard as the correct approach in paras [16], [17] of his judgment:

> '[16] In our view it is to be concluded from the majority speeches in *Smith* that the question whether the defendant should reasonably have controlled himself is to be answered by the jury taking all matters into account. That includes matters relating to the defendant, the kind of man he is and his mental state, as well as the circumstances in which the death occurred. The judge should not tell the jury that they should, as a matter of law, ignore any aspect. He may give them some guidance as to the weight to be given to some aspects, provided he makes it clear that the question is one which, as the law provides, they are to answer, and not him.
>
> [17] This approach has the considerable advantage that it is unnecessary to determine whether what has been called a "characteristic" of the accused is an eligible characteristic for the purposes of the second element in provocation, the objective element, or is one of which no account should be taken. It avoids categorising human defects into one category or the other, which would otherwise be necessary and is surely artificial. We refer in particular to the

difficulties which arose in *R v Dryden* [1995] 4 All ER 987 and to *R v Humphreys* [1995] 4 All ER 1008. It is all a matter for the jury.

[68] We need say little about the present appeal. Had the only evidence been that any loss of self-control by the defendant had been caused by self-induced intoxication, his provocation defence would necessarily have failed. It is a very well-established rule, on which we would wish to throw no doubt whatever, that criminal conduct cannot be excused by drunkenness unless it is so extreme as to preclude the necessary intent: see, for example, *R v Thomas* (1837) 7 C & P 817 at 820, 173 ER 356 at 358; *R v McCarthy* [1954] 2 All ER 262 at 265, [1954] 2 QB 105 at 112; *R v Fenton* (1975) 61 Cr App R 261 at 263–264; *R v Newell* (1980) 71 Cr App R 331 at 339–340; *R v Morhall* [1995] 3 All ER 659 at 667, [1996] AC 90 at 99–100. In this case, however, there was an issue, raised by the expert evidence, whether the defendant's chronic alcoholism had the effect of rendering him abnormally susceptible to provocation quite apart from any drink he had consumed. The defendant relied not on the disinhibiting effect of the drink he had taken, a contention which would have been doomed to certain failure, but on the disease of chronic alcoholism from which he suffered and its effect on his ability to resist provocation. The Deputy Bailiff directed the jury not to take this into account, and the Court of Appeal held this to be a misdirection: [2003] JLR 22, paras 17–19. It would not seem likely, on the facts, that the jury, appropriately directed and guided, would have returned a different verdict. But we cannot say that the careful and closely reasoned judgment of the Court of Appeal was wrong in law, and we would for our part dismiss this appeal. We must however accept that the effect of the majority decision is as stated in para [1] of the majority judgment.

LORD CARSWELL.

[69] I also regret that I do not find it possible to join in the opinion expressed by the majority of the Board. I fully agree with the reasons given and the conclusions reached in the dissenting opinion of my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann and wish to add only a few brief reasons of my own.

[70] I do not propose to discuss the many decisions in which the courts have sought to define and apply the principles of the law governing provocation in murder cases or to trace the historical development of that branch of the law, both of which tasks have been performed with great care in the minority opinion. I think that it is possible to find justification for either conclusion in the material put before the Board and that one is eventually faced with a policy choice between the two.

[71] In developing the criminal law the courts should strive to meet three important criteria: its principles should fit a logical pattern; it should be capable of explanation to a jury; and, above all, it should achieve justice. My concern is that the law of provocation accepted as correct by the majority of the Board fails to meet these criteria.

[72] The dichotomy expressed by the Board in *Luc Thiet Thuan v R* [1996] 2 All ER 1033, [1997] AC 131, and approved by the majority in the present appeal, was neatly expressed by Professor AJ Ashworth in his influential article 'The Doctrine of Provocation' [1976] CLJ 292 p 300:

> 'The proper distinction ... is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not.'

I cannot myself see any convincing logical ground for this distinction. It is, however, always as well to remember the famous remark of Oliver Wendell Holmes Jr about logic and the law, the full version of which bears repetition, for it could have been written about this very topic (*The Common Law* (1881), p 1):

> 'The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.'

That said, I regard the dichotomy as an unsatisfactory compromise, which should be maintained only if one is compelled to do so by necessary interpretation of the governing legislation or if there are good practical grounds to support it.

[73] For the reasons set out in the opinion of Lord Bingham and Lord Hoffmann I consider that the view which they take of the law, in agreement with that of the majority in *R v Smith* [2000] 4 All ER 289, [2001] 1 AC 146, is consistent with the terms of s 3 of the Homicide Act 1957 and its analogue art 4 of the Homicide (Jersey) Law 1986. I hold the very clear view that the dichotomy between the gravity of the provocation and the level of self-control in reaction cannot readily be made comprehensible to a jury by the directions fashioned by a judge with the greatest care and clarity. I am unable to agree with the majority judgment in the present appeal that 'any difficulties in this regard have been exaggerated' (see [11], above). I am rather in wholehearted agreement with the remark of Thomas J in the New Zealand case of *R v Rongonui* [2000] 2 NZLR 385 at 446 that most trial judges had seen—

> 'the glazed look in the jurors' eyes as, immediately after instructing them that it is open to them to have regard to the accused's alleged characteristic in assessing the gravity of the provocation, they are then advised that they must revert to the test of the ordinary person and disregard that characteristic when determining the sufficiency of the accused's loss of self-control.'

The formula is not only opaque (per Lord Hoffmann in *R v Smith* [2000] 4 All ER 289 at 312, [2001] 1 AC 146 at 173), but even if it can be comprehended by an intelligent jury, they are more than likely to ask themselves how they can sensibly decide whether an ordinary person would have reacted as the defendant did if he would not have found the acts or words provocative in the first place.

[74] That is not to say that the solution adopted by the majority in *R v Smith* is free of difficulties. The most fundamental one is the interpretation of s 3 of the 1957 Act, which gives the appearance of requiring an objective test. Yet once one rejects the notion that the comparison should be made with an abstract, hypothetical reasonable man, there is in my opinion sufficient ground for the majority's solution. It has been said that this gives insufficient weight to the standards of society, but it enables the jury, who for that purpose are a microcosm of society as a whole, to apply their standards of justice. Concerns have also been expressed about the relationship between the defence of diminished responsibility provided for in s 2 of the 1957 Act and that of provocation in s 3. There has been unease at the possibility that a defence of provocation may be made out of an unproved case of diminished responsibility. But the defences are not in my opinion mutually exclusive and in practice they are commonly run in tandem. This is not unacceptable in principle, for the two defences not only have different historical antecedents, but differ in the burden and standard of proof.

[75] If one finds the dichotomy illogical, inexplicable and unjust, as I do, then one must, in order to achieve an acceptable standard of justice agree with the conclusion reached by the majority in *R v Smith*. The approach was described by Lord Hoffmann ([2000] 4 All ER 289 at 313, [2001] 1 AC 146 at 173–174) in a passage which lucidly summarises the function of the court:

> 'The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an appropriate case be told, in whatever language will best convey the distinction, that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of *him* and which it would be unjust not to take into account. If the jury take this view, they are at liberty to give effect to it.'

[76] Applying this principle in cases involving drunkenness, such as the appeal before the Board, is by no means a simple matter. One might wish that drunkenness could be dealt with in a simple fashion: one might exclude the defence in cases of self-induced intoxication by refusing as a matter of policy to admit that as a relevant characteristic (see *R v Morhall* [1995] 3 All ER 659, [1996] AC 90), and one might deal with the disease of alcoholism solely under diminished responsibility (see *R v Tandy* [1989] 1 All ER 267, [1989] 1 WLR 350). In this way one might remove drunkenness from the ambit of provocation altogether. I do not think that the law as it stands would support such a solution, so I would accept that the Court of Appeal was correct in holding that the judge should have directed the jury that they could take into account the defendant's chronic alcoholism when considering the defence of provocation. I accordingly agree that the appeal should be dismissed.

[77] I should not like to leave this case without registering my strong agreement with both the majority and minority that the law of homicide needs comprehensive and fundamental reform. It is a patchwork of rules which makes coherent direction of juries unnecessarily difficult and reflects no credit on our legal system. Judges are bound to apply the law as it is, but that does not prevent one from reminding the world at large and the legislature in particular, that there is a real risk that the present law, containing as it does so many difficulties in its application, may cause injustice in individual cases, even where it is faithfully and correctly communicated to a jury. I do not propose to dilate upon the alternatives, a unified offence of unlawful killing or permitting the jury to return a verdict of murder with mitigating circumstances, allied with the abolition of the mandatory death penalty. They do exist, however, and the adoption of one or other would simplify the law, removing the need for the extended discussion of the minutiae of provocation and the differences of opinion among judges. The latter I genuinely regret, but as the law stands I must join the dissent.

Appeal allowed. Order of the Court of Appeal of Jersey let stand.

Celia Fox Barrister.

University of East London Higher Education Corp v Barking and Dagenham London Borough Council and others

[2004] EWHC 2710 (Ch)

CHANCERY DIVISION

LIGHTMAN J

14–16, 19, 20 JULY, 9 DECEMBER 2004

Restrictive covenant affecting land – Extinguishment – Freehold – Common ownership of burdened and benefited land – Local authority owning benefited land as housing authority and burdened land as education authority – Whether unity of seisin extinguishing covenant.

The principle that there is no extinguishment of restrictive covenants by unity of seisin when the dominant and servient properties are held by the same trustee on different trusts, the trustee in such a situation remaining under a duty as trustee of the dominant land to require that the use of the servient land complies with the covenant, applies when both properties are held by a public authority for different statutory purposes. Where a local authority holds the dominant land for one purpose and the servient land for another purpose, a blanket rule requiring such common ownership to operate to extinguish all restrictive covenants would prejudice the performance by the local authority of its statutory duties and fulfil no useful purpose (see [57], [58], below).

Notes

For effect of unity of ownership and for discharge of covenants apart from statute see 16(2) *Halsbury's Laws* (4th edn reissue) para 139, note 1, and para 629.

Cases referred to in judgment

Bromley London BC v Greater London Council [1982] 1 All ER 129, [1983] 1 AC 768, [1982] 2 WLR 62, HL.

Chambers v Kingham (1878) 10 Ch D 743.

Chambers v Randall [1923] 1 Ch 149, [1922] All ER Rep 565.

Crest Nicholson Residential (South) Ltd v McAllister [2004] EWCA Civ 410, [2004] 2 All ER 991n, [2004] 1 WLR 2409; *rvsg* [2002] EWHC 2443 (Ch), [2003] 1 All ER 46.

Ecclesiastical Comrs for England's Conveyance, Re, Re Law of Property Act 1925 [1936] Ch 430, [1034] All ER Rep 118.

Formby v Barker [1903] 2 Ch 539, [1900–3] All ER Rep 445, CA.

Mander v Falcke [1891] 2 Ch 554, CA.

Newton Abbot Co-operative Society Ltd v Williamson and Treadgold Ltd [1952] 1 All ER 279, [1952] Ch 286.

Post Investments Pty Ltd v Wilson (1990) 26 NSWLR 598, NSW SC.

Prescott v Birmingham Corp [1954] 3 All ER 698, [1955] Ch 210, CA.

Pritchard v Briggs [1980] 1 All ER 294, [1980] Ch 338, [1979] 3 WLR 868, CA.

Renals v Cowlishaw (1878) 9 Ch D 125; *affd* (1879) 11 Ch D 866, [1874–80] All ER Rep 359, CA.

Rogers v Hosegood [1900] 2 Ch 388, [1900–3] All ER Rep 915, CA.
Texaco Antilles Ltd v Kernochan [1973] 2 All ER 118, [1973] AC 609, [1973] 2 WLR 381, PC.
Tower Hamlets London BC v Chetnik Developments Ltd [1988] 1 All ER 961, [1988] AC 858, [1988] 2 WLR 654, HL.
Tulk v Moxhay (1848) 2 Ph 774, 41 ER 1143, [1843–60] All ER Rep 9, LC.

Claim

The University of East London Higher Education Corporation (UEL), the freehold registered proprietor of land known as the Barking campus, formerly part of the Becontree estate, and conveyed by the London County Council to UEL's predecessor in title by conveyances dated 8 June 1931, 9 February 1935, 31 December 1935 and 14 February 1946, sought declarations of freedom from restrictive covenants contained in the conveyances under s 84(2) of the Law of Property Act 1925. The first defendant, the London Borough of Barking and Dagenham (LBBD) and the second defendant, the London Borough of Redbridge (LBR) were the statutory successors to the London County Council as public housing authority responsible for public housing within the Becontree estate. The third defendants, who did not appear, were persons unknown owning or occupying property forming part of the Becontree estate. The facts are set out in the judgment.

David Ainger (instructed by *Finers Stephens Innocent*) for UEL.
Christopher Cant (instructed by *Barlow Lyde & Gilbert*) for LBBD.
Karen Walden-Smith (instructed by *Heidi Chottin*) for LRR.

Cur adv vult

9 December 2004. The following judgment was delivered.

LIGHTMAN J.

I INTRODUCTION

[1] The London County Council (the LCC) acquired as public housing authority for housing for the working classes the Becontree estate, an estate of some 3,000 acres. By four conveyances (the conveyances), dated 8 June 1931 (the 1931 conveyance), 9 February 1932 (the 1932 conveyance), 31 December 1935 (the 1935 conveyance) and 14 February 1946 (the 1946 conveyance) the LCC conveyed on sale in four tranches some 24 acres on the western edge of the Becontree estate to Essex County Council (Essex) as education authority for secondary educational purposes. The four tranches are now known as the Barking campus. By each of the conveyances Essex 'for themselves their successors and assigns' entered into restrictive covenants with the LCC 'their successors and assigns'. The relevant covenants (the covenants) contain three restrictions. The first covenant (the user covenant) prohibits use of the Barking campus except with the consent of the LCC for purposes other than for public educational purposes. The second covenant (the approval covenant) prohibits the erection of any building on the Barking campus except in accordance with plans and elevations approved by the LCC. The third covenant (the pre-emption covenant) prohibits the sale or (save for educational purposes) the parting with

possession of the Barking campus without first offering to sell the Barking campus to the LCC. I shall refer to the user covenant and the approval covenant together as 'the restrictive covenants'. a

[2] The claimant, the University of East London Higher Education Authority (UEL), as successor of Essex is the freehold registered proprietor of the Barking campus and occupies the Barking campus as one of its three campuses for educational purposes. As long ago as 8 November 1973 the then Department of b Education and Science indicated that the existence of three campuses was not acceptable. In 1997 UEL acquired land for a campus in Docklands with a view to concentrating the bulk (if not all) of its activities on that campus, and the Barking campus is now surplus to its requirements. UEL accordingly wishes to sell the Barking campus free from the covenants for the purposes of housing. The issue has however arisen whether the covenants prevent UEL from doing so, and in c particular whether the benefit of the covenants is vested in any and if so which of the successors in title of the LCC as owners of the remainder of the Becontree estate and whether the burden of the covenants binds the successors in title of Essex to the Barking campus.

[3] The first defendant, the London Borough of Barking and Dagenham d (LBBD), and the second defendant, the London Borough of Redbridge (LBR) are the statutory successors to the LCC as public housing authority responsible for the public sector housing within the Becontree estate and between them are the registered proprietors of the residential housing units on the Becontree estate which are not in private ownership. By far the greater number of such units is e vested in LBBD. Only some 45 housing units are vested in LBR. LBBD and LBR are at one in contending that they are entitled to the benefit of, and to enforce, the covenants and that the covenants preclude the proposed use of the Barking campus. They do so most particularly because they are concerned at the additional cost which will be occasioned to them in respect of the provision of education if the use of the Barking campus is changed to that of the provision of f housing and they claim to be entitled, as the price of giving their consent to what UEL proposes, to the payment of substantial consideration.

[4] The question also arises whether, if the covenants are enforceable, they are enforceable, not merely by LBBD and LBR as housing authorities owning residential housing on the Becontree estate, but also by LBBD's and LBR's g tenants and the owners and tenants of properties on the Becontree estate which are in private ownership. To enable any and all such persons to maintain a claim to the benefit of, and entitlement to enforce, the covenants, in accordance with an order made by Chief Master Winegarten on 6 January 2004 the third defendants were joined and given notice of the proceedings by advertisements and the placing of notices in prominent positions near to the Barking campus on h the Becontree estate. None of the third defendants attended, or were represented at, the hearing.

II RELEVANT HISTORY

(a) *General* j

[5] The LCC was established by the Local Government Act 1888. The Housing of the Working Classes Act 1890 (as amended by the Housing, Town Planning, &c. Act 1919) conferred on the LCC power to acquire land outside its area for the provision of housing for the working classes living within its area. On 14 May 1919 the LCC published a report proposing the purchase of some 3,000

acres which now constitute the Becontree estate for the purpose of the municipal provision of housing for the working classes. The London County Council (Compulsory Acquisition of Land) Order 1919 (the 1919 order) was made on 21 October 1919 and confirmed on 26 February 1920. Pursuant to the 1919 order (and possibly certain voluntary purchases outside the 1919 order) between 1919 and 1921 the LCC acquired the Becontree estate. The greater part of the Becontree estate was allocated to housing, but parts were allocated to other uses such as open space, commercial use, schools and other public services. The erection of about 20,000 houses for some 120,000 working class inhabitants from the LCC area began in 1921 and was officially completed in 1935. The architecture of the Becontree estate is distinctive. The houses are mostly small two-storied terraces houses constructed at twelve to the acre.

[6] The LCC wanted to extend its eastern boundary to include the Becontree estate and made representations to the Royal Commission on Local Government in 1922 to this effect. The proposal however met with almost unanimous objection from other local authorities who wanted to retain their separate identities. The Royal Commission in its report of 27 February 1923 (Cmd 1830) recommended retaining the status quo, but it recognised that there might be changes in the future at the level of local authorities and the changes might include local authorities acquiring parts of the housing functions of the LCC relating to the Becontree estate. Accordingly there can have been no realistic expectation on the part of the LCC at the date of the conveyances that the Becontree estate would fall within the boundaries of the LCC. But there was a real possibility that bodies other than the LCC might assume the responsibility for housing of the LCC.

[7] By the 1930s it was recognised that the provision of education for families on the Becontree estate was inadequate and that there was an urgent need for schools and institutions of further education. The responsibility of the LCC was limited to housing and did not extend to provision for education or other services on the Becontree estate which were the responsibility of the local authorities. Most particularly Essex was responsible for the provision of elementary and higher education in areas of rural district councils and higher education in all other areas.

[8] Under a succession of statutory provisions power was conferred upon the LCC to deal with land acquired for the purpose of providing accommodation and in particular to sell or lease all or part of the land for the purpose and under a condition providing for the erection and maintenance of housing for the working classes or for the use of the land for purposes necessary or desirable for or incidental to the development of the land as a building estate in accordance with plans approved by the local authority (see s 15(1)(b) of the Housing, Town Planning, &c. Act 1919; s 59(1)(b) of the Housing Act 1925; s 79 of the Housing Act 1936; and s 105(1)(a) and (b) of the Housing Act 1957). To enable Essex and the other local authorities to fulfil their responsibilities the LCC reserved sites on the Becontree estate for schools and other public services to be provided by them, and in particular the LCC reserved the Barking campus for the provision of education. By the conveyances pursuant to the statutory provisions to which I have referred the LCC conveyed to Essex as education authority the Barking campus, and Essex as education authority built and opened thereon a technical college and a secondary (technical) school. This secondary school moved to its own premises elsewhere in 1960. The technical college was renamed in 1965 Barking Regional College of Technology.

(b) Devolution of the Barking campus

[9] Section 1 of the London Government Act 1963 reorganised London's administrative bodies and created London borough councils. One such council was the LBBD. Section 30(1)(a) of the 1963 Act made LBBD the local education authority for its area and on 1 April 1965 ownership of the Barking campus vested in LBBD as local education authority.

[10] In the early part of 1967, the Department of Education invited the LBBD and the London boroughs of Newham (Newham) and of Waltham Forest (Waltham) as the local education authorities for their respective areas to apply for the establishment of the North-East London Polytechnic (NELP). NELP would use three locations (or campuses) of which the Barking campus would become one. A joint standing committee produced a scheme of establishment between April and June 1967 which was then subject to consultation. The scheme (the only extant copies of which are in draft form) was prepared and an application was sent to the Department of Education on 28 March 1968 under s 42 of the Education Act 1944. The scheme was approved on 27 May 1968. There were a number of outstanding issues after the scheme was approved which were dealt with by an agreement between the three local authorities dated 15 July 1969 (the 1969 agreement).

[11] The 1969 agreement formally established NELP and the manner of its governance by a governing body (the governing body) with certain functions reserved for the three local authorities through the medium of a Joint Education Committee (JEC). The JEC, comprising of representatives from the three local authorities, was established pursuant to para 3 of Pt II of the First Schedule to the 1944 Act. This required the approval of the Secretary of State for Education which was obtained on 22 July 1969.

[12] The role of the JEC is described in cl 3(iii) of the 1969 agreement which states that—

> 'subject to the provisions of this Agreement the Constituent Authorities [ie the three local authorities] hereby agree that all of their functions and powers with respect to the provision of facilities of further education by [NELP] shall be exercised on their behalf by the [JEC] save and except the powers to borrow money or to raise a rate.'

Certain powers and functions specified in the First Schedule were not to be exercised by the JEC without prior approval of the three local authorities. Clause 6(i) of the 1969 agreement provided that the Barking campus would continue to vest in the LBBD 'for the use of the NELP' under the control of the governing body in accordance with its instrument and articles of government which were approved by the Secretary of State for Education on 24 October 1969 pursuant to s 1(2) and (3) of the Education (No 2) Act 1968. The formula of words 'for the use of NELP' in the 1969 agreement and the similar wording in what I later refer to as the 1986 agreement no doubt were used because the fact that NELP was not a legal entity precluded the grant to it of a tenancy or the creation of a trust in its favour. Clause 6(v) provided that the LBBD was to be responsible for the maintenance and repair of the Barking campus as agents of the JEC. The governing body comprised of 37 individuals of whom three were from LBBD.

[13] By a letter (which has subsequently been lost) dated 5 January 1970, the Department of Education confirmed that NELP would be designated by the Secretary of State on 1 September 1970. The first director of NELP, Dr G Brown, took up his office on 1 February 1970.

[14] The 1969 agreement was binding on all three local authorities. None of them possessed the authority to make unilateral changes. Therefore, when Waltham subsequently wished to withdraw from the 1969 agreement, approval from the Secretary of State for Education was needed to an agreement dated 26 March 1986 providing for such withdrawal. On the same day LBBD and Newham entered into a fresh agreement (the 1986 agreement) which was not identical, but which was to like effect, to the 1969 agreement. Clause 6(1)(a) of the 1986 agreement provided that the Barking campus shall be held by LBBD 'for the purposes of the Polytechnic'. Clause 6(i)(b) provided that the LBBD should grant any lease or licence of the Barking campus and cl 10(a) provided that the consent of the LBBD should be obtained before any licence was granted for use of the Barking campus to be occupied otherwise than by the JEC or the governing body. Clause 7(1) provided that the two authorities should employ all staff engaged for the purposes of NELP.

[15] On 20 November 1988 NELP became a Higher Education Corporation and ceased to be funded by the LBBD and was renamed the Polytechnic of East London (the PEL). On 1 April 1989 the Barking campus was vested in PEL. This vesting was confirmed by a transfer dated 30 October 1990. On 16 June 1992, the PEL was renamed the UEL.

(c) Devolution of Becontree estate

[16] The 1963 Act abolished the LCC as from 1 April 1965 replacing it by the Greater London Council (the GLC) and (by s 23(1)) vested all the land owned by the LCC for the purposes of its housing functions (including those parts of the Becontree estate which had not been sold off before 1 April 1965) in the GLC.

[17] Section 23(5) expressly provided that housing accommodation for this purpose included 'any property held in connection therewith and any rights attaching thereto'. The rights under the covenants were transferred to the GLC under para 5(2)(ii) of the London Authorities (Property etc) Order 1964, SI 1964/1464 (the 1964 order):

> 'all contracts, deeds, bonds, agreements and other instruments subsisting in favour of, or against, and all notices in force which were given by, or to, the first-mentioned authority [ie LCC] in respect of such property, or in respect of liabilities transferred by the Act [ie the 1963 Act] or by this article, shall be of full force and effect in favour of, or against, the authority to whom such property and liabilities are transferred ...'

[18] Section 23(3) of the 1963 Act also provided for the making of orders for the transfer of public housing from the GLC to the newly created London borough councils. Under the provisions of ss 23 and 84 of the 1963 Act by seven transfer orders (the transfer orders) made between 1971 and 1982 the GLC transferred the Becontree estate (as to the greater part) to the LBBD and (as to a small part) to the LBR. The transfer orders were: (i) the London Authorities (Transfer of Housing Estates etc) Order 1971, SI 1971/231; (ii) the London Authorities (Transfer of Housing Estates etc) (No 1) Order 1972, SI 1972/171; (iii) the London Authorities (Transfer of Housing Estates etc) (No 3) Order 1972, SI 1972/173; (iv) the London Authorities (Transfer of Housing Estates etc) Order 1973, SI 1973/417; (v) the Greater London Council (Transfer of Land and Housing Accommodation) Order 1980, SI 1980/320 and the deposited schedule; (vi) the Greater London Council (Transfer of Land and Housing

Accommodation) Order 1981, SI 1981/289; (vii) the Greater London Council (Transfer of Land and Housing Accommodation) Order 1982, SI 1982/301.

[19] By 1980, LBBD held just under 20,500 houses which comprised over 90% of houses on the Becontree estate. Most of the remaining 1,600 houses were held by LBR. Pursuant to the recommendation of report no 660 of the Local Government Boundary Commission for England, on 1 April 1994 the East London Boroughs (London Borough Boundaries) Order 1993, SI 1993/1443 transferred the bulk of the houses held by the LBR to LBBD. As I have already said the LBR currently holds 45 properties.

[20] Since 1980, Pt I of the Housing Act (HA) 1980 and Pt V of the HA 1985 have introduced right-to-buy schemes for tenants of local authorities and pursuant to these schemes some of the houses on the Becontree estate are now privately owned. Those purchasers are included amongst the third defendants.

III CONVEYANCES

[21] The full terms of the conveyances need to be considered, but it is sufficient for this purpose to set out the full terms of the 1931 conveyance and the variations in the subsequent conveyances.

[22] The 1931 conveyance reads as follows:

> 'This Conveyance is made the eighth day of June One thousand nine hundred and thirty-one Between THE LONDON COUNTY COUNCIL (hereinafter called "the Vendors") of the one part and THE COUNTY COUNCIL OF THE ADMINISTRATIVE COUNTY OF ESSEX (hereinafter called "the Purchasers") of the other part.
>
> Whereas—
>
> (1) The Vendors are seised in fee simple in possession free from incumbrances of the property hereinafter described and intended to be hereby conveyed.
>
> (2) The Vendors have agreed with the Purchasers for the sale to them of the said property in fee simple in possession free from incumbrances at the price of Three Thousand Six Hundred and Fifty Pounds.
>
> Now in pursuance of the said agreement and in consideration of the sum of Three Thousand Six Hundred and Fifty Pounds paid by the Purchasers to the Vendors (the receipt of which sum the Vendors hereby acknowledge) this Deed Witnesseth as follows—
>
> 1. THE Vendors hereby convey unto the Purchasers All that piece or parcel of land situate in the Parish of Barking in the County of Essex having a frontage of six hundred and ten feet or thereabouts to a certain road called Longbridge Road and a depth therefrom along the east and west boundaries of four hundred and twenty feet or thereabouts and forming part of an area of land known as the Becontree Estate acquired and in course of development by the Vendors under the Housing Act 1925 and the Acts thereby consolidated. Which said piece or parcel of land hereby conveyed with the boundaries thereof is more particularly delineated and described in the plan annexed to these presents and thereon-edged pink To Hold unto the Purchasers in fee simple but subject to all rights and easements (if any) existing in over or under the same.
>
> 2. THE Purchasers for themselves their successors and assigns hereby covenant with the Vendors their successors and assigns to erect and for ever afterwards maintain to the satisfaction of the Vendors an unclimbable iron fence not less than six feet in height along all the boundaries of the property

(except the frontage to Longbridge Road aforesaid) And also that they the Purchasers their successors and assigns will henceforth at all times hereafter observe and perform all the restrictions and stipulations contained in the Schedule hereto.

3. PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that the Conveyance hereby made shall not be deemed to include and shall not operate to convey any ways water courses sewers drains lights liberties privileges easements rights or advantages whatsoever in through over or upon any land or property of the Vendors adjoining or near to the property hereby conveyed.

4. PROVIDED ALSO AND IT IS FURTHER AGREED AND DECLARED that the Purchasers their successors and assigns shall not at any time be entitled to the delivery over or production to them or any of them of any title deeds or evidence of title in the possession or control of the Vendors relating (whether solely or not) to the property hereby conveyed or any part thereof or to any copies or abstracts from any of such title deeds or evidence of title.

5. THE Vendors hereby covenant with the Purchasers that they the Vendors have not done or knowingly suffered or been party or privy to any act or thing whereby they are prevented from conveying the said property in manner aforesaid.

IN WITNESS whereof the parties hereto have caused their respective Common Seals to be hereunto affixed the day and year first before written

The Schedule.

(a) Not without the consent in writing of the Vendors to use or allow to be used the said property hereby conveyed or any part or parts thereof for any purposes other than as a site for a building or buildings to be used for educational purposes under the Education Act 1921 or any statutory amendment or re-enactment thereof for the time being in force.

(b) Not to erect on the said property hereby conveyed or any part or parts thereof any building or buildings except in accordance with plans and elevations first submitted to and approved by the Vendors it being the intention that such building or buildings shall be in reasonable harmony with the development of the Vendors' said Becontree Estate.

(c) Not during the lives or life of any issue now living of His Majesty King George V or within twenty-one years next after the death of the last survivor of such issue to sell or (except for the purpose aforesaid) part with the possession of the said property hereby conveyed or any part thereof without first offering it for sale to the Vendors and if the Vendors decide to purchase within three months from the date of the offer the purchase money shall in default of agreement between the parties be determined by an arbitrator either agreed on between the parties or in default of agreement nominated on the request of either party by the President for the time being of the Chartered Surveyors' Institution.'

[23] The relevant terms of the 1932 conveyance are precisely the same as those of the 1931 conveyance save that in the schedule there is an additional clause:

'(d) Not to interfere with or build over the five feet barrel surface water outfall sewer constructed in or under the property hereby conveyed the course of which sewer is shewn by a broken black line on the said plan.'

[24] The 1935 conveyance has not been located, but it appears from the Land Registry entries for titles EGL 378510 and EGL 381956 that the covenants are in similar wording to the 1931 and 1932 conveyances.

[25] Clause 2 of the 1946 conveyance is in the following words:

'The Purchasers for themselves their successors and assigns hereby covenant with the Vendors their successors and assigns at all times hereafter to observe and perform all the restrictions and stipulations contained in the Schedule hereto.'

The schedule provides as follows:

'(a) Not without the consent in writing of the Vendors to use or allow to be used the said property hereby conveyed or any part or parts thereof for any purposes other than as a site for a building or buildings to be used for educational purposes under the Education Act 1944 or any statutory amendment or re-amendment thereof for the time being in force.'

Paragraphs (b) and (c) of the schedule are worded the same as the 1931 conveyance.

IV PRELIMINARY COMMENTS ON CONVEYANCES

[26] There are a number of preliminary comments to be made on the terms of the conveyances.

(a) Right of pre-emption

[27] Rights of pre-emption, if reserved in a conveyance, are commonly framed as restrictive covenants. The pre-emption covenant is so framed. The question arises whether a pre-emption covenant creates an interest in land either as a form of estate contract or as a restrictive covenant.

[28] The general rule at the date of the conveyances was that a contractual (as opposed to a statutory) right of pre-emption does not create an interest in land unless and until the right of pre-emption is triggered and the right to purchase becomes exercisable (see *Pritchard v Briggs* [1980] 1 All ER 294, [1980] Ch 338). (The reversal of this rule by s 115 of the Land Registration Act 2002 is not retrospective.) There can be no suggestion that the right of pre-emption in the pre-emption covenant has been triggered. The right of pre-emption as a form of estate contract accordingly has not created an interest in land. In the alternative it has been suggested that a right of pre-emption (in particular if framed as a restrictive covenant) operates in law as a restrictive covenant. The argument proceeds that, since the grant of the right of pre-emption impliedly imposes on the grantor a negative obligation not to part with the land so as to frustrate the right, a right of pre-emption may be capable of binding successors in title as a restrictive covenant, if it obeys the rules for such covenants, including the rule that the covenant must be for the protection of adjacent land of the covenantee (see eg *Barnsley's Land Options* (3rd edn, 1988) pp 165 and 184–6 and Megarry and Wade *The Law of Real Property* (6th edn, 2000) p 685 (para 12-063)). This suggestion appears dubious, for a restrictive covenant is concerned with restricting the use of land, and not with restraints on alienation. Certainly the

a pre-emption covenant in this case is not a restrictive covenant though it forms an integral part of a single scheme together with the user and approval covenants. The pre-emption covenant accordingly can only bind successors in title of the LCC if and so far as the statutory vesting provisions relating to the Becontree estate or the Barking campus provide.

b *(b) 'Vendors' and 'Purchasers'*

[29] The conveyances define the LCC as 'the Vendors' and Essex as 'the Purchasers'. The conveyances clearly distinguish between covenants and agreements entered into between: (1) the vendors and purchasers alone (e g see recital (2) and cl 5); (2) the purchasers their successors and assigns and the vendors alone (see cl 4); and (3) the vendors their successors and assigns and the c purchasers their successors and assigns (see cl 2). The distinction would appear to be deliberate.

(c) 'Successors and Assigns'

[30] The issue arises as to the meaning and significance of the use of the terms d 'successors and assigns' in cl 2 and the schedule. I have been referred to a large number of authorities on the meaning of these words at various times and in various contexts. I do not think that it is necessary or useful to go through them. It is sufficient to say that in conveyances executed prior to August 1881 (the commencement date of the Conveyancing Act 1881) the term 'assigns' was used to denote successors in title to the land both of the original restrictive covenantor e and of the original covenantee (see e g *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143; *Renals v Cowlishaw* (1878) 9 Ch D 125 at 130; (1879) 11 Ch D 866 at 868, [1874–80] All ER Rep 359 at 362; *Rogers v Hosegood* [1900] 2 Ch 388 at 407, [1900–3] All ER Rep 915 at 921). For the like purpose the term 'successors and assigns' was used in case of covenants given by limited companies (see e g *Formby v Barker* f [1903] 2 Ch 539, [1900–3] All ER Rep 445). The purpose (or at least a purpose) of the use of the formulae appear to have been to make plain the intention that the benefit or burden of the restrictive covenant was not intended to be personal to the covenantor or covenantee.

g *(d) The Conveyancing Act 1881*

[31] The 1881 Act (which received the Royal Assent in August 1881) so far as material provided as follows: '**58.**—(1) A covenant relating to land of inheritance ... shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.'

[32] As stated in the commentary on the section in the 10th edition (1913) of h Wolstenholme, Cherry, Russell & Rawlence *Conveyancing and Settled Land Acts &c.*, p 129, the section rendered use of the words 'his heirs and assigns' unnecessary. But the words 'heirs and assigns' (see e g *Chambers v Randall* [1923] 1 Ch 149, [1922] All ER Rep 565) and 'successors' (see *Re Ecclesiastical Comrs for England's Conveyance, Re Law of Property Act 1925* [1936] Ch 430, [1034] All ER Rep 118) continued to be j used. In *Newton Abbot Co-operative Society Ltd v Williamson and Treadgold Ltd* [1952] 1 All ER 279, [1952] Ch 286 Upjohn J stated that in this context the word 'assign' was apposite to an assign of the land and not the benefit of the covenant. As Mr Ainger (counsel for UEL) submitted to me, conveyancers and judges continued to use the terms 'successors' and 'assigns' to show that the burden or benefit of the covenant was not intended to be personal to the covenantor or covenantee. It was not used to give any indication that the covenant was intended to be annexed to the

covenantee's land. It is to be noted that by a conveyance dated 25 October 1923 the LCC conveyed part of the Becontree estate, the future site of a primary school, to Essex subject to restrictive covenants in the same terms as the covenants save that there was no grant of a right of pre-emption.

(e) Section 78 of the Law of Property Act 1925

[33] Section 78(1) provides that a restrictive covenant relating to the land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them and shall have effect as if such successors and other persons were expressed, and the term 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

[34] This section was the subject of authoritative consideration by the Court of Appeal in *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410, [2004] 2 All ER 991n, [2004] 1 WLR 2409. The court there held that s 78(1) deems the covenants to be made with the owners and occupiers of the protected land for the time being and effects a statutory annexation of the benefit of a restrictive covenant to the land intended to be protected unless the instrument manifests the contrary intention. The relevant passages read as follows ([2004] 1 WLR 2409):

> '[41] ... it is impossible to identify any reason of policy why a covenantor should not, by express words, be entitled to limit the scope of the obligation which he is undertaking; nor why a covenantee should not be able to accept a covenant for his own benefit on terms that the benefit does not pass automatically to all those to whom he sells on parts of his retained land ... a developer who is selling off land in lots might well want to retain the benefit of a building restriction under his own control. Where ... development land is sold off in plots without imposing a building scheme, it seems to me very likely that the developer will wish to retain exclusive power to give or withhold consent to a modification or relaxation of a restriction on building which he imposes on each purchaser; unfettered by the need to obtain the consent of every subsequent purchaser to whom (after imposing the covenant) he has sold off other plots on the development land ...
>
> [42] ... section 78 of the [Law of Property Act 1925] defines "successors in title" as the owners and occupiers of the time being *of the land of the covenantee intended to be benefited*. In a case where the parties to the instrument make clear their intention that land retained by the covenantee at the time of the conveyance effected by the transfer is to have the benefit of the covenant only for so long as it continues to be in the ownership of the original covenantee, and not after it has been sold on by the original covenantee—unless the benefit of the covenant is expressly assigned to the new owner—*the land of the covenantee intended to be benefited* is identified by the instrument as (i) so much of the retained land as from time to time has not been sold off by the original covenantee and (ii) so much of the retained land as has been sold off with the benefit of an express assignment, but as not including (iii) so much of the land as has been sold off without the benefit of an express assignment.'

V THE ISSUES

[35] By these proceedings the parties seek the determination of a whole series of questions. In the course of the hearing the parties have made a number of additions and have agreed to defer a number of questions. I shall accordingly set out to answer those which require determination today.

(a) Single or separate covenants

[36] The first issue is whether the covenants in each of the conveyances form one single covenant or are separate and distinct. In my judgment in each of the conveyances there is a single scheme of covenants designed as a package to protect the Becontree estate and in particular the LCC as owner of the Becontree estate. Two covenants protect against use of the Barking campus otherwise than for the purpose of public education and against the erection of any building out of harmony with the Becontree estate. The third covenant protects against any sale of the Barking campus and against any parting with possession except for the purposes for provision of public education without first offering to sell to the LCC. In a word, the three covenants are aimed in the furthering of the same single purpose and complement each other, but they are of themselves separate and freestanding.

(b) Identity of beneficiary

[37] The second issue is the identity of the persons intended to be benefited by and to be entitled to enforce the covenants. The alternatives include: (a) the LCC alone; (b) any local authority which succeeded to the HA functions in relation to the Becontree estate; and (c) any successor in title claiming title under or through the LCC. The covenants given by Essex related to the remainder of the Becontree estate in the course of development by the LCC under the HA 1925 (referred to in cl 1 of the conveyance) and is accordingly to be deemed under s 78 to be made with the LCC and its successors in title and persons claiming title under the LCC unless a contrary intention is expressed. The question raised is whether a contrary intention is expressed.

[38] It has been argued before me that the conveyances do manifest such intention for the following reasons: (i) each of the conveyances refers to the LCC's acquisition and development of the Becontree estate under the HA 1925 and accordingly to the status of the Becontree estate as a municipal housing estate and to the capacity of the LCC as housing authority; (ii) the conveyances were executed under statutory powers conferred upon the LCC as housing authority; (iii) the terms 'successor' and 'assigns' are apposite for a successor in whole or in part to the housing responsibilities of the LCC in relation to the Becontree estate; (iv) the terms of the covenants are apposite for the protection of public housing on the Becontree estate; and (v) the provisions of the covenants themselves reserve to the LCC the exclusive power to give consent to any change of user and to plans and elevations for new buildings and (in case of any sale or parting with possession) the right of pre-emption. In a word the key to the covenants is the position of the LCC which alone has the right to say 'Yes' or 'No' and to decide whether the covenants should be enforced.

[39] After anxious consideration I have concluded on a fair reading of the conveyances in their historical context that the intention is expressed that the benefit of the covenants is to be confined to the LCC and to any other body to which by statute the LCC's statutory housing functions and the Becontree estate are transferred and to which incidental to that transfer the contractual rights are

also transferred. The purpose of imposing the covenants was to impose on Essex (and its statutory successors) the obligation to fulfil the purpose for which the LCC conveyed to it the Barking campus and to confer on the LCC (and its statutory successors) the right to require Essex and its statutory successors to fulfil that obligation. The formula of words 'successors and assigns' is deliberately and appropriately adopted as apposite for the situation where (as was the situation) it was recognised that the statutory housing functions of the LCC (together with the benefit of the covenants) might at any time be statutorily transferred elsewhere. This construction is confirmed by heading (c) below (see [40], [41], below). As a consequence of this holding: (1) neither tenants of LBBD or LBR nor purchasers of properties on the Becontree estate from the LCC, GLC, LBBD or LBR (whether or not having exercised statutory or other rights to buy) are entitled to the benefit of or to enforce the restrictive covenants; and (2) the area of the Becontree estate protected by the restrictive covenants has at all times been subject to reduction by the disposal by way of sale of properties on the Becontree estate by the LCC, the GLC, LBBD and LBR in exercise of their statutory powers and pursuant to their statutory duties.

(c) Identity of parties subjected to the covenants

[40] The third question relates to the identity of the owners of Barking campus who hold subject to the covenants, and in particular whether the covenants are intended to bind purchasers from Essex.

[41] In cl 2 of the conveyances Essex covenanted for themselves, their successors and assigns to observe and perform the covenants. The formula 'successors and assigns' is the same formula used to identify the beneficiaries of the covenants and accordingly those words prima facie have the same meaning, ie those to whom are statutorily transferred or assigned together with the Barking campus Essex's statutory functions in respect of the provision of public education. That this is the case and that the covenants are not intended to bind anyone else (eg a purchaser from, or tenant or licensee of, Essex) is made plain by the terms of the pre-emption covenant. The terms of the pre-emption covenant make plain that Essex (and its statutory successors and assigns) are free consistently with the user and approval covenants to sell and to part with possession for use for non-educational purposes, for the pre-emption covenant expressly provides for that eventuality. As the method of protecting the interests of the LCC and its statutory successors and assigns in this eventuality, the pre-emption covenant confers on them the right of pre-emption.

(d) Purchase price payable under pre-emption covenant

[42] The fourth question raised relates to the purchase price payable under the pre-emption covenant. The conveyances provide that on exercise of the right of pre-emption, in default of agreement between the parties, the price shall be determined by an arbitrator. The issue between the parties is whether for this purpose the arbitrator is to value the Barking campus subject to or free from the user and approval covenants. There can be no doubt that the restrictive covenants should be ignored if no longer valid or subsisting at the date of exercise of the right of pre-emption. It is likewise clear that they should be taken into account if they are valid and subsisting and will bind the purchaser of the Barking campus. The critical issue is whether they are to be taken into account if at the date of exercise they are binding on the seller (Essex) but will not bind a purchaser including a successor to the LCC exercising the right of pre-emption.

[43] The answer must be found in the language of the conveyances. This is not a case where the restrictive covenants will be extinguished by merger on completion of the sale of the servient land to the owner of the dominant land, in which case an intention might readily be implied that the 'marriage value' arising from the extinguishment of the burden of the restrictive covenant shall be shared. This is a case where (as I have held) upon the true construction of the conveyances Essex and its successors and assigns have at all times been entitled to sell the Barking campus free of any restriction, but subject only to first offering to sell to the LCC and its statutory successors and assigns. Viewed in this way (which I think is the correct way) the market value of the Barking campus must be determined free from the user and approval covenants. There is no indication in the conveyances that the purchase price payable should be artificially limited, as it often is in cases of statutory grants of rights of pre-emption, eg to the price originally paid by the grantor or below the full market value.

(e) Vesting of benefit of the covenants

[44] The fifth question raised is whether the benefit of the covenants reserved by the LCC and statutorily transferred to the GLC is now vested in LBBD and LBR. For this purpose it is necessary to distinguish between the restrictive covenants and the pre-emption covenant. The benefit of the restrictive covenants can in the ordinary way pass to a purchaser of the dominant land by assignment or annexation. There can be no annexation in respect of the pre-emption covenant.

[45] I begin with assignment. It is clear (even as it is common ground) that the benefit of the covenants was statutorily transferred by s 23(5) of the 1963 Act and para 5(2)(ii) of the 1964 order from the LCC to the GLC, and there vested in the GLC in place of the LCC the right to give consent under the user covenants and to grant approval under the approval covenant and to exercise the right of pre-emption. The question raised is whether the benefit of the covenants was transferred from the GLC to LBBD and LBR between 1971 and 1982 by the transfer orders.

[46] The critical article (the article) in the case of each of the transfer orders was to the effect that 'all contracts, deeds agreements and other instruments subsisting in favour of' the GLC in respect of the parts of the Becontree estate thereby transferred 'shall be of full force and effect in favour of' the transferee authority.

[47] I have in mind that the need for Essex and its statutory successors and assigns to obtain consent and approval from two bodies rather than one may be more onerous. None the less in my judgment the language of the article is clearly amply sufficient to effect a statutory assignment of the benefit of the restrictive covenants so far as they affect each transferred parcel of the Becontree estate and (in respect of each such parcel of the Becontree estate) the right to give consent to changes of user and approval of plans. The position is more difficult in respect of the benefit of the pre-emption covenant. The conveyances, as it seems to me, set out to create a single and indivisible right of pre-emption in favour of the LCC and statute later substituted the GLC when it became (in place of the LCC) the statutory housing authority in respect of the Becontree estate. The GLC is no more. I cannot read the article as vesting in LBBD or LBR as housing authorities owning the greater or lesser part of the Becontree estate the right to require an offer of sale to be made to either of them.

[48] The question arises whether, upon the true construction of the article, whilst accordingly the statutory transferees of part or parts of the Becontree estate (ie LBBD and LBR individually) are individually not qualified to exercise the

pre-emption covenant, none the less they are so qualified acting together owning as they do between them the entirety of the Becontree estate and constituting the housing authority for that entirety. If they are qualified, there should be no obstacle to the two public authorities adopting arrangements to effect such co-operation (see eg s 101(5) of the Local Government Act 1972).

[49] After long and anxious consideration I have reached the conclusion that the article does admit of this construction. It is to be borne in mind that the replacement in whole or in part of the LCC as public housing authority for the Becontree estate by one or more other authorities was a real possibility when the conveyances were executed and provision for transfer orders to the London borough councils was provided for in the 1963 Act. It cannot sensibly have been the intention of the draftsman of the conveyances or of the article that the right of pre-emption should be extinguished or cease to be exercisable in this eventuality. A purposive and commonsense construction in my view can and should be adopted to the effect that upon the statutory division of the Becontree estate between LBBD and LBR the pre-emption covenant continued to be enforceable by LBBD and LBR acting together in right of that ownership and of that statutory function.

[50] Since I have found that the benefit of the covenants was assigned, it is unnecessary to decide whether (in the alternative) the benefit of the restrictive covenants was annexed. I should however briefly express my view. I think that the benefit of the restrictive covenants was annexed to each and every part of the Becontree estate. Such annexation is in no way incompatible with the limitation of entitlement to the benefit of the restrictive covenants to the LCC and the successors to its statutory functions in respect of the Becontree estate. As held in *Crest Nicholson Residential (South) Ltd v McAllister* [2004] 2 All ER 991n, [2004] 1 WLR 2409, s 78 effects a statutory annexation to each and every part of the Becontree estate for the benefit of the LCC's statutory successors and assigns of the benefit of the restrictive covenants unless the instrument manifests a contrary intention. I can see no such contrary intention, let alone sufficient to exclude the operation of the section. The annexation is to each and every part of the Becontree estate and accordingly annexation is not precluded by the fact that the Becontree estate is now vested in two local authorities rather than one as was the position when the Becontree estate was vested in the LCC (and GLC). This accords with the presumed intention of the parties, for the future division of housing functions between local authorities was, as I have already said, a real possibility when the conveyances were executed.

(f) Effect of loss of right to consent or approve or exercise right of pre-emption

[51] The provisions of the covenants for 'the Vendor' to give consent to a change of user and approval to plans and prohibiting sale or parting with possession without first offering for sale to 'the Vendor' can still operate because the right to give consent and to exercise the right of pre-emption is vested in LBBD and LBR. I have been addressed at some length on the legal effect of a finding to the contrary effect and in particular of a finding that the right to give consent and approval and to exercise the right to pre-emption has ceased to be exercisable. The issue would then arise whether the covenants became absolute or whether the covenants as a matter of construction or by reason of implication of a term should be held to be discharged. Guidance on this issue is provided in the judgment of Neuberger J (approved on appeal by Chadwick LJ [2004] 2 All ER 991n, [2004] 1 WLR 2409) in *Crest Nicholson Residential (South) Ltd v McAllister* [2002] EWHC 2443 (Ch), [2003] 1 All ER 46. That guidance is to the effect that, if the person designated to exercise

the right to give consent or approval ceases to exist, the court must determine as a matter of construction of, or of implication of terms into, the conveyances whether the provisions for consent to the change of user and approval of plans are so bound together with the provisions imposing the restrictions that, if one goes, so does the other, or in other words whether the provisions for consent or approval are so fundamental as exceptions to the restrictions and are such an essential part of the restrictions that the restrictions are likewise discharged. On this basis, if I had found that the power to give approval was no longer exercisable because there no longer existed any person competent to give approval, I would have held that the provisions of the approval covenant as a whole (a covenant for practical purposes the same as that held discharged in *Crest Nicholson Residential (South) Ltd v McAllister*) were discharged. Likewise I would have held that the prohibition on selling or (except for the stipulated educational purposes) parting with possession in the pre-emption covenant (if otherwise enforceable) would be discharged, for there would be no one to whom the offer to sell could be made (consider the judgment of Neuberger J [2003] 1 All ER 46 at [59]). But the user covenant would survive challenge on this ground and become absolute.

VI UNITY OF SEISIN

[52] The legal title to the Barking campus and part of the Becontree estate was vested in the LBBD between 22 February 1971 (when the first tranche of the Becontree estate was divested from GLC) and 1 April 1989 when NELP became a Higher Education Corporation. UEL contends that, if LBBD was entitled (whether solely or together with LBR) to the benefit of the covenants, the covenants ceased to be enforceable by LBBD by reason of unity of seisin.

[53] The legal principle is briefly stated in *Texaco Antilles Ltd v Kernochan* [1973] 2 All ER 118 at 127, [1973] AC 609 at 626 that—

> 'if the restrictions in question exist simply for the mutual benefit of two adjoining properties [and not as part of a building scheme] and both those properties are bought by one man the restrictions will automatically come to an end and will not revive on a subsequent severance unless the common owner then recreates them.'

[54] There is however a qualification upon this general principle which is ordinarily applicable, namely that there must be complete unity not merely of ownership, but also of possession. As stated by Powell J in *Post Investments Pty Ltd v Wilson* (1990) 26 NSWLR 598 at 631, the law in this regard has developed by analogy with the law relating to easements, and the benefit of a restrictive covenant is destroyed 'upon the ownership and possession of both dominant and servient tenements coming into the same hands'. The basis for the qualification, as it appears to me, is that a restrictive covenant is not to be extinguished if there continues to exist a person (whether or not the successor in title to the estate held by the original covenantor or the original covenantee) entitled to the benefit or subject to the burden of the restrictive covenant.

[55] The authorities do not directly address the question whether restrictive covenants are extinguished where both tenements are in the same ownership and possession, but one tenement is occupied or subject to a right of occupation vested in a third party. On principle (as it seems to me) this must depend on whether the third party occupier is bound by or entitled to enforce the restrictive covenant. It is established that a restrictive covenant is enforceable against an occupier (*Mander v Falcke* [1891] 2 Ch 554). It is likewise established that an occupier (most particularly

of a residential home) may be entitled to sue in nuisance and for disturbance of an easement (see *Gale on Easements* (17th edn, 2002) p 491 (paras 14-17 and 14-18 and cases cited)). Occupation may be exclusive or it may be joint either with the legal owner or possessor or with someone else. I am of the view that any of these forms of occupation is sufficient to save a restrictive covenant from being extinguished. But whether or not this is so, in my judgment the governing body in this case was in exclusive occupation (if not possession) of the Barking campus and LBBD merely retained rights of access for specific purposes. Moreover, even if the governing body's occupation was not exclusive, its occupation was protected from interference by LBBD successively by the 1969 and the 1986 agreements. Both this occupation by the governing body and the possession of the Becontree estate by tenants of LBBD would each independently in the ordinary case preclude extinguishment by unity of seisin, for ordinarily occupiers in the position of the governing body would be bound by the restrictive covenants and occupiers in the position of LBBD's tenants would be entitled to enforce them. But this is not the ordinary case, for (as I have already held) upon their true construction the restrictive covenants did not bind the governing body and were not enforceable by the tenants.

[56] Since only the LBBD were accordingly entitled to enforce and were subject to the restrictive covenants in respect of the part of the Becontree estate vested in LBBD, the restrictive covenants in respect of that part of the Becontree estate are extinguished by unity of seisin unless LBBD and LBR succeed in their submission that there is a further qualification upon the general principle. That further qualification is that the unity of ownership of the dominant and servient properties necessary to extinguish restrictive covenants must be in the same right and that this requirement is not satisfied in this case. There are three stages in this argument: (1) when a trustee holds the dominant and servient properties on different trusts or for different trust purposes, there is no extinguishment of the covenant; (2) the ownership of LBBD of the Becontree estate and of the Barking campus was for different statutory purposes (namely for housing and education); (3) for this purpose the holding for different statutory purposes is analogous to, and the equivalent of, holding on different trusts (citing *Prescott v Birmingham Corp* [1954] 3 All ER 698, [1955] Ch 210).

[57] The general principle is that there is no merger of interests where the interests are not held in the same right. In *Chambers v Kingham* (1878) 10 Ch D 743 the issue arose whether a lease vested in an administrator in his own right merged in the reversion held by him as administrator. Fry J said (at 745) citing a passage from Williams J's work on *Executors* (6th edn (p 608)): 'mergers are odious in equity and never allowed unless for special reasons.' He held that there was no merger because the interests were held in different rights. I have no doubt that there is no extinguishment of restrictive covenants when the dominant and servient properties are held by the same trustee on distinct trusts. The trustee in such a situation remains under a duty as trustee of the dominant land to require that the use of the servient land complies with the covenant. The critical question is whether this same principle applies when both properties are held by a public authority for different statutory purposes.

[58] No authority has been cited which directly considers this question, and I must approach it as a matter of principle. There is high authority that: (1) the powers of local authorities conferred upon them for public purposes are conferred upon them 'as it were upon trust, not absolutely' and that they can only be lawfully used in the right and proper way which Parliament when conferring them may be

presumed to have intended (see *Tower Hamlets London BC v Chetnik Developments Ltd* [1988] 1 All ER 961 at 966, [1988] AC 858 at 872); and (2) the duties of local authorities in respect of their various powers are owed, not just to ratepayers, but to other classes of persons who are affected (see *Bromley London BC v Greater London Council* [1982] 1 All ER 129 at 154, [1983] 1 AC 768 at 814–815). Where a local authority holds for one purpose the dominant land and for another the servient, a blanket rule requiring such common ownership to operate to extinguish all restrictive covenants would prejudice the performance by the local authority of its statutory duties and fulfil no useful purpose. The analogy with joint ownership by a private person subject to no public or private law duties is inapplicable.

[59] For restrictive covenants to be extinguished merely because fortuitously the same public body held for different statutory purposes the dominant and servient properties would be calculated to defeat the objects of the restrictive covenants for no good or sufficient reason. In the words of Fry J the merger and extinguishment of the restrictive covenants would be 'odious' and there is no reason for it.

[60] I therefore hold that, because the dominant and servient properties were held for different statutory purposes, the restrictive covenants are not extinguished by unity of seisin.

CONCLUSION

[61] I accordingly hold that: (1) the covenants are valid and subsisting; (2) the benefit is vested in LBBD and LBR and the burden falls on UEL; (3) UEL is free to sell the Barking campus for its full market value free of the restrictive covenants, but by doing so will trigger the pre-emption clause; and (4) if UEL triggers that clause and LBBD and LBR exercise the right of pre-emption, they will be required to pay the full market price for the Barking campus free from the restrictive covenants.

[62] On the basis of my judgment the only persons interested in any outstanding issue in this litigation are public bodies namely UEL, LBBD and LBR and the only issue is monetary, namely what (if anything) UEL should pay to obtain a release from the covenants. This litigation has no doubt been extremely expensive and has been necessary until a judicial determination had been obtained whether the third defendants had an interest. That determination has now been obtained. In these circumstances UEL, LBBD and LBR as public bodies must be bound to use every effort to settle by agreement any outstanding issues without further expenditure of public funds by negotiations, mediation or some other form of alternative dispute resolution and they should (with goodwill) be able to do so.

[63] I conclude by acknowledging my debt to counsel for their valuable assistance at the hearing and in the skeleton arguments subsequently lodged during August, September and October 2004.

Order accordingly.

Neneh Munu Barrister.

University of East London Higher Education Corp v Barking and Dagenham London Borough Council and others (No 2)

[2004] EWHC 2908 (Ch)

CHANCERY DIVISION

LIGHTMAN J

10, 14 DECEMBER 2004

Restrictive covenant affecting land – Declaration whether covenant affecting land unenforceable – Costs of High Court application – Incidence of costs – Pre-CPR rule of practice – Whether consistent with CPR – Law of Property Act 1925, s 84(2) – CPR 44.3(2).

The claimant, who wished to clear its title to certain land and sell it, had applied under s 84(2)[a] of the Law of Property Act 1925 for declarations of freedom from certain restrictive covenants. The judge held that the covenants bound the claimant and were enforceable by the first two defendants. However, he also held that the claimant was entitled to sell the land free from the covenants which would trigger the entitlement of the first two defendants to exercise a right of pre-emption and that the price payable on the exercise of that right was the full market price. The issue of costs then arose. The 1925 Act conferred a discretionary jurisdiction on the court to make orders as to costs on such applications and there was an established rule of practice that a party seeking a declaration that restrictive covenants did not affect his property was expected to pay his own costs and the costs of any defendants who entered an appearance down to the point in proceedings at which they had a full opportunity of considering the matter and deciding whether or not to oppose the application. A defendant who then decided to continue and appeared unsuccessfully did so at his own risk as to his own costs at that stage, but he would not be ordered to pay the other party's costs. The costs were payable on common fund or solicitor and client basis. The claimant drew attention to CPR 44.3(2)[b] which provided that the general rule was that the unsuccessful party would be ordered to pay the costs of the successful party but that the court could make a different order and questioned whether the rule of practice had survived the CPR or should be given effect as a reason for making a different order.

Held – The 'rule of practice' was fully consistent with the CPR although it was now to be treated as a guideline in the exercise of the discretionary jurisdiction as to costs rather than a rule. The rationale for the rule had been that the claimant applying for a declaration under s 84(2) of the 1925 Act was seeking for his own benefit the protection of a court order against the existence of any adverse rights and for that

a Section 84, so far as material, provides: '(2) The court shall have power on the application of any person interested—(a) to declare whether ... any freehold land is affected by a restriction imposed by any instrument ...'

b CPR 44.3, so far as material, provides: '(2) If the court decides to make an order about costs (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order ...'

purpose had to join as defendants all who might have had such rights. The policy of the law in those circumstances was to encourage the defendants to contribute to the investigation by the court by reassuring them that until the new full facts were known and an informed decision whether to oppose the application could be reached they would be indemnified against costs incurred and that thereafter, in case their decision to oppose proved erroneous, they were put at no risk by so doing of incurring an adverse order as to costs. That rationale remained applicable although it was now necessary to reflect the emphasis placed by the CPR on pre-action disclosure as the 'rule of practice' reflected a time when full disclosure was only to be expected after proceedings had been commenced. The equivalent level of costs was now costs on an indemnity basis. In the instant case, the 'rule of practice' as a guideline, the respective successes and failures of the parties, and justice, required that the claimant should pay the defendants' costs on an indemnity basis (see [10]–[14], below).

Re Jeffkin's Indentures [1965] 1 All ER 608n and *Re Wembley Park Estate Co Ltd's Transfer, London Sephardi Trust v Baker* [1968] 1 All ER 457 considered.

Notes

For discharge or modification of covenants under the statutory power: jurisdiction of the court, see 16(2) *Halsbury's Laws* (4th edn reissue) para 641, and for general rules about costs: the court's discretion, see 10 *Halsbury's Laws* (4th edn reissue) para 16.

For the Law of Property Act 1925, s 84, see 37 *Halsbury's Statutes* (4th edn) (2003 reissue) 217.

Cases referred to in judgment

Jeffkin's Indentures, Re [1965] 1 All ER 608n, [1965] 1 WLR 375.

Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 2 All ER 299, [1999] 1 WLR 1507, CA.

Sainsbury (J) plc v Enfield London BC [1989] 2 All ER 817, [1989] 1 WLR 590.

Wembley Park Estate Co Ltd's Transfer, Re, London Sephardi Trust v Baker [1968] 1 All ER 457, [1968] Ch 491, [1968] 2 WLR 500.

Application for costs

The claimant, the University of East London Higher Education Corporation and the first and second defendants, the London Borough of Barking and Dagenham and the London Borough of Redbridge applied for orders for costs following the judgment of Lightman J on 9 December 2004 ([2004] EWHC 2710 Ch, [2005] 3 All ER 398) on the claimant's application for a declaration under s 84(2) of the Law of Property Act 1925. The third defendants, who did not appear, were persons unknown owning or occupying property forming part of the Becontree estate. The facts are set out in the judgment.

David Ainger (instructed by *Finers Stephens Innocent*) for the claimant.

Christopher Cant (instructed by *Barlow Lyde & Gilbert*) for the first defendant.

Karen Walden-Smith (instructed by *Heidi Chottin*) for the second defendant.

Cur adv vult

14 December 2004. The following judgment was delivered.

LIGHTMAN J.

[1] On 9 December 2004 I gave judgment in this case. By my judgment I upheld the first two defendants' contentions that the covenants imposed by four conveyances (the covenants) bound the claimant as owner of the Barking campus and were enforceable by the first two defendants as owners of the Becontree estate. I held that they were not enforceable by the (unrepresented) third defendants. But I went on to hold that the claimant was entitled to sell the Barking campus free from the covenants, that by doing so the claimant would trigger the entitlement of the first two defendants to exercise a right of pre-emption and that the price payable on exercise of the right of pre-emption was the full market price. Questions were then raised as to the grant of permission to appeal and as to costs, which were adjourned to 10 December 2004 to enable the parties to marshal in the form of skeleton arguments their respective contentions on these issues. Skeleton arguments were prepared and exchanged.

[2] On 10 December 2004 the first two defendants gave me details of the issues on which they requested permission to appeal. It is sufficient to say that I consider that the first two defendants should have permission to appeal on those issues.

[3] The issue of costs is less straightforward. An immediate reaction to the judgment is to say that as a practical matter the claimant has succeeded in this litigation for, whatever the position regarding the validity of the covenants, the claimant has established its entitlement to sell each, any or all of the four parts of the Barking campus free of the covenants at their full market value either on the open market or (on exercise of the right of pre-emption) to the first two defendants. But I do not think that it would be proper to adopt such a simplistic approach.

[4] The claimant commenced these proceedings to clear its title to the Barking campus. The application is made for declarations of freedom from the covenants under s 84(2) of the Law of Property Act 1925 which confers upon the court a jurisdiction to grant declarations to this effect. Section 84(5) provides that such declarations are binding on everyone interested ie for practical purposes 'in rem' or as to the status of the Barking campus. Section 203(5) of the 1925 Act expressly confers on the court a discretionary jurisdiction to make orders as to costs on such applications. Guidance as to how the jurisdiction is to be exercised must however be found elsewhere.

[5] In *Re Jeffkin's Indentures* [1965] 1 All ER 608n at 608, [1965] 1 WLR 375 at 375 Cross J stated the rule of practice (the rule of practice) established since 1937 as follows:

> 'a plaintiff seeking a declaration that restrictive covenants do not affect his property is expected to pay his own costs. He is also expected to pay the costs of any defendants who enter an appearance down to the point in proceedings at which they have a full opportunity of considering the matter and deciding whether or not to oppose the application. Any defendant who then decides to continue, and appears unsuccessfully before the judge, does so at his own risk as to his own costs at that stage. Such a defendant would not, however, be ordered to pay the plaintiff's costs.'

[6] In *Re Wembley Park Estate Co Ltd's Transfer, London Sephardi Trust v Baker* [1968] 1 All ER 457 at 466, [1968] Ch 491 at 507–508 Goff J confirmed the rule of practice and that the costs payable to the defendant should be paid on the common fund basis

'since the obtaining of the order is something in the nature of a luxury to the plaintiffs for which they ought to pay'.

[7] In *J Sainsbury plc v Enfield London BC* [1989] 2 All ER 817, [1989] 1 WLR 590 Morritt J held that the successful applicant for a declaration under s 84(2) in that case should be paid its costs by the defendants. The law report does not state the reasons for the decision. It is not apparent whether the defendant sought to rely on the rule of practice or whether there was some reason why it was not applicable. In the circumstances I do not think that the decision should be treated as negating or qualifying the rule of practice.

[8] Mr Ainger, counsel for the claimant, has questioned whether the rule of practice has survived the CPR. CPR 1.1 lays down that the CPR are a new procedural code with the overriding objective of enabling the court to deal with cases justly and CPR 1.2 requires the court to seek to give effect to the overriding objective when exercising any power given by the CPR and when interpreting any rule. CPR 44.3(2) provides that, whilst the court has a broad discretion as to costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but that the court may make a different order. It is common ground that the terms of CPR 44.3(2) in general reflect the pre-CPR law but the CPR is much more specific as to the matters to which the court should have regard in deciding what order should be made (see *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 2 All ER 299 at 313, [1999] 1 WLR 1507 at 1522, per Lord Woolf MR). The question raised however is whether the rule of practice should be given effect as a reason for making a different order.

[9] In my judgment the correct approach in answering a question such as this is to start with the terms of the CPR as a new procedural code, and then to examine the underlying rationale for the prior authority or practice and determine how far it is consonant with the terms and the principles of the CPR and how far giving effect to them accords with the overriding objective.

[10] The rationale for the rule of practice is that the claimant applying for the declaration is seeking for his own benefit the protection of a court order against the existence of any adverse rights and for this purpose must join as defendants all persons or representatives of all persons who may have adverse rights. The court must for this purpose be satisfied that there are no adverse third party rights whether or not such defendants take part in the proceedings. The policy of the law in these circumstances is to encourage the defendants to contribute to the investigation by the court by reassuring them that until the new full facts are known and an informed decision whether to oppose the application can be reached they will be indemnified against costs incurred, and thereafter (in case their decision to oppose proved erroneous) they are put at no risk by so doing of incurring adverse order as to costs. It is just that, as the price of the exercise of the court's extraordinary jurisdiction in his favour, the claimant should provide the fullest available information to third parties to enable them to make an informed decision whether to oppose the application and to act on such information and pay for the costs of this exercise; and that after this exercise has been completed the claimant should pay the costs of the defendant if the defendant succeeds in his objection, but should have no right to recover his own costs if the objection fails.

[11] As it seems to me the rationale for the rule of practice is equally applicable today as it was prior to the CPR and both the rule of practice and the rationale are (subject to three minor glosses) fully consistent with the CPR. The first gloss is that the rule of practice is a guideline in the exercise of the discretionary jurisdiction as to costs rather than a rule. It has less rigour than a rule and is more flexible. The second

is that there is a need to reflect the emphasis placed by the CPR on pre-action disclosure. The rule of practice reflected a time when full disclosure was only to be expected after proceedings had been commenced. The opportunity to obtain such disclosure after the CPR may, and indeed generally should, be afforded before proceedings are commenced and the defendant may be able to take an informed decision whether to oppose the application before the proceedings commenced. In either event the claimant should be obliged to pay the costs of the exercise, but the exercise may be completed before the proceedings commenced. The third relates to the level of costs. Under the pre-CPR practice the entitlement of the defendant was to costs on a common fund or solicitor and client base. The equivalent basis today is indemnity costs.

[12] I turn to the application of the relevant legal principles to the facts of this case. The position in a nutshell is that on all the issues argued before me relating to the validity and enforceability of the covenants the first two defendants succeeded. More than this on all issues raised before me prior to 16 July 2004 the first two defendants succeeded. The only issue on which they failed was the issue of construction of the pre-emption clause which I raised as late as 16 July 2004 very much at the close of oral argument. The success of the claimant on this issue has very considerable practical significance, but it had no significance until that late stage. It was not an issue raised by either side at any earlier stage and it was an issue which, once raised did not admit elaborate argument.

[13] Whilst success on the construction of the pre-emption clause salvages the case so far as it concerns the claimant, I do not think that it salvages the case for the purposes of costs. Success on the issue is 'bounty', but in nowise should it cloud the total success of the first two defendants on all issues raised until the last moment in the action.

[14] After anxious consideration I have concluded that both the rule of practice as a guideline, the respective successes and failures of the parties and justice require that the claimant should pay the defendants' costs of this action on an indemnity basis. I make it clear that I have considered whether I should allow the claimant a discount for success in respect of the right of pre-emption, but I have decided that I should not do so. The claimant sought a determination of all rights under the conveyances. The first two defendants acted totally reasonably in meeting this late raised plea as they did. It is justice enough for the claimant that the plea was allowed to be raised at all.

[15] I have to decide whether to allow two sets of costs, one for each of the first two defendants. I have been anxious about their separate representation at the trial. I have however concluded that this was reasonable. The interests of the first two defendants are in general practically identical. I do no think that it is significant that the first defendant alone was interested in the issue of unity of seisin: there was no conflict of interest on this issue. But there was a potential conflict of interest as to whether entitlement to enforce the covenants might be vested in the first defendant alone, for the great bulk of the Becontree estate is vested in it. The propriety of separate representation is supported by the fact that the claimant at no stage objected to it or raised any question in regard to it. Ms Walden-Smith, the second defendant's counsel was careful to avoid duplicating the submissions of Mr Cant, counsel for the first defendant. Both counsel gave me invaluable assistance. I think I should allow both sets of costs.

Order accordingly.

Neneh Munu Barrister.

Re SK (an adult) (forced marriage: appropriate relief)

[2004] EWHC 3202 (Fam)

FAMILY DIVISION

SINGER J

10 DECEMBER 2004, 3 FEBRUARY 2005

High Court – Jurisdiction – Inherent jurisdiction – Circumstances in which exercisable – Circumstances leading to suspicion where forced marriage abroad of adult British citizen might be in contemplation – Whether jurisdiction to grant appropriate relief.

SK was a young adult British citizen habitually resident in England. She was believed to be in Bangladesh, from where her family had originated. Consular officers in Bangladesh and London had received information concerning her which, if true, would have led to the conclusion that she might be being kept by relatives or friends of relatives and family in Bangladesh contrary to her will, and that her anticipated return to the United Kingdom, the expected date of which had been seriously delayed, might be being frustrated as part of an attempt to marry her forcibly. A without notice application for relief on SK's behalf was made to the High Court and the court considered the issue of jurisdiction.

Held – It was within the court's power to make orders and give directions designed to ascertain whether or not an adult English resident currently abroad had been able to exercise his or her free will in decisions concerning civil status and country of residence. The inherent jurisdiction of the court could, in an appropriate case, be relied upon and utilised to provide a remedy. In the instant case the defendants to the order would include SK's parents. The purpose of the order would be to do what could be done properly to order the defendants and to invite and encourage other persons and authorities not subject to the court's orders to arrange for SK to be seen by an appropriate official at the High Commission for the purpose of establishing what her true wishes were (see [8]–[10], below).

Re S (hospital patient: court's jurisdiction) [1995] 3 All ER 290 and *A v A Health Authority, Re J* [2002] FCR 481 considered.

Notes

For the inherent jurisdiction of the court, see 37 *Halsbury's Laws* (4th edn reissue) para 12.

Cases referred to in judgment

A v A Health Authority, Re J [2002] EWHC 18 (Fam/Admin), [2002] 1 FCR 481, [2002] 3 WLR 24.

P v R (Forced Marriage: Annulment: Procedure) [2003] 1 FLR 661.

S (hospital patient: court's jurisdiction), Re [1995] 3 All ER 290, [1995] 3 WLR 78, CA.

Application

An application was made without notice on behalf of SK (an adult), the proposed plaintiff, without her knowledge by her litigation friend Anne-Marie Hutchinson for the exercise of the powers of the High Court in relation to the possible forced marriage of SK who was visiting Bangladesh. The facts are set out in the judgment.

Teertha Gupta acting pro bono (instructed by *Dawson Cornwell* acting pro bono).

Cur adv vult

3 February 2005. The following judgment was delivered.

SINGER J.

[1] This judgment is intended as a brief explanation of why I have decided to exercise jurisdiction in this case, which although novel is of a type which has been anticipated by commentators and practitioners who work in the field of forced marriage: where the threat or the reality of this abuse strikes at an adult. What powers if any have the courts of England and Wales and how should they exercise them?

[2] The proposed plaintiff in these proceedings as yet knows nothing about them. She is a young adult British citizen, so far as I know on the information that is available brought up and certainly habitually resident in England unless she herself has very recently voluntarily taken up habitual residence elsewhere. Her family comes from Bangladesh and this is where she now is so far as is known. They too are unaware of this application which is brought without advance notice to any proposed defendant.

[3] The request to take action on her behalf has come to Miss Anne-Marie Hutchinson of Dawson Cornwell, a solicitor with expertise in cases involving child abduction and forced marriage, from the Community Liaison Unit at the Foreign & Commonwealth Office (FCO). Consular officers in Bangladesh and London have from a variety of sources received information concerning the young woman who is the proposed plaintiff which, if true, is gravely disquieting. It is quite unnecessary, I think, for present purposes to go into the detail of the reasons for that anxiety or how they have been communicated. Suffice to say that if they prove to be substantially well-founded they would certainly satisfy me that there would be serious cause for concern about her capacity to control her own life and destiny at the moment. This notwithstanding that she is an adult and is emancipated, at least in terms of English law, and should not be the subject of duress or force or be deprived of the ability to make her own decisions.

[4] There is, as I say, information which if true (and that of course is as yet untested) would lead me to believe that she may be being kept by relatives or friends of relatives and family in Bangladesh contrary to her will, and that her anticipated return to this country (the expected date for which has been seriously delayed) may be being frustrated as part of an attempt to marry her forcibly. It may transpire indeed that she may be or is a young woman in relation to whom that has already happened. In either event the activities involved to those ends would be or would have been a gross interference with her human rights and might have involved the commission of criminal offences against her. If, in truth,

she were forced to marry or if, in truth, that is the outcome which she may contemplate and fear, then steps taken in furtherance of those ends would be a series of acts to which she did not consent. Indeed her very capacity to consent would have been overborne by fear, duress or threat. If therefore she has been through or faces the prospect of going through a ceremony of marriage with which she is, in fact, not in agreement it would be a voidable marriage, but nevertheless one which might engender irreparable and severe physical and emotional consequences for its victim.

[5] In the case of a young person (male or female) still a minor, that is to say under the age of 18, the English courts have over recent years demonstrated their capacity to act in concert with, amongst others, the FCO, a number of non-governmental organisations (NGOs) in this country and abroad, and humanitarian and committed judges and lawyers abroad to attempt to prevent such gross transgressions of an individual's integrity and, wherever possible, to remedy their consequences. Amongst the fruits of this co-operation are the publication last June of Guidance on Forced Marriage from the Law Society of England and Wales (see [2004] 126 IFL), the imminent issue by the FCO of a brochure designed to alert potential victims to the preventive measures and the remedies available, and the recent establishment of a new joint Home Office-Foreign Office Forced Marriage Unit (announced on 27 October 2004: see fco.gov.uk or homeoffice.gov.uk). In the press release issued on that occasion the then Home Secretary is quoted thus:

> 'Forced marriage is simply an abuse of human rights. It is a form of domestic violence that dehumanises people by denying them their right to choose how to live their lives. Valuing individual citizens, their dignity and the contribution they have to make to society in their own right is a central part of our drive for strong, active communities. The appalling practice of forced marriage represents the opposite extreme and that is why Government is taking tough action to eradicate it. It is very encouraging that a large number of community and faith leaders and voluntary organisations have come forward to take a full part in raising awareness of these problems and the support that is available.'

[6] The communities within which forced marriage can take place are numerous and they are by no means restricted to communities of one faith, or to communities in or from any one part of the world. I certainly have had experience of forced marriage cases involving various religions other than Islam and with connections elsewhere than in South-East Asia. However it is certainly to be noted and applauded that responsible Muslim bodies within England and Wales recognise and broadcast that forced marriage is un-Islamic, finds not the slightest vindication in the Koran, and is as unacceptable in Islam as to all other true religions.

[7] I emphasise, as needs always to be emphasised, that there is a spectrum of forced marriage from physical force or fear of injury or death in their most literal form, through to the undue imposition of emotional pressure which is at the other end of the forced marriage range, and that a grey area then separates unacceptable forced marriage from marriages arranged traditionally which are in no way to be condemned, but rather supported as a conventional concept in many societies. Social expectations can of themselves impose emotional pressure and the grey area to which I have referred is where one may slip into the other: arranged may become forced but forced is always different from arranged.

[8] This young woman, therefore, if a child, would be protected by the court, which would make orders of the sort I am making but adapted to the fact that a child can be made a ward of court. An adult cannot be made a ward of court, but the inherent jurisdiction of the High Court can, in an appropriate case, be relied upon and utilised to provide a remedy. I believe that the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values. If an adult is deprived of the capacity to make relevant decisions, then if there is disagreement about what should be done in his or her best interests or if there is a serious issue as to the propriety of what is proposed, recourse can be had to the court for declaratory relief. Clear resemblances are to be discerned, in my judgment, with cases such as that of the Norwegian deprived of the capacity for autonomy by the after-effects of a stroke (see *Re S (hospital patient: court's jurisdiction)* [1995] 3 All ER 290, [1995] 3 WLR 78). I draw attention also, as to the scope of the court's declaratory powers in relation to those infelicitously described as 'incompetent adults', to Munby J's helpful summary in *A v A Health Authority, Re J* [2002] EWHC 18 (Fam/Admin) at [37]–[40], [2002] 1 FCR 481 at [37]–[40], [2002] 3 WLR 24.

[9] Decisions can be made for such unfortunate persons in the light of, and guided by, what is in their best interests as objectively viewed by an independent court with an oversight of relevant information. By analogy, and appropriately it seems to me, it is within this court's power, notwithstanding that this English resident is currently abroad, to make orders and to give directions designed to ascertain whether or not she has been able to exercise her free will in decisions concerning her civil status and her country of residence. It may, of course, turn out to be the case that all is well and that she is content with whatever arrangements are currently in place. But as I say, the causes for anxiety are such and sufficiently cogent in my view to justify this court's interference in the first instance at least to the extent and for the purpose of evaluating her circumstances.

[10] The defendants to the process, which will be issued by way of originating summons with my leave, will be her parents. It is a matter for the election of those who represent her interests whether also to include as defendants one or both of her brothers who are believed also to be in Bangladesh at present. The purpose of the order will be to do what can be done properly to order defendants where binding orders are indeed appropriate, and to invite and encourage other persons and authorities where they are not subject to this court's orders, to arrange for the plaintiff to be seen by an appropriate official at the High Commission in Dhaka for the purpose of establishing what SK's true wishes are in an environment where, it is to be hoped, she will feel able to express them. That I know to be an objective which the FCO will espouse as being within the consular protection that this country extends to its nationals abroad, irrespective, in the first instance, of any question of dual nationality.

[11] That is pretty much as far as the form of my order for the moment goes, but it will include injunctions preventing relevant individuals from causing or permitting any arrangements to be made for her to go through a ceremony of marriage or permitting such a ceremony to take place. I will also provide for injunctive relief restraining such persons from threatening, intimidating or harassing her, or using violence on her. Such is the strength of my anxiety, although the evidence is indirect and incomplete, that it seems to me that powers of arrest can be attached for the time being to bring home to those who receive

the order the seriousness with which such plainly improper behaviour will be regarded by this court, if established.

[12] The precise whereabouts of the plaintiff are unknown and need to be established to maximise the prospect of an effective investigation of SK's wishes and circumstances. In what I hold to be a proportionate response to what I regard as the potential urgency of the situation and the seriousness of the risk, I authorise the issue of bench orders requiring the attendance of a number of relatives of the plaintiff before a High Court Judge next Tuesday, for them to be required to give information about their last knowledge of her precise whereabouts in Bangladesh or elsewhere.

[13] I will reserve the case to myself if available, because it should if possible have judicial continuity. An extract of the pertinent portions of the order I approve is annexed in case it may prove of assistance in any comparable situation, and as a draft to which improvements can undoubtedly be made.

[14] I will make no order in relation to the costs incurred in making this application thus far. There are indeed none in this case as yet as both solicitor and counsel are acting at this stage on a pro bono basis. But I do suggest that any necessary consultation should take place so that where, as here, one government department (the FCO via its Human Rights section of which the Community Liaison Unit forms part) invites lawyers to act upon information it has received, the other (the Legal Services Commission which is responsible for maintaining and developing Community Legal Service through which public funding for litigation is made available) should enable reasonable consequential applications to the court to be remunerated. The risk or threat of forced marriage seems to me to be just as critical in its significance for the individuals caught up in such situations as the completed fact of a marriage imposed by force is upon one or both its participant 'spouses'. The need for such proceedings to come before a Family Division judge is clear when the perceived threat is to an adult. Thus the sentiments (both generally as to the impact of forced marriage, and concerning public funding in particular) expressed by Coleridge J when granting a decree of nullity in a forced marriage case are apt by analogy. The case is reported as *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661, and he said:

> [17] In cases where a forced marriage is alleged the proper course is for a petition under s 12(c) [of the Matrimonial Causes Act 1973] to be brought before the court. I am informed by counsel for the petitioner that there is a real stigma attached to a woman in the petitioner's situation if merely a divorce decree is pronounced and it is desirable from all points of view that where a genuine case of forced marriage exists the court should, where appropriate, grant a decree of nullity and as far as possible remove any stigma that would otherwise attach to the fact that a person in the petitioner's situation has been married.
>
> [18] It follows from that that those charged with the decision of whether or not public funds should be made available in these circumstances should be ready, in the right case, to grant public funding to enable such nullity proceedings to be brought. It is necessary for public funding to be made available so that these cases, which are now not rare, can be investigated by the court. They are of special significance in the community from which the petitioner originates and it is appropriate that they should be transferred to the High Court and investigated properly and fully in open court.

POSTSCRIPT

[15] What then happened is that immediately upon service with the bench orders the relatives took steps to communicate with the plaintiff and her family in Bangladesh, with the result that very promptly indeed she was interviewed in Dhaka by a British consular officer. The outcome was that the plaintiff did return to this country and conveyed that her wish was that the proceedings should not continue, maintaining that she had no need of the court's intervention on her behalf. In those circumstances the proceedings were discontinued.

[16] Although therefore in this particular case it seems that the anxieties giving rise to the proceedings may have been ill-founded, their utility has been to clarify to this family (if clarification may have been needed) the importance these courts place on the right of the individual to exercise choice in this most intimate area of decision-making. There can be no doubt that a very significant number of young persons find themselves coerced into marriage each year, or subject to that threat. The count was 105 during the past year through the Islamabad High Commission alone, of whom about 20% of those seeking assistance were male teenagers or young men. It seems reasonable to suppose that these known cases may constitute a representative sample only.

[17] There is therefore in my view a need for it to be known by relevant professionals and amongst the relevant communities that proceedings such as these are in appropriate situations available, and that the courts are accessible to investigate the circumstances of adults as well as children. I should add that the same is true in the courts of, for instance, the Islamic Republic of Pakistan and in Azad Kashmir where the ancient writ of habeas corpus has been turned to contemporary use. In a case of suspected restraint with a view to or subsequent to forced marriage, habeas corpus is effective there to secure the attendance of children and young adults at court, so that the judge may ascertain their true wishes and, if coercion is established, ensure their release and (if they wish) their return to this country.

Bench orders issued accordingly.

Pamela Hardisty Barrister (NZ).

ANNEX

[AFTER THE PENAL NOTICE:]

WHEREAS SK is an adult British citizen, ordinarily resident in England, travelling on a British passport and currently believed to be in the People's Republic of Bangladesh at an address the details of which are currently uncertain

AND WHEREAS this Honourable Court has reason to believe on the basis of the information presented to it that SK:

a) may be detained involuntarily in Bangladesh contrary to her true wishes
b) may be confined or restricted by third parties contrary to her true wishes
c) may be incapable therefore of expressing her true wishes
d) may be unwilling to be or to remain in Bangladesh

e) may have been or may become the subject of a ceremony of marriage to which she did not or does not consent, namely a forced marriage to which she lacked or would lack capacity to consent

AND WHEREAS this Honourable Court is anxious to protect and secure the well-being and best interests of SK and to ensure that she may freely express her wishes concerning her country and place of residence and concerning her marital status

IT IS ORDERED that:

1. SK is to contact the British High Commission in Dhaka, Bangladesh forthwith with a view to being interviewed alone, the address of which is: ...

2. The Proposed Defendants do forthwith upon the terms of this order coming to their attention disclose the exact whereabouts of SK to [... the Plaintiff's litigation friend, care of Messrs ...]

3. The Proposed Defendants do assist and allow the Proposed Plaintiff SK to visit the British High Commission in Dhaka, Bangladesh for her to be interviewed alone by an officer of the said High Commission, on a date and at a time to be agreed between the parties through the Plaintiff's litigation friend

4. Pending further order the Proposed Defendants shall not cause or permit SK to undergo any ceremony or purported ceremony of betrothal or marriage whatsoever

5. Until ... the Proposed Defendants are prohibited whether by themselves or by instructing or encouraging any other person whether in the United Kingdom or in Bangladesh from:

a) threatening, intimidating or harassing the Proposed Plaintiff SK

b) using violence towards or upon the Proposed Plaintiff SK

6. Leave is granted to disclose this order and the originating summons together with the supporting documentation to the Foreign & Commonwealth Office

7. Liberty is granted to the Proposed Defendants to apply to vary or discharge the orders herein on 48 hours notice to the solicitors for the Proposed Plaintiff.

8. a) Permission is granted to serve these proceedings outside the jurisdiction if necessary

b) Personal service of a facsimile copy of this order upon any person is hereby deemed to be good service

9. Permission is granted to Messrs ... not to serve these proceedings and/or to serve only an edited version of the evidence thus far filed in these proceedings on the Defendants if so advised, upon the basis that this direction shall be reviewed at each hearing of this application

10. A Bench Order shall issue to require such of the following individuals as are adult (ie over 18 years of age) to attend court on ... to give evidence as to the current and recent whereabouts and circumstances of SK: ...

AND THIS COURT RESPECTFULLY INVITES all judicial and administrative bodies and police authorities in the People's Republic of Bangladesh to render assistance in establishing the whereabouts of SK and in arranging for her to be placed in contact with the British High Commission in Dhaka.

Singer J.

R (on the application of Moore and others) v Care Standards Tribunal and another

[2005] EWCA Civ 627

COURT OF APPEAL, CIVIL DIVISION
WALLER, MANCE LJJ AND SIR WILLIAM ALDOUS
8 APRIL, 24 MAY 2005

Social services – Registered care homes – Owners of care homes seeking deregistration – Tribunal refusing deregistration on basis homes 'establishments' within meaning of statute – Meaning of 'establishment' – Whether homes establishments where occupants assured tenants – Care Standards Act 2000, s 3.

The claimants had severe learning disabilities requiring personal care. They were long term residents of registered care homes, which were owned by Alternative Housing Ltd (Housing). Another company Alternative Futures Ltd (Futures) provided the personal care. Both Housing and Futures were part of the Alternative Group. Each claimant was an assured tenant of a room in one of the houses and had a right with the other tenants to use the communal parts of the house. Futures applied to the second defendant, the National Care Standards Commission, to cancel its registration in respect of 15 of its homes. Four were considered by the commission to be suitable for deregistration, but eleven were not. Futures appealed to the first defendant, the Care Standards Tribunal. The tribunal dismissed the appeal having referred to s 3[a] of the Care Standards Act 2000. That section provided that an establishment was a care home if it provided accommodation, together with nursing or personal care for certain persons including those with a mental disorder. The tribunal decided that eleven homes were establishments within the meaning of the section. The claimants sought judicial review of that decision. They submitted, inter alia, that once a tenancy was granted, the relationship between Housing and Futures and the tenants changed. The tenants occupied their homes as of right not under licences. That being so, neither Housing nor Futures were supplying accommodation, they were a domiciliary care agency supplying care to the claimants in their own homes. The judge rejected that submission. He ruled that the working definition of the word 'establishment' as used in s 3 was a place, including a building, in which organised activities were conducted and that there was nothing to prevent an establishment from being carried on by two companies. He held that the fact that the accommodation element was provided by means of an assured tenancy did not mean in principle that the establishment ceased to be a care home within s 3. The claimants appealed.

Held – On its true construction the word 'establishment' in s 3 had to include a building to be a home, but could include a controller or organiser formed as a partnership, a company or companies. It was true that the intention of the legislature was to include within the 2000 Act a range of models of care facilities, but there was no reason why an establishment could not provide accommodation within the meaning of that word in s 3 whether or not the

a Section 3, so far as material, is set out at [4], below

accommodation provided was by lease or licence. The crucial consideration was whether the establishment provided the accommodation together with nursing or personal care. That was essentially a question of fact. The establishment of a lessor and lessee relationship could be an indicator of a situation where an establishment did not provide both the accommodation and the care, but could not be determinative. It followed that in the instant case, the judge had come to the correct decision. Accordingly, the appeal would be dismissed (see [20], [21], [23], [24], below).

Notes

For registration of residential care homes, see Supp to 44(2) *Halsbury's Laws* (4th edn reissue) para 1042A.

For the Care Standards Act 2000, s 3, see 35 *Halsbury's Statutes* (4th edn) (2002 reissue) 1327.

Case referred to in judgments

Street v Mountford [1985] 2 All ER 289, [1985] AC 809, [1985] 2 WLR 877, HL.

Cases referred to in skeleton arguments

Lyons v East Sussex CC (1988) 86 LGR 369, CA.

Radaich v Smith [1959] ALR 1253, (1959) 101 CLR 209, Aus HC.

Appeal

The claimants, Andrew Moore, Ronnie Smith, Raymond Wilson, Linda Darlington, Carol Williams, Eileen Shakespeare, Brian Sloan, Alan Edge and Tess Hyland appealed against the decision of Mitting J, on 15 October 2004 ([2004] EWHC 2481 (Admin), [2004] All ER (D) 116 (Nov)) upholding the decision of the Care Standards Tribunal dismissing an application made to the National Care Standards Commission (now called the Commission for Social Care Inspection) under s 15(1)(b) of the Care Standards Act 2000 by Alternative Futures Ltd to cancel the registration of eleven homes owned by Alternative Housing Ltd. The tribunal did not appear. The facts are set out in the judgment of Sir William Aldous.

David Berkley QC and *John de Bono* (instructed by *Peter Edwards Law*, Hoylake) for the appellants.

Roger McCarthy QC (instructed by *Hill Dickinson*, Liverpool) for the commission.

Cur adv vult

24 May 2005. The following judgments were delivered.

SIR WILLIAM ALDOUS (giving the first judgment at the invitation of Waller LJ).

[1] One of the main purposes of the Care Standards Act 2000 was to reform the regulatory system for care services in England and Wales which had been governed by the Registered Homes Act 1984 and certain provisions of the Children Act 1989. In England, Pt 1 of the 2000 Act provides for an independent National Care Standards Commission, now called the Commission for Social Care Inspection, to undertake the regulatory functions. It also contains

definitions for the purposes of the 2000 Act. Part 2 of the 2000 Act makes provision for the regulatory procedures to be followed by the commission and gives to the Secretary of State powers to make regulations in relation to the care services regulated under the 2000 Act. a

[2] Alternative Futures Ltd (Futures), is a not-for-profit company limited by guarantee and is a registered charity. It was established in 1992, primarily to assist the retraction of the NHS institutional hospitals by providing care in the community. This took the form of small registered residential homes, nursing homes, and supported living services. At first, Futures provided both housing and personal services. In March 2001, Alternative Housing Ltd (Housing) was established as a separate not-for-profit company to facilitate the move towards supported and assisted living. It is also registered as a charity. Futures and Housing are part of the Alternative Group. b c

[3] Section 11 of the 2000 Act provides: 'Any person who carries on or manages an establishment or agency of any description without being registered under this Part ... shall be guilty of an offence.' The care homes owned and operated by Futures were registered as such under the 1984 Act and remained registered under the 2000 Act when it came into force on 1 April 2002. Futures applied under s 15(1)(b) of the 2000 Act, on 15 May 2002 to cancel the registration of their houses as care homes. Four of their houses were considered by the commission to be suitable for deregistration, but eleven were not. Futures appealed against the decision to refuse to cancel the registration of the 11 houses. d

[4] On appeal to the Care Standards Tribunal, Futures referred to s 3 of the 2000 Act which reads as follows: e

> '**3.**—(1) For the purposes of this Act, an establishment is a care home if it provides accommodation, together with nursing or personal care, for any of the following persons.
>
> (2) They are—(a) persons who are or have been ill; (b) persons who have or have had a mental disorder; (c) persons who are disabled or infirm; (d) persons who are or have been dependent on alcohol or drugs. f
>
> (3) But an establishment is not a care home if it is—(a) a hospital; (b) an independent clinic; or (c) a children's home, or if it is of a description excepted by regulations.' g

[5] Futures contended that the 11 homes no longer functioned as care homes as defined in s 3 as they provided supported living. That contention was based upon the reorganisation that had taken place within the Alternative Group. The freehold of the houses had been transferred to Housing with Futures providing care. Housing had then granted an assured tenancy to each of the residents. Put shortly, Features contended that because the accommodation element was provided by means of an assured tenancy the establishment ceased to be a care home as defined by s 3. h

[6] The hearing before the tribunal lasted 11 days and involved many issues ranging from submissions on onus of proof to human rights and investigation of the tenancies. The tribunal concluded: j

> '108. We have reached the unanimous decision that the 11 homes are establishments providing accommodation together with nursing or personal care for persons with a mental disorder (s 3(1) Care Standards Act 2000). We wish to emphasise what we have stated in para 60 above that our decision in

this case is in no way a statement that the service users are better provided for in a care home environment than in a supported living environment.'

[7] Section 9 of the Protection of Children Act 1999 provides for an appeal from the decision of the tribunal on issues of law. There was no appeal by Futures, but the appellants sought judicial review of the tribunal's decision.

[8] The appellants are all long term residents in the homes owned and run by Housing and Futures respectively which were the subject of the applications to deregister. Each of them is an assured tenant of a room in one of the houses and has a right with the other tenants to use the communal parts of the house. Each of them has a severe learning disability which requires them to receive personal care.

[9] The propriety of the appellants' claim and their sufficiency of interest were initially challenged. That challenge was decided in the appellants' favour by Charles J and was not pressed at the full hearing before Mitting J on 15 October 2004. The reason, I understand, was that the commission, like the claimants, desire clarification of the law relating to deregistration. We were told that there were a number of similar applications for deregistration which were awaiting the outcome of this appeal.

[10] The judge in his judgment of 15 October 2004 ([2004] EWHC 2481 (Admin), [2004] All ER (D) 116 (Nov)) did not deal in detail with many of the issues raised before the tribunal. He said that it was not necessary for him to comment on the human rights issues and assumed for the purposes of the hearing that the tenancies were valid. The validity of the tenancies was challenged in a respondents' notice, but that challenge was not pressed as the parties agree that the issues raised would, if the appeal succeeded, need to be referred back to the tribunal for further findings of fact to be made and further argument.

[11] I like the judge will assume that the appellants are assured tenants of Housing. That being so, they have a legal interest in the property and have the right to exclude others (see *Street v Mountford* [1985] 2 All ER 289, [1985] AC 809). Even so, it is appropriate to record some of the matters to which we were referred. First the tenants all suffer from severe learning difficulties and the commission are concerned that they may not have the capacity to enter into the tenancies. Second the grant of the tenancies may not in fact have made any difference to the way the tenants live or are cared for and may be a sham or a device to enable housing and other benefits to be obtained. Third, although the leases appear to be in a standard form for an assured lease, there are matters that suggest that they are not standard leases. For example the rent exceeds £700 per week and the tenant receives care.

[12] Mr Berkley QC, who appeared for the appellants, submitted that at the heart of the appeal lay a question which was fundamental to the developing and changing attitudes to persons in need of care. There was a major social shift away from long term institutional care to living in the community. The significance of the grant of tenancies to the appellants was that they were transformed, from sharers of commodities including living space in an establishment which could properly be categorised as a care home, to living in their own homes and receiving domiciliary services.

[13] Mr Berkley referred us to the white paper 'Valuing People' (Cm 5086) (March 2001) which stated (p 2):

'People with learning disabilities are amongst the most vulnerable and socially excluded in our society. Very few have jobs, live in their own homes

or have choice over who cares for them. This needs to change: people with learning disabilities must no longer be marginalised or excluded. *Valuing People* sets out how the Government will provide new opportunities for children and adults with learning disabilities and their families to live full and independent lives as part of their local communities.'

[14] The appellants believe that they are better placed within the regime of autonomous house owners than in the more institutionalised care home environment. Their belief it seems is based, at least in part, on their ability to access housing benefit as well as other welfare benefits not available to residents of care homes. However the Department of Health guidance ('Supported Housing and Care Homes: Guidance on Regulation' (August 2002)) makes it clear that government policy does not support inappropriate changes to care homes which do not promote genuine independence. Whatever view is taken of the benefits or alleged benefits of deregistration for the appellants, the result of the appeal must depend upon the meaning of the words in s 3 of the 2000 Act.

[15] The appellants did not rely upon the division of responsibility between Housing and Futures. They argued their case upon the basis that Housing and Futures with their houses were an 'establishment'. They submitted that once a tenancy was granted, the relationship between them and the tenants changed. The tenants occupied their homes as of right not under licences. It followed that the tenants were being provided with care in their own homes. That being so, neither Housing nor Futures were providing accommodation within the meaning of that word in s 3 of the 2000 Act. To support that construction of s 3, they referred us to s 4(3) of the Act which defines a 'domiciliary care agency' as follows:

> '"Domiciliary care agency" means ... an undertaking which consists of or includes arranging the provision of personal care in their own homes for persons who by reason of illness, infirmity or disability are unable to provide it for themselves without assistance.'

[16] The appellants submitted that Housing and Futures did not supply accommodation. They were a domiciliary care agency supplying care to them in their own homes.

[17] The judge rejected that submission. He put forward ([2004] All ER (D) 116 (Nov) at [30]) this working definition of the word establishment as used in s 3 of the 2000 Act: '"a place, including a building, in which organised activities are conducted" and "the conduct of organised activities in a place, including a building."' He went on as follows:

> '[31] The "establishment" or "it" must provide accommodation together with "nursing or personal care". As far as accommodation is concerned, it is provided by a room and facilities within a building which the owner permits the resident to occupy and make use of. As far as nursing or personal care is concerned, they have to be provided by a person or persons. Accommodation and care must be provided "together", but they need not be provided by the same company or individual. Although "person" is referred to in the singular in s 11(1), the Interpretation Act 1978 permits that singular to include the plural. Thus, as the tribunal held, there was nothing to prevent an establishment from being carried on by two companies, Alternative Housing and Alternative Futures together. Both could carry it on, and if they did so, both required to be registered. In fact, as the facts

found by the tribunal and the terms of the tenancy agreements show, both accommodation and services were to be provided, and were provided, by Alternative Housing.

[32] Does the fact that the accommodation element as provided by means of an assured tenancy mean that the establishment ceases to be a care home within s 3? The answer is: not in principle. Nothing in the 2000 Act or the [Care Homes Regulations 2001, SI 2001/3965] excludes expressly or by necessary implication the provision of accommodation by that means; and accommodation is still provided by the "establishment" as defined. A detailed examination of the terms of the tenancy agreements reveals nothing that conflicts with the obligations of the service provider in the Regulations.

[33] Mr de Bono suggested that there was a conflict, and chose as his example, reg 16(2)(d), which provides:

> "The registered person shall having regard to the size of the care home and the number and needs of service users ... (d) permit service users, so far as it is practicable to do so, to bring their own furniture and furnishings into the rooms they occupy ..."

[34] Nothing in the tenancy agreement prevents any resident from doing just that, although in practice the schedule which includes provision for depreciation of furniture and white goods suggests that they are, in fact, provided by Alternative Homes. Given that analysis of s 3, and the tribunal's findings, the claimants continued to be accommodated and to receive care in an establishment within s 3, were the commission right to refuse to cancel the registrations, and the tribunal to dismiss Alternative Futures' appeal? Subject to a possible argument that Alternative Homes should have been substituted, the answer is clearly: Yes.'

[18] Mr Berkley submitted the judge's view was contrary to the meaning of s 3. Neither Housing nor Futures were providing accommodation for the purposes of s 3 of the 2000 Act. Their buildings were occupied by the appellants, not as residential institutions, but comprised separate dwellings. The intention of the legislature expressed in the 2000 Act and in the regulations under the 2000 Act (the Care Homes Regulations 2001, SI 2001/3965) was to offer a range of different models for living and imposed different schemes of regulation upon residential care homes, domiciliary care agencies and other agencies and establishments.

[19] Mr Roger McCarthy QC for the commission supported the conclusion of the judge. He drew attention to the consequences of the appellants' submissions, namely that it would be impossible for a person to be a tenant in a care home whether or not the lessor and care provider were the same person. It followed that an establishment could move away from being a registered care home by granting assured tenancies, even though the residents' needs and circumstances were unchanged and there was no actual difference in the way that the care was provided.

[20] Mr McCarthy submitted, rightly in my view, that the word establishment did not have a technical meaning and therefore should be given its ordinary meaning. However that word must be construed in the context of s 3(1) and as part of it. As such an 'establishment' must include a building to be a home, but can include a controller or organiser formed as a partnership, a company or

companies. The word is wide enough to encompass Housing and Futures and their houses. a

[21] I conclude that the judge was right. No doubt Mr Berkley is right that the intention of the legislature was to include within the 2000 Act a range of models of care facilities, but I can see no reason why an establishment cannot provide accommodation within the meaning of that word in s 3 of the 2000 Act whether or not the accommodation provided is by lease or licence. The crucial b consideration is whether the establishment provides the accommodation together with nursing or personal care. That is essentially a question of fact which does not arise in the present case as the appellants accepted for the purposes of the appeal that Housing and Futures, together with each house, were an establishment. The establishment of a lessor and lessee relationship can be an indicator of a situation where an establishment does not provide both the c accommodation and the care, but cannot be determinative.

[22] I would dismiss the appeal.

MANCE LJ.

[23] I agree. d

WALLER LJ.

[24] I also agree.

Appeal dismissed. e

Dilys Tausz Barrister.

Huang and others v Secretary of State for the Home Department

[2005] EWCA Civ 105

COURT OF APPEAL, CIVIL DIVISION
JUDGE, LAWS, LATHAM LJJ
1, 2 DECEMBER 2004, 1 MARCH 2005

Immigration – Leave to enter – Refusal of leave – Appeal – Appeal to adjudicator – Immigrant claiming on facts removal amounting to unlawful interference with right to respect for private and family life – Whether adjudicator's assessment of proportionality limited to review of Secretary of State's decision to refuse leave – Whether adjudicator to decide for himself whether removal proportionate or not – Immigration and Asylum Act 1999, s 65, Sch 4, para 21 – Human Rights Act 1998, Sch 1, Pt 1, art 8.

In each of the three appeals, the appellants, who had no right to remain in the United Kingdom under the Immigration Rules, were refused leave to enter by the Secretary of State. They each appealed to an adjudicator pursuant to s 65(1)[1] of the Immigration and Asylum Act 1999, arguing that the decision to refuse them leave to enter was a disproportionate, and therefore, unlawful, interference with the appellant's right to respect for his private and family life pursuant to art 8[2] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). In the first appeal, the appellant was a citizen of China aged 59. Her husband and two children were settled in the United Kingdom. She applied unsuccessfully in 2000 for indefinite leave to remain as a dependant of her daughter. The adjudicator observed that it was unfortunate that the case had reached the appeal stage. He was of the opinion that if the appellant had not had to return to China in 1993 in order to look after her father who was ill, it was highly probable that she would have been granted indefinite leave to remain as a spouse of a person settled in the United Kingdom. However by the time she applied for indefinite leave in 2000 she had become separated from her husband. He, therefore, decided that, on the facts, her removal could not be justified and would be disproportionate. The Secretary of State appealed. The Immigration Appeal Tribunal (IAT) allowed the appeal, ruling that the Secretary of State was entitled to say that it was not disproportionate to remove her in the public interest. The appellant in the second appeal was a citizen of Iran. He remained in Iran when his family came to the United Kingdom in 2001. He unsuccessfully claimed asylum at the end of 2001. The adjudicator held that the appellant's removal, so far as it interfered with his family life in the United Kingdom, would none the less be proportionate to the legitimate policy aim of immigration control, and dismissed the appeal. Before the IAT the appellant put a new case to support his art 8 claim, claiming to be bisexual, but stating that he had concealed it from his parents. The IAT concluded that although the Secretary of State had not been seized of all the details, he was aware of the broad basis of the claim and that unless such a view could be categorised as plainly wrong, it should be accorded appropriate

1 Section 65, which has since been repealed, is set out at [24], below
2 Article 8 is set out at [2], below

deference. They accordingly, dismissed the appeal. The third appeal concerned a Palestinian whose country of habitual residence was Lebanon. He had funded his own education in the United Kingdom and had become engaged to a British citizen. The Secretary of State refused him asylum. On appeal, the adjudicator held that his removal to the Lebanon would be disproportionate to the pursuit of the legitimate aim of the maintenance of immigration control and allowed his appeal. The IAT allowed the Secretary of State's appeal. They held that the appellant's removal would not be disproportionate. In each of the appeals, the tribunal relied on one of its starred decisions in which it was held that on a statutory appeal in which the immigrant claimed that his removal would be disproportionate and therefore unlawful, the tribunal and adjudicators had normally to hold that a decision to remove was unlawful only when the disproportion was so great that no reasonable Secretary of State could have removed in those circumstances. On appeal to the Court of Appeal, the appellants argued that the tribunal had to decide on the merits whether the removal would be proportionate or not.

Held – Where in a human rights challenge the court was called upon in any respect to judge the weight or the merits of government policy, it would in deciding the outcome allow a margin of discretion to the policy maker. In such a case, consistently with its obligations under the 1998 Act, the test to be applied was more intrusive than the *Wednesbury* one (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680). There were, however, cases where the court or adjudicator was not called upon to judge policy, whereupon a decision would have to be made on the merits whether removal of an asylum seeker, who had raised art 8 grounds, would be disproportionate and therefore unlawful. The adjudicator would be required to allow such an appeal if, but only if, he concluded that the case was so exceptional on its particular facts that the imperative of proportionality demanded an outcome in the appellant's favour notwithstanding Immigration Rules. In doing so, he was not in the least degree being called upon to pass judgment on government policy, which would go against the principle of respect by the courts for the democratic powers of the State. Rather, his duty was to see to the protection of individual fundamental rights, which was the particular territory of the courts. Moreover, the adjudicator would not be ignoring or overriding the rules. On the contrary, he would be respecting the balance between public interest and private right struck by the rules with Parliament's approval. In the instant cases, the decisions of the IAT in the first and third appeals were legally defective, since both deferred to the Secretary of State's view of proportionality in the light of the particular facts, which was not the correct approach. That was not the case, in the second appeal. Nevertheless, in the second and third appeals there was no possibility that a tribunal, properly directing itself, could have found anything amounting to truly exceptional circumstances. Accordingly, those appeals would be dismissed. The first appeal was in a different category. A tribunal might have found in the light of the whole history, that her case could be regarded as truly exceptional so as to give rise under art 8 notwithstanding she did not meet the Immigration Rules. It followed that the first appellant's appeal would be allowed; (see [51]–[52], [55]–[56], [59], [62], [63]–[64], below).

R v Secretary of State for the Home Dept, ex p Daly [2001] 3 All ER 433, *R (on the application of Ala) v Secretary of State for the Home Dept* [2003] All ER (D) 283 (Mar), *Edore v Secretary of State for the Home Dept* [2003] 3 All ER 1265, *R (on the application of Razgar) v Secretary of State for the Home Office* [2004] 3 All ER 821, considered.

M(Croatia) v Secretary of State for the Home Dept* [2004] INLR 327, overruled.

Notes

For appeals against a decision under the Immigration Acts in breach of a person's human rights, see 4(2) *Halsbury's Laws* (4th edn) (2002 reissue) para 179.

Section 65 of the Immigration and Asylum Act 1999 has been repealed by the Nationality, Immigration and Asylum Act 2002, ss 114(1), (2), 161, Sch 9 with effect from 1 April 2003.

Cases referred to in judgment

A v Secretary of State for the Home Dept [2004] UKHL 56, (2004) 17 BHRC 496, [2005] 2 WLR 87.

Abdulaziz, Cabales, Balkandali v UK (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Boultif v Switzerland (2001) 33 EHRR 1179, [2001] ECHR 54273/00, ECt HR.

Costello-Roberts v UK [1994] 1 FCR 65, (1995) 19 EHRR 112, ECt HR.

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.

De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.

Edore v Secretary of State for the Home Dept [2003] EWCA Civ 716, [2003] 3 All ER 1265, [2003] 1 WLR 2979.

Harrow London BC v Qazi [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983, [2003] 3 WLR 792.

Kacaj v Secretary of State for the Home Dept [2002] Imm AR 213, IAT; *rvsd* [2002] EWCA Civ 314, [2002] All ER (D) 203 (Mar).

Lustig-Prean and Beckett v UK (1999) 29 EHRR 548, ECt HR.

M(Croatia) v Secretary of State for the Home Dept* [2004] UKIAT 00024, [2004] INLR 327.

Poku v UK (1996) 22 EHRR CD 94, E Com HR.

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.

R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, CA.

R v Secretary of State for the Home Dept, ex p Mahmood [2001] 2 FCR 63, [2001] 1 WLR 840, CA.

R (on the application of Ala) v Secretary of State for the Home Dept [2003] EWHC 521 (Admin), [2003] All ER (D) 283 (Mar).

R v Secretary of State for the Home Dept, ex p Daly [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.

R (on the application of ProLife Alliance) v BBC [2003] UKHL 23, [2003] 2 All ER 977, [2004] 1 AC 185, [2003] 2 WLR 1403.

R (on the application of Razgar) v Secretary of State for the Home Dept, R (on the application of Soumahoro) v Secretary of State for the Home Dept, R (on the

application of Nadarajah) v Secretary of State for the Home Dept [2003] EWCA Civ 840, [2003] INLR 543; *affd* sub nom *R (on the application of Razgar) v Secretary of State for the Home Dept* [2004] UKHL 27, [2004] 3 All ER 821, [2004] 2 AC 368, [2004] 3 WLR 58.

R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23.

R (on the application of Yogathas) v Secretary of State for the Home Dept, R (on the application of Thangarasa) v Secretary of State for the Home Dept [2002] UKHL 36, [2002] 4 All ER 800, [2003] 1 AC 920, [2002] 3 WLR 1276.

Samaroo (Allan) v Secretary of State for the Home Dept; Sezek (Mehmet) v Secretary of State for the Home Dept [2001] EWCA Civ 1139, [2002] INLR 55.

Sen v Netherlands (2003) 36 EHRR 81, [2003] ECHR 41478/98, ECt HR.

Smith and Grady v UK (1999) 29 EHRR 493, ECt HR.

Sporrong v Sweden (1983) 5 EHRR 35, [1982] ECHR 7151/75, ECt HR.

Young v Bristol Aeroplane [1944] 2 All ER 293, [1944] 1 KB 718, CA; *affd* [1946] 1 All ER 98, [1946] 1 All ER 163, HL.

Cases referred to in skeleton arguments

Amrollahi v Denmark [2002] ECHR 56811/00, ECt HR.

Berrehab v Netherlands (1989) 11 EHRR 322, ECt HR.

Boultif v Switzerland (2001) 33 EHRR 1179, [2001] ECHR 54273/00, ECt HR.

Boyle v UK (1995) 19 EHRR 179, [1994] ECHR 16580/90, ECt HR.

Carpenter v Secretary of State for the Home Dept Case C-60/00 [2003] All ER (EC) 577, [2003] QB 416, [2003] 2 WLR 267, [2002] ECR I-6279, ECJ.

Ciliz v Netherlands [2000] 2 FLR 469, ECt HR.

Djali v Immigration Appeal Tribunal [2003] EWCA Civ 1371, [2004] 1 FCR 42.

EC Commission v Germany Case 249/86 [1989] ECR 1263, ECJ.

Entrance Clearance Officer, Dhaka v Box [2002] UKIAT 02212.

Gul v Switzerland (1996) 22 EHRR 93, [1996] ECHR 23218/94, ECt HR.

Jakupovic v Austria [2003] 2 FCR 361, (2004) 38 EHRR 595, ECt HR.

Jovanovic v Secretary of State for the Home Dept (unreported, 6 August 2004), IAT.

Kugathas v Secretary of State for the Home Dept [2003] EWCA Civ 31, [2003] INLR 170.

Lebbink v Netherlands [2004] ECHR 45582/99, ECt HR.

Marckx v Belgium (1979) 2 EHRR 330, [1979] ECHR 6833/74, ECt HR.

Mehemi v France (No 2) (2004) 38 EHRR 301, ECt HR.

Nylund v Finland App No 27110/95 (unreported, 29 June 1999), ECt HR.

R (on the application of Hamfi) v Immigration Appeal Tribunal [2003] EWHC 939 (Admin).

Singh v Entry Clearance Officer New Delhi [2004] EWCA Civ 1075, [2004] 3 FCR 72, [2005] 2 WLR 325.

R v Secretary of State for the Home Dept, ex p Mahmood [2001] 2 FCR 63, [2001] 1 WLR 840, CA.

Vujnovic v Secretary of State for the Home Dept [2003] EWCA Civ 1843, [2003] All ER (D) 317 (Dec).

Yildiz v Austria (2003) 36 EHRR 32, ECt HR.

Appeals

Huang v Secretary of State for the Home Dept

The appellant, Mei Ling Huang, appealed, with the permission of Sedley LJ on 4 July 2004, against the decision of the Immigration Appeal Tribunal, notified on 25 September 2003, overturning a determination of a adjudicator, promulgated on 13 January 2003, that the decision of the Secretary of State to remove her from the United Kingdom could not be justified and would be disproportionate. The facts are set out in the judgment of the court.

Abu-Qulbain v Secretary of State for the Home Dept

The appellant, Montaser Abu-Qulbain, appealed, with the permission of Sedley LJ granted on 6 July 2004, against the decision of the Immigration Appeal Tribunal notified on 30 October 2003 overturning the decision of the adjudicator, promulgated on 2 April 2003, that the decision of the Secretary of State to remove the appellant from the United Kingdom would be disproportionate to the pursuit of the legitimate aim of the maintenance of immigration control. The facts are set out in the judgment of the court.

Kashmiri v Secretary of State for the Home Dept

The appellant, Ali Kashmiri, appealed, with the permission of Tuckey LJ granted on 3 September 2004, against the decision of the Immigration Appeal Tribunal notified on 18 May 2004, dismissing an appeal against the decision of the adjudicator, promulgated on 30 April 2003, that the decision of the Secretary of State to remove the appellant from the United Kingdom so far as it would interfere with his family life in the United Kingdom was proportionate to the legitimate policy aim of immigration control. The facts are set out in the judgment of the court.

Nicholas Blake QC and *Raza Husain* (instructed by *TRP Solicitors*) for Mrs Huang.

Nicholas Blake QC and *James Collins* (instructed by *Sheikh & Co*) for Mr Abu-Qulbain.

Nicholas Blake QC and *Ranjiv Khubber* (instructed by *Luqmani Thompson & Partners*) for Mr Kashmiri.

Monica Carss-Frisk QC and *Adam Robb* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

1 March 2005. The following judgment of the court was delivered.

LAWS LJ.

INTRODUCTORY

[1] These three appeals against decisions of the Immigration Appeal Tribunal (the IAT) were heard together pursuant to directions given by Tuckey LJ on 3 September 2004, when they were selected by him as appropriate lead cases for the determination by this court of what has been called 'the *M*(Croatia)* issue', named from the starred IAT decision[1] whose reasoning has given rise to it. The

issue concerns the proper approach to be taken by an adjudicator in an appeal where he is called upon to determine whether the Secretary of State's decision to remove the appellant from the United Kingdom (or, it may be, to refuse him leave to enter) is a disproportionate, and therefore unlawful, interference with the appellant's right to respect for his private and family life pursuant to art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (as set out in Sch 1 of the Human Rights Act 1998) (ECHR). By s 6 of the 1998 Act public authorities, which include the Secretary of State, the adjudicators and the IAT, and this court, must not 'act in a way which is incompatible with a Convention right'.

[2] As is well known art 8 of the ECHR provides:

> '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[3] At this stage we will set out para [29] from the judgment in *M* (delivered by the President of the IAT, Ouseley J). It contains the pith of the IAT's reasoning, and serves well to introduce the issue. As will become clear, however, this reasoning is closely related to earlier decisions of this court, and one of the questions we must confront is whether, or to what extent, we are free to depart from those decisions should we think it right to do so. But that lies ahead. It is stated in *M*:

> 'The starting point should be that if in the circumstances the removal could reasonably be regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful. The Tribunal and adjudicators ... should normally hold that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances. However, where the Secretary of State, eg through a consistent decision-making pattern or through decisions in relation to members of the same family, has clearly shown where within the range of reasonable responses his own assessment would lie, it would be inappropriate to assess proportionality by reference to a wider range of possible responses than he in fact uses. It would otherwise have to be a truly exceptional case, identified and reasoned, which would justify the conclusion that the removal decision was unlawful by reference to an assessment that removal was within the range of reasonable assessments of proportionality ...' (See [2004] INLR 327 at [29].)

[4] It is trite Convention law, for which we need cite no authority, that if on the face of it action by the state interferes with the individual's right to respect for his private and family life (so that art 8(1) of the ECHR is engaged) a condition of the action's justification pursuant to art 8(2) is that it should be proportionate to

1 *M*(Croatia) v Secretary of State for the Home Dept* [2004] UKIAT 24, [2004] INLR 327. I will refer to it simply as *M*.

a legitimate aim for whose purpose the action is undertaken. Here the legitimate aim is the maintenance of the integrity of the state's immigration policies, given by statute and by Immigration Rules (1994) (HC 395). The action in question (in the standard case) is of course the decision to remove the immigrant. The 'M* (*Croatia*) issue' may at this stage be crudely stated thus: upon a statutory appeal to the adjudicator in which the immigrant claims that on the facts his removal would be disproportionate and therefore unlawful, is the adjudicator's assessment of proportionality limited to a review of the Secretary of State's decision (is the decision 'within the range of reasonable assessments of proportionality'?) or must the adjudicator decide for himself, on the merits, whether the removal would be proportionate or not? Our consideration of this issue has raised, not for the first time, broad questions as to the assignment of responsibility between the courts (here in particular the adjudicator) and the executive in the administration of fundamental rights.

[5] Permission to appeal was granted on the papers by Tuckey LJ in *Kashmiri*'s case at the time of the directions hearing on 3 September 2004. Sedley LJ had earlier granted permission in *Huang*'s case on 4 July and in *Abu-Qulbain*'s case on 6 July 2004.

THE FACTS AND THE DECISIONS OF THE IMMIGRATION APPELLATE AUTHORITIES

Huang

[6] Mrs Huang is a citizen of China, born on 29 March 1942. She is married to Dr Qing Yun Yao, though they are estranged in circumstances we will briefly describe. They are both medical practitioners and have specialised in the field of cancer research. Two children, now grown up, were born to the marriage. The daughter, Mrs Hong Yao, is married to Mr Bruce Phenix. They have two children with whom they live in the United Kingdom where they are lawfully settled. So does Mrs Huang's husband. Mrs Huang's other child, Mr Shao Ning Yao, works in Gibraltar but as we understand it has a base (again in perfectly legitimate circumstances) here in the United Kingdom. Mrs Huang also has an elderly mother and two younger brothers living in Shantou in China. It takes about eleven hours journey time to visit them from Mrs Huang's home in China. There is a third brother, who lives in Hong Kong.

[7] Mrs Huang's husband seems first to have come to the United Kingdom as long ago as 1981. He has not been continuously present in this country but at length became settled here. The son, Shao Ning, joined his father in the United Kingdom in 1987. Mrs Huang and her daughter first arrived here in 1993 to join the husband and son. On 1 April 1993 she applied for indefinite leave to remain on the basis of her marriage to a person settled in the United Kingdom. That was refused by the Secretary of State on 11 June 1993, but Mrs Huang was granted limited leave until 9 March 1994. However, she left the United Kingdom and returned to China in order to look after her father who was ill. She returned here in 1998 and obtained leave to enter for six months as a visitor. At this time she stayed with her husband. During this period her daughter gave birth to her first child. She returned to China, and next returned to the United Kingdom on 27 June 2000 when she was again given a six months visitor's leave. On 24 November 2000, when she was 58 (her age is relevant to the operative Immigration Rule, to which we will come in due course), she applied for indefinite leave to remain as a dependant of her daughter who was and is settled

here. That was refused by the Secretary of State on 5 March 2001, and Mrs Huang appealed against that refusal to the adjudicator.

[8] Mrs Huang told the adjudicator that she had separated from her husband in June 2000. It was as we have said in that month that she last returned to the United Kingdom. As we understand it there have been no proceedings between Mrs Huang and her husband. It seems that he is unwilling for her to live in his household, nor would he support her former application to remain here as a spouse. Her case under art 8 of the ECHR is based, certainly primarily based, on the bond between herself and her daughter and her daughter's own family. She has lived in her daughter's household since returning here in 2000. In his determination promulgated on 13 January 2003 the adjudicator was to observe wryly[2]:

> 'It is rather unfortunate that this case has reached the appeal stage because if the appellant had not returned to China in 1994 due to her father being ill it is highly probable that she would have been granted indefinite leave to remain as a spouse of a person settled in the United Kingdom. Furthermore, if the appellant had not been separated from her husband and he had supported her application as his spouse then again the matter would probably not have reached the appeal stage.'

[9] The Secretary of State had not been satisfied on the facts that Mrs Huang enjoyed any claim to indefinite leave under the provisions of the Immigration Rules which might potentially have been engaged, namely para 317(i)(e) and (v). We must return to the rules in due course[3]. At this point it is enough to say that the Secretary of State was plainly right. Mrs Huang had no claim under the rules. Her real case, which the adjudicator accepted, was that her removal to China would nevertheless violate her rights under art 8 of the ECHR. The adjudicator held that she enjoyed a substantial family life in the United Kingdom with her daughter, son-in-law and grandchildren, and that her removal would be disproportionate to the legitimate aim of maintaining immigration control. His reasoning on the proportionality issue was as follows[4]:

> 'The appellant is approximately 60 years of age and cannot be expected to make long journeys to the United Kingdom in order to visit her family. The appellant's family in the United Kingdom cannot be expected to move to China or make regular expensive trips in order to visit her. Both the appellant's daughter and son-in-law are in employment and her grandchildren attend school. I note from the financial evidence produced that both the appellant's daughter and son-in-law are of modest means ... and therefore cannot be expected to finance expensive trips to China for the whole family or for the appellant to visit them in the United Kingdom. In short, the appellant has formed a strong family life in the United Kingdom and her removal cannot be justified and would be disproportionate.'

2 Paragraph 18 of his determination.
3 The relevant provisions of paragraph 317 of HC Paper 395 are set out at [58], below.
4 Paragraph 17.

[10] And so the adjudicator allowed the appeal on art 8 grounds. On 24 February 2003 the Secretary of State obtained leave to appeal to the IAT. In its decision notified on 25 September 2003 the IAT observed[5] that when Mrs Huang applied for leave to enter as a visitor (the reference must be to her entry in June 2000) 'she was intending to return to China in order to continue her life there as it had been before'. They proceeded[6] to criticise the adjudicator for failing to reason out his conclusion on proportionality. The decision ends thus:

> 'We have considered her position on the basis that all the adjudicator accepted of the factual situation is correct but, taking everything at its highest from her point of view, it seems to us that *the Secretary of State is entitled to say that it is not disproportionate to remove her in the public interest*. For those reasons the appeal of the Secretary of State is allowed.' (Our emphasis.)

Kashmiri

[11] Mr Kashmiri is a citizen of Iran, born on 4 July 1981. Until June 2000 he lived in that country with his parents and two younger brothers. However in June 2000 the rest of the family travelled to the United Kingdom. The father claimed asylum on 31 July 2000. His wife and the two younger sons claimed as his dependants. The Secretary of State at first refused the father's claim, but by a decision promulgated on 16 October 2001 the adjudicator allowed his appeal and he was formally granted indefinite leave to remain as a refugee by letter dated 7 January 2002.

[12] It is we think not disputed that Mr Kashmiri (the present appellant) made a conscious decision to remain behind in Iran when his family left for the United Kingdom in June 2000, and did so out of a desire to complete his education in that country. At the time he was just short of 19 years of age. At length he travelled to this country, arriving on 6 December 2001. He claimed asylum. That was refused by the Secretary of State on 11 January 2002. Mr Kashmiri appealed to the adjudicator on grounds both of asylum and arts 3 (which of course prohibits torture or other inhuman or degrading treatment) and 8 of the ECHR. He claimed to fear persecution, if he were returned to Iran, because he had been targeted on account of his father's activities as an artist and sculptor. He said he had been dismissed from the university because of his association with a female classmate, had been arrested and detained for 48 hours (when he was slapped in the face) for walking in the street with a girlfriend, and stopped and searched on suspicion of possessing drugs. In his determination promulgated on 30 April 2003 the adjudicator accepted some parts of Mr Kashmiri's account but found him to be of 'low credibility'. He dismissed the asylum appeal, and held also that there was nothing in the human rights appeal based on art 3 of the ECHR.

[13] In interview Mr Kashmiri had made it entirely clear that his main purpose in coming to the United Kingdom was to join his parents and brothers. The adjudicator proceeded to consider the art 8 appeal. In summarising the facts he said[7]:

> 'He has girlfriends in Iran. He has not been persecuted by the Iranian authority. He has close relatives in Iran, including his father's elder brother

5 (Unreported, 25 September 2003) para 4.
6 Paragraph 8.
7 Paragraph 28 of his determination.

> and five cousins. He has a family life in the UK with his parents and siblings but it only commenced after his arrival in the UK at the end of 2001 ... He is now aged 22 and a mature young man who can be expected to continue to pursue his own private life in Iran.'

And so the adjudicator held that Mr Kashmiri's removal, so far as it would interfere with his family life in the United Kingdom, would nonetheless be proportionate to the legitimate policy aim of immigration control; and he dismissed the art 8 appeal.

[14] Mr Kashmiri's appeal to the IAT was limited to the art 8 ground. A major element in his case was, as the IAT accepted, that there were 'insurmountable obstacles to the continuation of a family life, as it now exists, in Iran where the parents and siblings could not be expected to return having regard to their accepted status [sc as refugees] in this country'[8]. He also put forward a new case to support his art 8 appeal. In a written statement he claimed to be bisexual and to have had relationships with men and women, a fact which (so he said) he had concealed from his parents. The IAT were concerned as to how to deal with this late claim, about which Mr Kashmiri had not given evidence or been cross-examined. In the court they proceeded on the assumption that it was true.

[15] The IAT held[9] that Mr Kashmiri's new case 'inevitably calls into question the nature and intensity of the current claimed family relationship', since that relationship was now to be taken as 'based on a concealment of his sexuality from his parents and it is clear from what he says that he expects it, if ever known to them, to have a serious effect on that relationship'. Then after considering authority, and setting out [29][10] of *M*, the IAT concluded thus:

> '17. ... Although the Secretary of State was not seized of all the detail which is now before us, he was ... aware of the broad basis of the claim and was not prepared to accept it. *We consider that, unless such a view can be categorized as plainly wrong, it should be accorded appropriate deference by us.* (Our emphasis.)
>
> 18. If we are wrong, however, in the view that the Secretary of State had sufficient information before him to make his own informed decision, it does not seem to us that the appellant makes out his grounds of appeal that the adjudicator has clearly erred in law in reaching the views as to proportionality of removal which he had expressed. *The most that the appellant could successfully submit in that respect is ... that the adjudicator could have arrived at a different conclusion. But that is wholly different from saying that his conclusion was plainly wrong and therefore unlawful on the totality of the evidence (see M*(Croatia) above).'* (Our emphasis.)

Finally[11] the IAT dismissed the late claim about Mr Kashmiri's sexuality as having no bearing on the result.

Abu-Qulbain

[16] Mr Abu-Qulbain was born in Jordan on 11 January 1981. He is by parentage a Palestinian, but his country of habitual residence was the Lebanon. He was to give details of ill-treatment suffered by him at a refugee camp in the

8 IAT decision (unreported, 18 May 2004), para 11.
9 Paragraph 14.
10 Wrongly referred to as [28].
11 Paragraph 19.

Lebanon to which he had moved with his grandmother in 1994, but given the issues in the case as they were at length refined we need not take time with that. He left the camp on 28 November 1999. He arrived in the United Kingdom, via Turkey and France, on 30 November 1999 without any travel document. He applied for asylum on arrival but—lamentably—was not required to attend for interview until 16 October 2002. He was refused asylum the same month.

[17] Mr Abu-Qulbain put forward like grounds of appeal to the adjudicator as did Mr Kashmiri: asylum, and arts 3 and 8 of the ECHR. The adjudicator found that the core of the account he gave was credible, but held that his appeal on asylum and art 3 grounds was not made out. Thus again the sole remaining issue arose under art 8. As to that, Mr Abu-Qulbain's case was that in the three years and more in which he had been in the United Kingdom he had worked hard to obtain further educational qualifications at his own expense (he had obtained a place at Nottingham University), and had become engaged to a young woman who was a British citizen: she had been only 16 when they met in August 2000. The adjudicator held[12] that his getting further education at his own expense in this country had been a 'considerable achievement'; that he could not continue his education if returned to the Lebanon, which would be an 'unduly harsh' outcome: '[h]e could well face economic destitution and economic disadvantage'; and it would be impossible for his fiancée to accompany him to the Lebanon:

> '[s]he has never lived in an Arab nation and would not be allowed by her family to go there. The Appellant would not be in a position to offer her accommodation or financial support and she would be unable to continue her education.'

[18] Accordingly the adjudicator held that Mr Abu-Qulbain's removal to the Lebanon would be disproportionate to the pursuit of the legitimate aim of the maintenance of immigration control, and allowed his appeal under art 8 of the ECHR.

[19] The Secretary of State appealed with leave to the IAT. The IAT accepted that Mr Abu-Qulbain's removal to the Lebanon would interfere with his family and private life established here, but found that it would not be disproportionate. They held[13] (in contrast to the adjudicator's finding) that the difficulties in the way of the fiancée travelling with Mr Abu-Qulbain were not insurmountable. However an additional major factor which moved the IAT's decision was their view[14] that Mr Abu-Qulbain could return to the Lebanon and there, with little delay, seek entry clearance to come to the UK as a fiancé of a person settled here. So it was that they allowed the Secretary of State's appeal.

[20] In this court Mr Blake QC for Mr Abu-Qulbain sought to put in fresh evidence which had been served on the Secretary of State as late as 30 November 2004. We may deal with this aspect very shortly. The evidence, whose details we need not describe, was intended to demonstrate that contrary to the IAT's conclusion Mr Abu-Qulbain would face very substantial difficulty, as an 'undocumented' Palestinian, in seeking to obtain an entry clearance for the United Kingdom from the Lebanon. And it is said that the IAT acted unfairly by

12 Paragraph 25 of his determination.
13 Determination (unreported, 30 October 2003) para 21.
14 Paragraph 22.

introducing this issue without warning to Mr Abu-Qulbain. Miss Carss-Frisk QC for the Secretary of State objected to this evidence being adduced. It had plainly been the Secretary of State's case before the IAT that Mr Abu-Qulbain might return to the Lebanon and there seek an entry clearance. Thus there was no unfairness. His representatives before the IAT never sought to raise the difficulties now contended for, nor did they find any place in the grounds of appeal to this court. The fresh evidence is sought to be relied on to support a new case on the facts which the Secretary of State, by the date of the hearing before us, had had no reasonable opportunity to investigate. We indicated in the course of argument that we considered Miss Carss-Frisk's objection to be well-founded. Accordingly we have not taken this new evidence into account in preparing our judgment.

THE *M*(CROATIA)* ISSUE: RIVAL CONTENTIONS

[21] This issue involves a kaleidoscope of different facets, and it is necessary to proceed step-by-step. We will first repeat the outline of the issue we have already[15] given. Here is the question: upon a statutory appeal to the adjudicator in which the immigrant claims that on the facts his removal would amount to a disproportionate and therefore unlawful interference with his rights under art 8 of the ECHR, is the adjudicator's assessment of proportionality limited to a review of the Secretary of State's decision (is the decision 'within the range of reasonable assessments of proportionality'?) or must the adjudicator decide for himself, on the merits, whether the removal would be proportionate or not? Mr Blake for all three appellants contends for the latter answer, Miss Carss-Frisk for the former. Her distinct submission was that if in any given case it was legitimate for the Secretary of State to strike the balance as he did, the adjudicator cannot for his part conclude that the decision was incompatible with the convention even though he would himself have struck the balance differently; and by 'legitimate' she meant that the decision was indeed 'within the range of reasonable assessments of proportionality'.

A NON SEQUITUR

[22] On one view of her submissions, Miss Carss-Frisk's argument is flawed by a logical mistake. It may be supportable on grounds which are independent of this mistake, but it is convenient to expose the error at this stage. At the hearing we understood her to reason from the premise that in any given case there may be a range of reasonable responses open to the decision-maker upon an issue of proportionality, to the conclusion that the adjudicator's duty is only to see whether the removal decision is within the range. But the conclusion does not follow from the premise. We certainly accept that the issue of proportionality, arising in any particular case, may often admit of a range of possible reasonable answers. But this does not entail the proposition that the adjudicator is not obliged to decide which answer in his view is the right one. There are many situations in the law where the issue under consideration might be resolved in a number of ways, all of them perfectly reasonable; but it will be the court's task to decide which solution to adopt. This is true in cases as diverse as a libel jury's assessment of a claimant's reputation and a family judge's assessment of the interests of a child. Generally where the court's duty is to decide the merits of an

15 At [4], above.

issue, it must form its own view of the merits and give judgment accordingly: notwithstanding the existence of a range of reasonable solutions.

[23] Of course, if the adjudicator's duty were by law confined to a review by which he would determine whether the Secretary of State's proportionality decision was within the range of reasonable conclusions, Miss Carss-Frisk's case would be good. But that would not be so because the proportionality question may admit of a range of possible reasonable answers. It would be because the adjudicator's task falls as a matter of law to be treated as a form of review rather than a merits appeal. This is closer to the true substance of Miss Carss-Frisk's argument. The court's duty on these appeals is to explain precisely what is the nature of the adjudicator's task in such cases as these.

THE STATUTORY SOURCE OF THE ADJUDICATOR'S JURISDICTION

[24] Where a question arises as to the scope of an appellate jurisdiction, the statute by which the jurisdiction is conferred must ordinarily be the court's first port of call; and will very often be the last. But here, the statute's imperatives are elusive, and it is fair to say that its terms played little part in the substance of counsel's arguments; but plainly they must be considered. The relevant provisions are to be found in s 65 and para 21 of Sch 4 to the Immigration and Asylum Act 1999[16]. Section 65 (which is contained in Pt IV) provides in part:

> '(1) A person who alleges that an authority [sc including the Secretary of State] has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom ... acted in breach of his human rights may appeal to an adjudicator against that decision ...
>
> (2) For the purposes of this Part—... (b) an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by s 6(1) of the Human Rights Act 1998.'

Paragraph 21 of Sch 4 provides in part:

> '(1) On an appeal to him under Part IV, an adjudicator must allow the appeal if he considers—(a) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (b) if the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, but otherwise must dismiss the appeal ...
>
> (3) For the purposes of sub-paragraph (1), the adjudicator may review any determination of a question of fact on which the decision or action was based.'

Appeals from the adjudicator to the IAT are dealt with in para 22 of Sch 4 which we need not set out. The right of appeal to this court (with permission) is conferred by para 23 'on a question of law material to [the IAT's] determination'.

[25] What is the bite of these provisions on counsel's rival contentions? The distinction between a right of appeal on a question of law only, and a general right of appeal on the merits, is a familiar one. It is a commonplace that some

16 These are the provisions which were effective at times material to these appeals. Appeals to the IAT from adjudicators' decisions promulgated since 9 June 2003 are now on a point of law only: s 101(1) of the Nationality, Immigration and Asylum Act 2002.

empowering statutes provide for the former, some for the latter. But in this case, in our judgment, the words of the statute do not on their face settle the scope of the appeal rights thereby conferred. The reason is that the material provisions of the 1999 Act appear to collapse the difference between fact and law. On the one hand, the right of appeal on human rights grounds given by s 65(1) surely requires the court to consider whether in substance there has been a violation of the appellant's convention rights (see s 65(2)(b)), and at least in part that must be a factual question. On the other hand, the relevant provision of para 21(1) of Sch 4 (conferring the adjudicator's jurisdiction) requires the adjudicator to allow the appeal if he considers that 'the decision or action against which the appeal is brought was not in accordance with the law'; otherwise he must dismiss the appeal.

[26] The tension (if it be such) between s 65 and para 21 may well be due to the fact that the language of para 21 has been lifted from s 19 of the Immigration Act 1971. The 1971 Act of course contained no analogue to s 65; at that time the incorporation of ECHR was nearly 30 years off. We apprehend that the phrase 'not in accordance with the law or with any immigration rules applicable to the case' may have been chosen, not to limit the adjudicator's jurisdiction to one akin to judicial review, but to rule out appeals based on grounds outside the Immigration Rules. However that may be, we have to confront the 1999 Act as it is. We prefer the view that the language of s 65 is not confined or restricted by the language of para 21. If that is right, the adjudicator must on the face of it decide in substance whether the action appealed against involves a violation of the appellant's convention rights. Any other approach would in our judgment perpetrate an abdication of his duty and ours, as public authorities, to vindicate and uphold the convention rights[17]. We should add two qualifications. First, Miss Carss-Frisk would say that this interpretation of the 1999 Act is implicitly barred by binding authority of this court which we have yet to discuss. Secondly, for reasons we will give, such an approach by no means requires the adjudicator to ignore, or even to pass judgment upon, government policies on immigration as they are articulated in the Immigration Rules. But all this is yet to come.

WEDNESBURY?

[27] It is central to Mr Blake's case that Miss Carss-Frisk's position restricts the adjudicator's role to a minimalist form of judicial supervision which is in principle inapt in the context of the convention rights: that is to say, it confines the adjudicator to review on conventional *Wednesbury*[18] grounds. Miss Carss-Frisk does not accept that her argument should be so categorised, and we will have to consider whether it can be understood in some different signification and perhaps prevail accordingly. But it will make for clarity if we first address the objection at face value.

[28] We are sure we need take little time describing the conventional *Wednesbury* test of public law error. Very shortly, the court would ask itself whether the decision in question was so unreasonable that no reasonable public decision-maker could have arrived at it. As is well known the test was re-stated by Lord Diplock in the *GCHQ* case[19] as condemning 'irrational' decisions.

17 See s 6 of the Human Rights Act 1998 which I will not set out.

18 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, [1948] 1 KB 223.

19 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 951, [1985] AC 374 at 410.

However precisely stated, the test imposed on the decision-maker a duty to make his decision in good faith, to have regard to all and only relevant considerations, and to bring a rational mind to bear on whatever was the issue. This approach informed a judicial review jurisdiction which was largely remote from the merits of the decision under review. The judge might violently disagree with the merits decision; but applying the *Wednesbury* test he could only strike it down if he were satisfied that it failed to meet the test's relatively undemanding standards.

[29] Mr Blake's case is that where the court's duty under the 1998 Act and art 8 of the ECHR is to decide whether the impugned decision is proportionate to the legitimate aim pursued (here immigration control), it is well established in the cases that a test altogether more intrusive than *Wednesbury* is to be applied. There are many authorities, of these courts and from Strasbourg. A leading English case is the decision of their Lordships' House in *Ex p Daly*[20], which we shall cite when we have addressed the learning in this court which bears on the *M*(Croatia)* issue and which, as will appear, may be said in particular to favour a *Wednesbury* approach to be taken by the adjudicator to questions of proportionality in art 8 cases.

[30] At this stage we will merely state a bald conclusion: if the matter were free from authority we would regard it as plain that the *Wednesbury* test is inapt to the adjudicator's task. In discussing the material provisions of the 1999 Act we have already expressed the view that the adjudicator must on the face of it decide in substance whether the action appealed against involves a violation of the appellant's convention rights, since any other approach would perpetrate an abdication of his duty and ours, as public authorities, to vindicate and uphold these rights. If this is correct, there are further issues which we must consider in due course. Is there a position open to Miss Carss-Frisk which has more blood in it than *Wednesbury* but less than a full merits appeal? If there are constraints on the adjudicator's role, are they to be expressed in terms of 'deference' to the democratic decision-maker, or is some other analysis to be preferred which may be more apt to provide an objective demarcation of the respective legal responsibilities of the Secretary of State and the adjudicator? First we must turn to the earlier learning material to the *M*(Croatia)* issue.

THE AUTHORITIES AND THE FORCE OF PRECEDENT

[31] Miss Carss-Frisk submits that she has the solid support of authority of this court in favour of her position (however that position is exactly articulated). We will start, however, with the High Court case of *R (on the application of Ala) v Secretary of State for the Home Dept*[21], which as we shall show has been distinctly approved in this court. Moses J said:

> '44. It is the convention itself and, in particular, the concept of proportionality which confers upon the decision-maker a margin of discretion in deciding where the balance should be struck between the interests of an individual and the interests of the community. A decision-maker may fairly reach one of two opposite conclusions, one in

20 *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532. As I shall show *Daly* was not an immigration case, but their Lordships' statements of principle touch the core of the *M*(Croatia)* issue.

21 [2003] EWHC Admin 521, [2003] All ER (D) 283 (Mar).

favour of a claimant the other in favour of his removal. Of neither could it be said that the balance had been struck unfairly. In such circumstances, the mere fact that an alternative but favourable decision could reasonably have been reached will not lead to the conclusion that the decision-maker has acted in breach of the claimant's human rights. Such a breach will only occur where the decision is outwith the range of reasonable responses to the question as to where a fair balance lies between the conflicting interests. Once it is accepted that the balance could be struck fairly either way, the Secretary of State cannot be regarded as having infringed the claimant's art 8 rights in concluding that he should be removed.

45. So to conclude is not to categorise the adjudicator's appellate function as limited to review. It merely recognises that the decision of the Secretary of State in relation to art 8 cannot be said to have infringed the claimant's rights merely because a different view as to where the balance should fairly be struck might have been reached.'

Ala's case was in fact a judicial review case, in which the claimant sought an order to quash the Secretary of State's certificate, given pursuant to s 72(2)(a) of the Immigration and Asylum Act 1999, that his human rights claim was 'manifestly unfounded'. The statutory effect of the certificate, if it survived challenge, was to deprive the claimant of his right of appeal to the adjudicator against the Secretary of State's substantive decision to remove him from the United Kingdom. However it was common ground[22] that the validity of the certificate depended on the nature of the adjudicator's task on an appeal to him. If he was only to police the 'range of reasonable responses', the certificate was good; but if he was to decide the proportionality issue (arising under art 8) for himself, the certificate was bad, since it was at least arguable that the claimant's art 8 rights had been violated.

[32] *Edore v Secretary of State for the Home Dept*[23], upon which Miss Carss-Frisk placed particular reliance, was not a certification case. It directly engaged the statutory appeal process. The appellant was a Nigerian woman who had entered the United Kingdom illegally. In this country she bore two children to a married man who already had three children by his wife. The Secretary of State resolved to remove her and her two children to Nigeria. The adjudicator allowed her appeal under s 65 of the 1999 Act, holding that removal would violate her and her children's rights under art 8. The IAT allowed the Secretary of State's appeal. This court overturned the IAT. Simon Brown LJ said[24]:

'For my part I find Moses J's analysis in *R (on the application of Ala) v Secretary of State for the Home Dept* [2003] EWHC 521 (Admin), [2003] All ER (D) 283 (Mar) entirely convincing and in the result conclude that, in cases like the present where the essential facts are not in doubt or dispute, the adjudicator's task on a human rights appeal under s 65 is to determine whether the decision under appeal (ex hypothesi a decision unfavourable to the appellant) was properly one within the decision maker's discretion, ie, was a decision which could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play. If it was, then

22 See Moses J's judgment at [1].

23 [2003] EWCA Civ 716, [2003] 3 All ER 1265, [2003] 1 WLR 2979.

24 [2003] 3 All ER 1265 at [20].

the adjudicator cannot characterise it as a decision "not in accordance with the law" and so, even if he personally would have preferred the balance to have been struck differently (ie in the appellant's favour), he cannot substitute his preference for the decision in fact taken.'

[33] However the approach thus taken in *Edore*'s case, indorsing the reasoning of Moses J in *Ala*'s case, contained the seeds of a problem. What if the Secretary of State had made his decision to remove the applicant without considering any proportionality issue arising under art 8 because it had not been put to him? Such an issue sometimes only surfaces when the applicant's case is prepared for appeal to the adjudicator. In such a case there is no prior determination by the administration which the appellate authorities might adjudicate to be or not to be 'a decision which could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play'. Equally, where the adjudicator makes findings of fact at variance from the factual premises on which the Secretary of State's conclusions were arrived at, there is no prior decision to be scrutinised for the virtues or vices of the balance which it struck: the adjudicator is faced with a new set of facts.

[34] There is thus a dichotomy between cases where the adjudicator proceeds on the same factual assumptions or findings as did the Secretary of State, and cases where he proceeds on different findings. The approach taken in *Ala*'s case and *Edore*'s case to the adjudication of proportionality issues in the context of art 8 is plainly available only in the first class of case. What is to be done with the second class? This court confronted the question in *R (on the application of Razgar) v Secretary of State for the Home Dept, R (on the application of Soumahoro) v Secretary of State for the Home Dept, R (on the application of Nadarajah) v Secretary of State for the Home Dept*[25]. Like *Ala's* case, *Razgar* was a certification case. The court held that the Secretary of State's certificate was only good if an appeal to the adjudicator against the substantive decision was bound to fail[26]. Again, therefore, the case depended upon the nature of the adjudicator's jurisdiction under s 65 and para 21 of Sch 4 to the 1999 Act. Giving the judgment of the court Dyson LJ said:

'40. We note that both Moses J and Simon Brown LJ were careful to limit what they said to cases where there is "no issue of fact" (Moses J) and "the essential facts are not in doubt or dispute" (Simon Brown LJ). We recognise that, if the adjudicator finds the facts to be essentially the same as those which formed the basis of the Secretary of State's decision, there will be no difficulty in adopting the approach enunciated by Moses J and Simon Brown LJ. But what if the adjudicator finds the facts to be materially different? In such a case, the adjudicator will have concluded that the Secretary of State carried out the balancing exercise on a materially incorrect and/or incomplete factual basis. There is no power in the adjudicator to remit the case to the Secretary of State for a reconsideration of the balancing exercise on the facts as found by the adjudicator. There will, therefore, be cases where it is not meaningful to ask whether the decision of the Secretary of State was within the range of reasonable responses open to him because his determination was based on an accurate analysis of the facts. But even if the

25 [2003] EWCA Civ 840, [2003] INLR 543.

26 See [28] of the judgment of the court, citing the decision of the House of Lords in *R (on the application of Yogathas) v Secretary of State for the Home Dept, R (on the application of Thangarasa) v Secretary of State for the Home Dept* [2002] UKHL 36, [2002] 4 All ER 800, [2003] 1 AC 920.

adjudicator were to conclude that the Secretary of State's analysis was wrong, it would not necessarily follow that the Secretary of State acted in breach of a claimant's Human Rights Convention rights in such a case. It would remain open to the adjudicator to decide that the conclusion reached by the Secretary of State was lawful (and did not breach the claimant's human rights) because it was, in fact, a proportionate response even on the facts as determined by the adjudicator.

41. Where the essential facts found by the adjudicator are so fundamentally different from those determined by the Secretary of State as substantially to undermine the factual basis of the balancing exercise performed by him, it may be impossible for the adjudicator to determine whether the decision is proportionate otherwise than by carrying out the balancing exercise himself. Even in such a case, when it comes to deciding how much weight to give to the policy of maintaining an effective immigration policy, the adjudicator should pay very considerable deference to the view of the Secretary of State as to the importance of maintaining such a policy. There is obviously a conceptual difference between: (a) deciding whether the decision of the Secretary of State was within the range of reasonable responses; and (b) deciding whether the decision was proportionate (paying deference to the Secretary of State so far as is possible). In the light of *Edore* ... we would hold that the correct approach is (a) in all cases except where this is impossible because the factual basis of the decision of the Secretary of State has been substantially undermined by the findings of the adjudicator. Where (a) is impossible, then the correct approach is (b). But we doubt whether, in practice, the application of the two approaches will often lead to different outcomes.'

[35] Thus Miss Carss-Frisk submits there is clear authority of this court for the essence of her argument, that the task of the adjudicator is to decide in any given art 8 case whether the Secretary of State's conclusion on proportionality was 'within the range of reasonable responses' open to him. In the case where the Secretary of State has arrived at no such conclusion or has done so on facts found by the adjudicator to be wrong, she submits that the adjudicator (faced with the proportionality issue) should still ask and answer the question whether the decision to remove was 'within the range of reasonable responses' against the backdrop, of course, of the adjudicator's own findings of fact.

[36] We are driven to say, with great respect, that we are much troubled by the learning in the High Court and this court on which Miss Carss-Frisk relies, and we entertain very considerable misgivings as to the dual approach described in this court's judgment in *Razgar*'s case. Whether the case falls within (a) or (b) (as those categories are described in *Razgar*'s case), the adjudicator is exercising the selfsame statutory jurisdiction. We find it extremely difficult to see how the quality of that single jurisdiction can shift between policing reasonable responses on the one hand and deciding the merits on the other, depending only on whether the adjudicator is operating on the same set of facts as the Secretary of State.

[37] In this court the claimant succeeded on the facts in *Razgar*'s case, as he had before Richards J at first instance. The Secretary of State appealed to the House of Lords ([2004] UKHL 27, [2004] 3 All ER 821, [2004] 2 AC 368). *Edore*'s case, *Ala*'s case and *M*(Croatia)* were all cited to the House by counsel for the

Secretary of State[27], though none of them is referred to in their Lordships' opinions. Lord Bingham of Cornhill said:

'17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be: (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* [1994] 1 FCR 65, ((1995) 19 EHRR 112). If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.

19. Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 235 at [6]) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.

20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the convention. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have

27 [2004] 2 AC 368 at 374F–375B.

been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213 at 228 (para 25), the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that—

> "although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate."

In the present case, the Court of Appeal ([2003] Imm AR 529 at [26]) had no doubt that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.'

Although Lord Walker of Gestingthorpe and Baroness Hale of Richmond dissented in the result, we conceive that the House was unanimous as to the correctness of this reasoning.

[38] Where does the approach taken in their Lordships' House in *Razgar*'s case leave the position? The opinions, notably that of Lord Bingham which we have cited, do not in express terms address either the scope of jurisdiction question (range of responses or merits?) or the dual approach question ((a) and (b) in this court's judgment in *Razgar*'s case). We are obliged to consider whether the effect of their Lordships' reasoning in *Razgar*'s case is to displace the force of *Edore*'s case, and of *Razgar*'s case in this court, as binding precedent for the purposes of our determination of these appeals.

[39] The question is whether the earlier decisions of this court 'cannot stand'[28] with what was said in the House of Lords in *Razgar*'s case. In our judgment they cannot. First, it seems to us that the dual approach taken in *Razgar* in this court is frankly inconsistent with Lord Bingham's reasoning ([2004] 3 All ER 821 at [20]). If the very nature of the adjudicator's task differed according to the kind of case he was dealing with, that would have been a conspicuous feature of 'the questions which would have to be answered by an adjudicator' which Lord Bingham precisely describes. As it happens counsel agree that the dual approach falls to be abandoned in light of *Razgar*'s case in their Lordships' House. But there remains a lively contest as to the nature of the unitary task which it is then the adjudicator's function to perform. In a written note put in after the hearing (the stare decisis issue surfaced somewhat late in the day) Miss Carss-Frisk submits that had their Lordships intended to depart from the statement of principle found in *Edore*'s case it is extremely surprising that the fact finds no mention in Lord Bingham's observations.

[40] It is, we think, worth noticing that the primary issue before their Lordships in *Razgar*'s case did not require any adumbration of the *Edore* approach. It was whether 'the rights protected by art 8 [can] be engaged by the foreseeable consequences for health or welfare of removal from the United Kingdom pursuant to an immigration decision, where such removal does not violate article 3'[29]. Moreover Mr Razgar's case on the facts fell within category (b) as formulated in this court. Lord Bingham said:

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28 *Young v Bristol Aeroplane* [1944] 2 All ER 293 at 298, 300, [1944] 1 KB 718 at 725–726, 729.

29 Per Lord Bingham [2004] 3 All ER 821 at [1].

'24. I have no doubt but that an adjudicator would, and could only, answer questions (3) and (4) in the affirmative. Question (5), being more judgmental, is more difficult and ... the Secretary of State and the judge did not consider it. The Secretary of State, moreover, failed to direct himself that art 8 could in principle apply in a case such as this. Question (5) is a question which, on considering all the evidence, before him, an adjudicator might well decide against Mr Razgar ...'

We think it plain from this passage, read with [20] which is cast in general terms, that Lord Bingham contemplated that an adjudicator would properly have arrived at his own decision on the merits in *Razgar*'s case, had he been called on to answer question (5).

[41] What follows? Since we are clear that (a) their Lordships' opinions entail an abandonment of the dual approach and (b) the House contemplated that an adjudicator would have decided the merits of the proportionality issue in *Razgar*'s case, it might well be urged that the decision of the House implies a merits approach on the adjudicator's part in all cases; and in that event it remains only to declare that the *M*(Croatia)* issue has been resolved by the *Razgar* judgment in the appellants' favour. But we do not think it would be right to adopt so summary a course. Their Lordships have addressed no express reasoning to the approach taken in *Edore*'s case, or the basis for it set out by Moses J in *Ala*'s case. We have heard substantial argument on the issue in these appeals. And the proposition that the adjudicator is to take a merits approach in all cases is itself not free of subtlety, as will become clear. We consider that we ought to revisit *Edore*'s case and decide the *M*(Croatia)* issue for ourselves. We are satisfied that in light of their Lordships' opinions in *Razgar*'s case this court is at least entitled to take that course. In fact the approach adopted in *Edore*'s case and Miss Carss-Frisk's argument built upon it face other difficulties, as it seems to us, as regards the law of precedent by reason of the earlier decision of their Lordships' House in *Ex p Daly* to which we have referred in passing and which we will cite in due course.

THE *M*(CROATIA)* ISSUE FURTHER CONSIDERED

[42] There is nothing more to say about the non sequitur which we earlier laid at Miss Carss-Frisk's door. As for the construction of the provisions of the Immigration and Asylum Act 1999 which confer the adjudicator's jurisdiction, we have already said that the words of the statute do not on their face settle the scope of the appeal rights thereby created. We have seen no reasoning in the authorities which colours this view. Whether s 65(1) (acted in breach of his human rights) is taken to prevail so as to require the adjudicator to reach a merits decision, or the primary provision is taken to be para 21(1) of Sch 4 (the decision or action against which the appeal is brought was not in accordance with the law), cannot be decided merely by reference to the statute itself. We must look elsewhere, and find autonomous reasons upon which to base a conclusion as to the true nature of the adjudicator's task.

NO *WEDNESBURY*

[43] First, as we have foreshadowed, we think it is at least clear that the adjudicator is obliged to do more than conduct a *Wednesbury* review of the Secretary of State's decision on the proportionality issue. Here we will cite the case of *R v Secretary if State of the Home Dept, ex p Daly*[30] in their Lordships' House.

It concerned the legality of policy arrangements under which a prisoner's privileged correspondence with his solicitor might be examined in the prisoner's absence. Lord Steyn, with all of whose reasoning Lord Bingham and Lord Cooke of Thorndon agreed, said:

> '27. The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective (see [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684)."
>
> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights ... a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed *in R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Ex p Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ... foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v UK* (1999) 29 EHRR 493. The court concluded, (at 543 (para 138)):
>
> > "the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention."

30 [2001] 3 All ER 433, [2001] 2 AC 532.

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so (see [2000] PL 671 at 681). To this extent the general tenor of the observations in *R (Mahmood) v Secretary of State for the Home Dept* [2001] 1 WLR 840 are correct. And Laws LJ (at 847 (para 18)) rightly emphasised in *Mahmood*'s case "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving convention rights. In law context is everything.'

Lord Cooke said:

'32. ... Lord Steyn illuminates the distinctions between "traditional" (that is to say in terms of English case law, *Wednesbury* (*see Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223)) standards of judicial review and higher standards under the convention or the common law of human rights. As he indicates, often the results are the same. But the view that the standards are substantially the same appears to have received its quietus in *Smith and Grady v UK* (1999) 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (1999) 29 EHRR 548. And I think that the day will come when it will be more widely recognised that the *Wednesbury* case was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.'

[44] *Ex p Daly* was a judicial review case. Here, we are dealing with a statutory appeal, but we have already said more than once that the words of the 1999 Act do not on their face settle the scope of the appeal rights conferred. For the purposes of the question in hand—must the adjudicator provide his own autonomous answer upon the proportionality issue?—nothing turns on the distinction between review and appeal save that the right of appeal (as opposed to review only) may be apt to require the adjudicator to conduct a judicial exercise which is not merely more intrusive than *Wednesbury*, but involves a full-blown merits judgment, which is yet more than *Ex p Daly* requires on a judicial review where the court has to decide a proportionality issue.

[45] It is thus in our judgment plain that where the *Ex p Daly* approach applies (as all parties say it does here), something more than the conventional *Wednesbury* test must be brought to bear on the decision in question. Miss Carss-Frisk as we understand it accepts as much. But she would repudiate the

Wednesbury test as being inherent in her argument. However there remains the question whether her case in fact commits her to it. Let us recall her distinct submission: it was that if in any given case it was legitimate for the Secretary of State to strike the balance as he did, the adjudicator cannot conclude that the decision was incompatible with the convention even though he would himself have struck the balance differently; and by 'legitimate' she meant that the decision was 'within the range of reasonable assessments of proportionality'. But if the submission means what it says this argument cannot stand with *Ex p Daly*. One has only to recall the words of Lord Steyn: 'the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions' ([2001] 3 All ER 43 at [27]). The very language of Miss Carss-Frisk's argument—'the range of rational or reasonable decisions'—is here *contrasted* with what proportionality will require.

[46] Accordingly, to the extent that it is formulated so as to propound a *Wednesbury* test for the adjudicator, Miss Carss-Frisk's case must in our judgment be rejected. Strasbourg authority supports this conclusion. As is well known the European Court of Human Rights entertains a doctrine by which, as an international tribunal, it accords a margin of appreciation upon human rights questions to the state authorities out of respect for their closer knowledge of national conditions. Despite this there is authority to show that, at least in some art 8 contexts, the European Court of Human Rights may adopt a thoroughgoing merits approach. In *Boultif v Switzerland*[31] the court was concerned with a refusal by the Swiss authorities to renew an Algerian national's residence permit because of his conviction and sentence for offences of robbery and damage to property. The court was satisfied that the decision was taken 'for the prevention of disorder [and] crime' ((2001) 33 EHRR 1179 at 1184 (para 34)) within art 8(2) of the ECHR, and proceeded to consider whether it was proportionate to the fulfilment of this legitimate aim. At 1187 (para 47) the court stated its task as being to ascertain whether the decision struck a fair balance between the applicant's art 8 right and the legitimate aim in question. At 1187 (para 48) it stated that it was called on to establish guiding principles. The court proceeded to list a whole series of factual matters which it was obliged to consider. It then addressed[32] 'the extent to which the offence committed by the applicant served to assume a danger for public order and security', and[33] 'the possibility of the applicant and his wife establishing family life elsewhere'. After going into these matters and passing judgment upon them, the court concluded[34] that the Swiss state's interference with the applicant's art 8 right was not proportionate to the aim pursued.

[47] The decision in *Boultif*'s case is striking. There is no mention of the margin of appreciation. The court determined the case by reference to its own view of the merits. It adopted a similar course on very different facts in another art 8 case to which we were referred, namely *Sen v Netherlands*[35]. We need not with respect take time with the details.

31 (2001) 33 EHRR 1179.
32 At 1188 (para 50).
33 At 1188 (para 52).
34 At 1189 (para 55).
35 (2003) 36 EHRR 81.

A MIDDLE WAY?

[48] *Boultif*'s case and *Sen*'s case, however, provide in our judgment an insufficient basis for concluding without more that the adjudicator's task in our municipal jurisdiction is to conduct a full merits appeal. The judgments contain no patent reasoning to support that approach, although the court adopted it in practice. And it has to be remembered that the Strasbourg court has often stated that art 8 imposes no general obligation on states to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in the other's country[36]. Further, our own human rights jurisprudence is familiar with the notion that in measuring what justifies (under a provision such as art 8(2)) an interference with the convention rights, the court will recognise a margin of discretion[37], or discretionary area of judgment, enjoyed by the democratic decision-maker. Something of this kind appears, moreover, to be contemplated by the reasoning in *Ex p Daly*. Could Miss Carss-Frisk's position be modified, so as to propose an approach that somehow lies between a *Wednesbury* review and a merits appeal, and recognises a degree of respect due to the Secretary of State as the primary decision-maker? If so, it may be thought not too generous a reading of the language deployed in *M*(Croatia)*, *Ala*'s case, *Edore*'s case, and *Razgar*'s case in this court, despite its affinity with the *Wednesbury* test, to conclude that those cases after all do no more than acknowledge and verify just such an approach. In that case they would involve no error of law. Nor would the IAT decisions in these cases, and the appeals would fall to be dismissed.

[49] However, quite apart from the language of *Edore*'s case and the other cases, there is we think great difficulty in taking such an approach. *Ex p Daly* does not directly tell us where this middle ground might lie. Lord Steyn makes it clear that the reviewing court is to 'assess the balance which the decision-maker has struck', pay 'attention ... to the relative weight accorded to interests and considerations', and '[consider] ... whether the interference with the applicants' rights answered a pressing social need'[38]. These injunctions appear to commend something close to an autonomous merits decision. But Lord Steyn states also[39] that '[t]hat does not mean that there has been a shift to merits review. On the contrary ... the respective roles of judges and administrators are fundamentally distinct and will remain so.' There seems, with great respect, to be something of a tension here. It shows at least that the nature and quality of the court's task in deciding whether an executive decision is proportionate to the aim it seeks to serve is more conceptually elusive than has perhaps been generally recognised.

INTENSITY OF REVIEW

[50] The degree of intensity with which the courts will expose any given administrative decision to the demands of fundamental rights vouchsafed in our domestic law by the 1998 Act has not so far been susceptible to principles with sharp edges. We apprehend it never will, and that is by no means of necessity a

36 The leading case is *Abdulaziz, Cabales, Balkandali v UK* (1985) 7 EHRR 471 (at 498 (para 68)). See also, for example, the Commission decision in *Poku v UK* (1996) 22 EHRR CD 94.

37 Not to be confused with the Strasbourg doctrine of margin of appreciation, which as we have indicated recognises that the Strasbourg court, as an international tribunal, is often not the best judge of the impact of local conditions on the merits of human rights claims.

38 *R v Secretary of State for the Home Dept, ex p Daly* [2001] 3 All ER 433 at [27], per Lord Steyn. The last quotation is from Lord Steyn's citation of *Smith and Grady v UK* (1999) 29 EHRR 493.

39 At [28].

bad thing; a prime virtue of the common law is its flexibility. But we need to have certainty as well; indeed the law of Luxembourg and of Strasbourg prompts us to insist upon it. Here, our law has not progressed far beyond very general propositions. We know that '[t]he depth of judicial review and the deference due to administrative discretion vary with the subject matter'[40]. Can we find a principled approach to give this proposition concrete effect in cases such as these appeals?[41] In *R (on the application of ProLife Alliance) v BBC*[42] Lord Hoffmann said (at [75]):

> 'My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.'

[51] It seems to us that we might move some distance towards the goal of legal certainty by examining the question, whether the adjudicator must provide his own autonomous answer upon the proportionality issue, by reference to this approach. Since the statute itself does not furnish an answer, we must see whether an appeal to legal principle does so. By what principle should the adjudicator confine himself to scrutiny of 'the range of reasonable responses'? We can see only one candidate. It is that because the first decision-maker, the Secretary of State, acts for the elected government, the court should accord him that margin of discretion, or discretionary area of judgment, often said to be properly enjoyed by the democratic decision-maker. The principle here is respect for the democratic powers in our constitution. Is it engaged in these adjudicators' decisions?

THE ADJUDICATION OF POLICY

[52] We think not. The reason is that the adjudicator is not required to pass upon any aspect of government policy. The principle of law by which respect for the democracy requires a margin of discretion to be accorded to the democratic decision-maker primarily applies where the subject of decision is the formation of policy. We accept there are other cases where the courts will (pace Lord Hoffmann) defer to government: cases where for practical reasons the courts are in no position to arrive at an autonomous decision. Historically, the most familiar instance arose where the question was whether the interests of national security required this or that particular action to be taken[43]. Such a case involved the application of policy, not its formulation (the policy itself—the preservation of national security—was perfectly clear). But nothing of the kind arises here.

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40 Per Lord Cooke (see *R v Secretary of State for the Home Dept, ex p Daly* [2001] 3 All ER 433 at [32]).

41 There are of course other general propositions in the books concerning the intensity of the review. One is that the greater the interference with a fundamental right, the more intensive the review that is required. This has been stated many times. It first very clearly appeared in the heightened scrutiny test developed in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554 referred to by Lord Steyn in *Ex p Daly* (see [2001] 3 All ER 433 at [27]), cited at [43], above. But we doubt whether this goes far to resolve the *M*(Croatia)* issue.

42 [2003] UKHL 23, [2003] 2 All ER 977, [2004] 1 AC 185.

[53] Human rights challenges not infrequently involve an assault on government policy. Sometimes the policy is enshrined in legislation. The 1998 Act recognised the prospect of review of policy so enshrined by providing for the special rule of interpretation of statutes contained in s 3, and the mechanism for declarations of incompatibility contained in s 4. Statutes articulate policy which Parliament has accepted, and the enactment of s 3 recognises that policy so articulated might itself offend the ECHR unless subjected to special interpretation. In deciding whether a policy (whether enshrined in legislation or not) of itself entails violations of the convention rights, or whether by contrast it represents no more than a proportionate response to the problem in hand, the courts will generally recognise that the democratic powers in the state have a special responsibility. Policy-making is their territory, and not that of the judges. Hence the margin of discretionary judgment accorded to the government policy-maker on democratic grounds. The courts are also likely to recognise that government is better equipped than the court to judge how needful the policy is to achieve the aim in view. So where policy is the subject matter in hand, principle and practicality alike militate in favour of an approach in which the court's role is closer to review than appeal: where a degree of deference does no more than respect the balance to be struck between the claims of democratic power and the claims of individual rights.

[54] In such cases, moreover, the court is by no means merely thrown back to *Wednesbury*. A 'middle way' is readily at hand. If the policy perpetrates an apparent violation of a Convention right so that the government must demonstrate proportionality, the court will not be satisfied merely upon its being shown that a reasonable decision-maker might consider the policy proportionate. It will require a substantial reasoned justification of the policy in light of the discipline inherent in this kind of case as described by Lord Steyn in *Ex p Daly*[44]:

> '... the intensity of the review ..., is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.'

The difference between this approach and *Wednesbury* is plain to see. *Wednesbury* review consigned the relative weight to be given to any relevant factor to the discretion of the decision-maker. In the new world, the decision-maker is obliged to accord decisive weight to the requirements of pressing social need and proportionality. It is important to recognise that *Ex p Daly* was itself a policy case, and indeed the House of Lords struck down certain paragraphs of the material Security Manual 'in so far as they provided that prisoners were always to be absent when privileged legal correspondence held by them in their cells was examined by prison officers'[45].

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43 However the use of secret hearings and special advocates before the Special Immigration Appeals Commission under the provisions of Part 4 of the Anti-terrorism, Crime and Security Act 2001, whatever the demerits of that legislation (for which see *A v Secretary of State for the Home Dept* [2004] UKHL 56, (2004) 17 BHRC 496, [2005] 2 WLR 87) tend to show that, at least in a specially adapted procedural environment, the judicial process can be made apt to resolve specific practical questions arising in the national security field.

44 [2001] 3 All ER 433 at [27].

45 [2001] 2 AC 532 at 533B–C (headnote).

THE ADJUDICATION OF ISSUES OTHER THAN POLICY

[55] But the adjudication of particular instances, in which the adjudicator is not in the least degree called upon to pass judgment on government policy, belongs as it seems to us to an altogether different category. The principle by which a margin of discretion is to be accorded to the primary decision-maker out of respect for the democratic claims of elected government has no application. In these appeals, the adjudicators were not called on to decide whether any policy was proportionate to its legitimate purpose, nor, therefore, to pass judgment on government policy at all. Accordingly they were not required to enter into any field which distinctly lies within the constitutional responsibility of government. On the contrary, their duty was to see to the protection of individual fundamental rights, which is the particular territory of the courts (here the adjudicator), while policy is the particular territory of the elected powers in the state.

[56] Here, the material policy is given first by the statutory requirement that persons who are not British citizens require leave to enter or remain in the United Kingdom[46]; secondly and more particularly by the Immigration Rules, made by the Secretary of State subject to parliamentary approval[47]. The rules state the detail of immigration policy, and in doing so prescribe in effect which classes of aliens will in the ordinary way be allowed to enter the United Kingdom and which will not. The adjudicator has no business whatever to question or pass judgment upon the policy given by the Rules. In our judgment his duty, when faced with an art 8 case where the would-be immigrant has no claim under the rules, is and is only to see whether an exceptional case has been made out such that the requirement of proportionality requires a departure from the relevant rule in the particular circumstances. If that is right, the importance of maintaining immigration control is a prior axiom of the debate before him. It is not at all the subject of that debate. There is no basis upon which he should defer to the Secretary of State's judgment of the proportionality issue in the individual case *unless* it were somehow an open question what weight should be given to the policy on the one hand, and what weight should be given to the art 8 right on the other. In that case, no doubt, the adjudicator would have to address their relative importance. If he had to do that, we apprehend that he would be obliged to accord a considerable degree of 'deference' to the Secretary of State's view as to how the balance should be struck. But that is not the position. The adjudicator is not required to address the relative importance of the public policy and the individual right.

THE TRUE RESTRICTION OF THE ADJUDICATOR'S ROLE

[57] In these cases, the rules have themselves struck the balance between the public interest and the private right, the search for which is inherent in the ECHR as it has been interpreted by the Strasbourg court[48]. At least they have done so for the general run of cases. Now, where Parliament has itself struck the balance between public interest (constituted by a statutory policy) and private right (constituted by a claim of ECHR violation perpetrated by the policy), the court

46 Though the language has changed through amendments over the years, this has in essence been a requirement of the Immigration Act 1971 since its inception. We need not set out the material provisions.

47 See ss 1(4) and 3(2) of the Immigration Act 1971. Section 3(2) provides for a negative resolution procedure in each House of Parliament.

48 See *Sporrong v Sweden* (1983) 5 EHRR 35 at 52 (para 69), but there are many other references.

will accord very considerable respect to the balance so struck, and that approach is perfectly consonant with the court's own obligations under the 1998 Act. So much appears from the reasoning of Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*[49]. The case raised the question whether an assured shorthold tenant's art 8 right to respect for her home was violated by the housing association's entitlement to claim possession under s 21(4) of the Housing Act 1988. Lord Woolf CJ, giving the judgment of the court, said:

> '[69] ...[I]n considering whether Poplar [sc. the housing association] can rely on art 8(2), the court has to pay considerable attention to the fact that Parliament intended when enacting s 21(4) ... to give preference to the needs of those dependent on social housing *as a whole* over those in the position of the defendant ... This is an area where, in our judgment, the courts must treat the decisions of Parliament as to what is in the public interest with particular deference. The limited role given to the court under s 21(4) is a legislative policy decision. The correctness of this decision is more appropriate for Parliament than the courts and [the HRA] does not require the courts to disregard the decisions of Parliament in relation to situations of this sort when deciding whether there has been a breach of the convention ...
>
> [72] We are satisfied that ... s 21(4) of the 1998 Act does not conflict with the defendant's right to family life. Section 21(4) is certainly necessary in a democratic society in so far as there must be a procedure for recovering possession of property at the end of a tenancy. The question is whether the restricted power of the court is legitimate and proportionate. This is the area of policy where the court should defer to the decision of Parliament. We have come to the conclusion that there was no contravention of art 8 ...'

This decision was passed upon by their Lordships' House in *Harrow London BC v Qazi*[50], but the reasoning we have quoted was not the subject of any criticism or qualification.

[58] In the present case the policy is given and the balance struck by the rules and not by main legislation. But the balance so struck is not in our judgment entitled to less respect or deference on that account. We would emphasise the particularity with which the rules have prescribed which classes of aliens will in the ordinary way be allowed to enter the United Kingdom and which will not. Here are the provisions of para 317 of the relevant set of Immigration Rules[51] which are material to *Huang*'s case:

> 'The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:
>
> (i) is related to a person present and settled in the United Kingdom in one of the following ways:
>
> (a) mother or grandmother who is a widow aged 65 years or over; or ...

49 [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48.
50 [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983.
51 HC Paper 395.

(e) a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances, and mainly dependent financially on relatives settled in the United Kingdom; or

(ii) is joining or accompanying a person who is present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and

(iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and

(iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and

(iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and

(v) has no other close relatives in his own country to whom he could turn for financial support; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.'

There are also the Immigration Directorates' Instructions, which serve as guidance for the application of the rules. Chapter 8, s 6, Annex V of these relates to para 317 of the rules. Other paragraphs of the rules deal, for example, with a claim to enter as a child of a refugee[52], which is in the territory of the *Kashmiri* case, and a claim to enter as a fiancé(e)[53], which is potentially material in the *Abu-Qulbain* case. Like para 317 they are franked by provisions in the Immigration Directorates' Instructions. We will not set out these further materials. It is common ground that none of the appellants qualifies under the rules.

[59] It might be said that the Immigration Rules constitute for all cases the balance to be struck between private right and public interest, and this is conclusive for any judgment in an art 8 case as to whether removal or deportation is proportionate and so justified under art 8(2). But the Secretary of State rightly does not so contend. If that were the law, our municipal statute need do no more than confer a right of appeal to allow the immigrant to contend that on the true facts he has a good claim under the rules. However, whatever else may be said about the relation between s 65(1) and para 21(1) of Sch 4 to the Immigration and Asylum Act 1999, it is surely plain that the legislature contemplated appeals on convention grounds, including art 8, which might succeed even though the appellant had no good claim under the rules. The true position in our judgment is that the 1998 Act and s 65(1) require the adjudicator to allow an appeal against removal or deportation brought on art 8 grounds if, but only if, he concludes that the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour notwithstanding that he cannot succeed under the rules.

[60] In such a case the adjudicator is not ignoring or overriding the rules. On the contrary it is a signal feature of his task that he is bound to respect the balance between public interest and private right struck by the rules with Parliament's

52 Paragraph 352D.
53 Paragraph 290.

approval. That is why he is only entitled on art 8 grounds to favour an appellant outside the rules where the case is truly exceptional. This, not *Wednesbury* or any revision of *Wednesbury*, represents the real restriction which the law imposes on the scope of judgment allowed to the adjudicator. It is not a question of his deferring to the Secretary of State's judgment of proportionality in the individual case. The adjudicator's decision of the question whether the case is truly exceptional is entirely his own. He *does* defer to the rules; for this approach recognises that the balance struck by the rules will generally dispose of proportionality issues arising under art 8; but they are not exhaustive of all cases. There will be a residue of truly exceptional instances. In our respectful view such an approach is also reflected in Lord Bingham's words in *Razgar*'s case[54], which we have already cited:

> 'Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.'

[61] We have considered whether the view we have taken of the adjudicator's task in these cases is in conflict with the reasoning of Dyson LJ in *Samaroo (Allan) v Secretary of State for the Home Dept; Sezek (Mehmet) v Secretary of State for the Home Dept*[55]. In that case there were two appellants whom the Secretary of State had decided to deport on the ground that their continued presence in the United Kingdom was not 'conducive to the public good'[56]. The first appellant, Samaroo, sought on art 8 grounds to challenge the Secretary of State's refusal to grant exceptional leave to remain, a deportation order having earlier been made against the appellant. His application for judicial review was dismissed, as was his appeal. In the course of giving judgment Dyson LJ said[57]:

> ' ... The Secretary of State must show that he has struck a fair balance between the individual's right to respect for family life and the prevention of crime and disorder. How much weight he gives to each factor will be the subject of careful scrutiny by the court. The court will interfere with the weight accorded by the decision maker if, despite an allowance for the appropriate margin of discretion, it concludes that the weight accorded was unfair and unreasonable. In this respect, the level of scrutiny is undoubtedly more intense than it is when a decision is subject to review on traditional *Wednesbury* grounds ...'

Samaroo's case did not involve the statutory jurisdiction of the adjudicator or the IAT. As we have said the proceedings were by way of judicial review to challenge the refusal of exceptional leave to remain. An application for judicial review is categorically inapt as an arena for a full-blown merits appeal. But *Samaroo*'s case was in any event in truth a policy case. There were no applicable Immigration Rules. The Secretary of State's position was that the gravity of the appellant's crime outweighed the compassionate circumstances. The case was therefore one

54 [2004] 3 All ER 821 at [20].
55 [2001] EWCA Civ 1139, [2002] INLR 55.
56 Immigration Act 1971 s 3(5)(b).
57 [2002] INLR 55 at 71 at [39].

in which there was an open question as to the respective weight to be given to private right and public interest. The court was in particular asked to make an assessment, in the context of the case's facts, of the importance attached by the Secretary of State to the desirability of the appellant's deportation in light of his criminal past. In those circumstances the principle of respect for the democratic powers was plainly engaged. Our conclusions in these present appeals march with the reasoning in *Samaroo*'s case.

[62] In summary, where in a human rights challenge the court is called upon in any respect to judge the weight or the merits of government policy, it will in deciding the outcome allow a margin of discretion to the policy maker. So much is required by the democratic principle: the principle of respect for the democratic powers of the state. In such a case, consistently with its obligations under the 1998 Act, the court's decision is more intrusive than *Wednesbury*, being subject to the disciplines described by Lord Steyn in *Ex p Daly*. But there are cases, exemplified by these appeals, in which the court or adjudicator is not at all called upon to judge policy. In that case no question of respect for the democratic powers of the state arises: save in the sense, again exemplified here by the Immigration Rules, that prior decisions of the executive or legislature may have fixed, and narrowed, the territory across which the adjudicator's autonomous judgment may operate.

CONCLUSIONS FOR THESE APPEALS

[63] It must follow that the decisions of the IAT in *Huang*'s case and *Kashmiri*'s case are legally defective, since both adopted a review approach based on deference to the Secretary of State's view of proportionality in light of the particular facts. The same is not obviously true in *Abu-Qulbain*'s case, although the IAT in that case seems to have placed some reliance on this court's decision in *Razgar*[58]. In any event we are entirely clear that on the facts of *Kashmiri*'s case and *Abu-Qulbain*'s case, which we will not repeat, there is no possibility that a tribunal properly directing itself in accordance with the approach we have described could have found anything amounting to truly exceptional circumstances. We would dismiss the appeals in those cases.

[64] We are persuaded that *Huang*'s case is in a different category. On any view the case is an unusual one. We consider that a tribunal might find that in light of the whole history Mrs Huang's circumstances should be regarded as truly exceptional so as to give rise to a claim under art 8 notwithstanding that she does not meet the rules. We do not find it necessary to offer any further reasoning on the facts, which will no doubt have to be considered afresh by the IAT. We do not of course for a moment suggest that the Secretary of State's appeal to the IAT ought to fail. But for reasons we have given we would allow Mrs Huang's appeal in this court.

POSTSCRIPT

[65] Finally, since making the text of this judgment available to counsel in draft, we have been asked in a note from Mr Blake and his junior to consider the addition of some observations on the question, what classes of art 8 cases (if any) are governed by a 'flagrancy' threshold. It is accepted on all hands that so-called

58 See paras 18 and 20 of the IAT determination.

domestic art 8 cases are not governed by such a threshold. We consider that on our approach to the law, and in particular the requirement that the adjudicator must find a truly exceptional case if he is to allow an appeal on art 8 grounds in instances such as these, it is not helpful to categorise the exercise he must perform in terms of 'flagrancy'.

Orders accordingly.

Dilys Tausz Barrister.

R (on the application of H) v Secretary of State for Health

[2004] EWCA Civ 1609

COURT OF APPEAL, CIVIL DIVISION

BUXTON, WALL LJJ AND LINDSAY J

19 OCTOBER, 3 DECEMBER 2004

Mental health – Admission of patient to hospital – Admission for assessment – Right to liberty and security – Patient admitted for assessment – Patient not competent to avail herself of statutory provision allowing for application for discharge – Whether breach of right to liberty and security – Mental Health Act 1983, ss 2, 66 – Human Rights Act 1998, Sch 1, Pt I, art 5(4).

Mental health – Admission of patient to hospital – Admission for assessment – Right to liberty and security – Patient admitted for assessment – Statutory period for detention for assessment – Hospital applying for court order relating to nearest relative before end of statutory period – Effect of application extending statutory period until application finally disposed of – Whether breach of right to liberty and security – Mental Health Act 1983, s 29(4) – Human Rights Act 1998, Sch 1, Pt I, art 5(4).

The claimant was admitted to detention in hospital under s 2[a] of the Mental Health Act 1983 which provided for the admission and detention for assessment of a patient on the ground that he was suffering from mental disorder of a nature warranting such detention and that he needed to be detained in the interests of the health or safety of himself or others. Detention under s 2 could only last for 28 days. Section 66[b] of the 1983 Act permitted a patient who was, inter alia, admitted to hospital for assessment, to make an application for discharge to a mental health review tribunal. An order for discharge from a s 2 detention could also be applied for by the hospital authorities or by the nearest relative of the patient. Under s 29[c] of the 1983 Act an authorised social worker could apply to the county court for removal of the nearest relative from performance of his functions if, inter alia, the nearest relative was unreasonably objecting to the making of an application for admission for treatment or a guardianship application. When such an application was made, the 28-day period under s 2 was

a Section 2, so far as material, provides: '(1) A patient may be admitted to a hospital and detained there for the period allowed by subsection (4) below ... (2) An application for admission for assessment may be made in respect of a patient on the grounds that—(a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and (b) he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons ... (4) Subject to the provisions of section 29(4) below, a patient admitted to hospital in pursuance of an application for admission for assessment may be detained for a period not exceeding 28 days beginning with the day on which he is admitted, but shall not be detained after the expiration of that period unless before it has expired he has become liable to be detained by virtue of a subsequent application, order or direction ...'

b Section 66, so far as material, provides: '(1) Where—(a) a patient is admitted to hospital in pursuance of an application for admission for assessment ... an application may be made to a Mental Health Review Tribunal ... by the patient ...'

extended automatically by s 29(4) until the court proceedings had been finally disposed of. The claimant's mother, as her nearest relative, sought the claimant's discharge, but the responsible medical officer considered that, if discharged, she would be liable to be a danger to herself or to others, and made a barring order preventing it. The day before the s 2 order would have expired automatically after 28 days a s 29 application was made to displace the claimant's mother as nearest relative. The claimant therefore remained subject to detention under the s 2 order. She applied for judicial review contending that the statutory scheme of the 1983 Act did not conform to the requirement of art 5(4)[d] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) that everyone who was deprived of their liberty by arrest or detention was entitled to take proceedings by which the lawfulness of that detention should be decided speedily by a court. The claimant complained: (i) that her disability was sufficiently serious for her to have been unable either herself to make an application to the mental health review tribunal in respect of the s 2 detention, or to authorise others to make an application on her behalf; and (ii) that by virtue of the application under s 29 she had been detained under s 2 very well beyond the normal period of 28 days without recourse to the mental health review tribunal in respect of the extension of that period. The judge dismissed the application and the claimant appealed. The Secretary of State contended, inter alia, that he had a default power to refer cases to the mental health review tribunal if he thought fit, and had so referred the case of the claimant; and that added relief was unnecessary as in an appropriate case a patient could bring judicial review proceedings.

Held – (1) Section 2 of the 1983 Act was incompatible with art 5(4) of the convention in that it was not attended by adequate provision for the reference to a court of the case of a patient detained pursuant to s 2 in circumstances where a patient had a right to make application to a mental health review tribunal but the patient was incapable of exercising that right on his own initiative. The power of the Secretary of State to refer cases to the mental health review tribunal if he thought fit could not meet the requirement that recourse under art 5 should not be controlled by a non-judicial body. The state was obliged by the general principles of protection that informed art 5 to place the incompetent patient in the same position as the competent patient, as nearly as it was possible to do so, with regard to access to the mental health review tribunal. Withholding of access could not be justified by substituting the process of judicial review, which was by definition not a merits challenge, and recourse to judicial review, even if it were

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c Section 29, so far as material, provides: '(1) The county court may, upon application made ... in respect of a patient, by order direct that the functions of the nearest relative of the patient ... shall ... be exercisable by the applicant, or by any other person specified ... being a person who, in the opinion of the court, is a proper person to act as the patient's nearest relative and is willing to do so. (2) An order under this section may be made on the application of ... (c) an approved social worker ... (3) An application for an order under this section may be made upon any of the following grounds ... (c) that the nearest relative of the patient unreasonably objects to the making of an application for admission for treatment or a guardianship application in respect of the patient; ... (4) If, immediately before the expiration of the period for which a patient is liable to be detained by virtue of an application for admission for assessment, an application under this section ... is pending in respect of the patient, that period shall be extended—(a) in any case, until the application under this section has been finally disposed of ... '

d Article 5, so far as material, is set out at [14], below

available, was inappropriate where what the patient sought was access to a skilled and specialist tribunal uniquely able to make a professional assessment of his or her medical condition. The remedy under the 1998 Act of a reading down of the statutory provisions could not be used to add to a statute provisions that it did not contain and therefore a declaration of incompatibility was appropriate (see [16], [18], [20], [23], [24], [26], [28]–[30], [44], [47], [56], below); *Winterwerp v Netherlands* (1979) 2 EHRR 387 and *Tam v Slovakia* [2004] ECHR 50213/99 considered.

(2) Section 29(4) of the 1983 Act was incompatible with art 5(4) of the convention in that it was not attended by provision for the reference to a court of the case of a patient detained pursuant to s 2 of the 1983 Act whose period of detention was extended by the operation of s 29(4). A patient detained under s 2, whether competent or incompetent, could be detained beyond the 28 day limit without adequate judicial supervision. When that occurred, the justification for his or her original detention, whether or not it had been approved by the mental health review tribunal, had expired, and he was detained simply because of proceedings in respect of which he or she was a spectator. In those circumstances the patient should have the right to return to the mental health review tribunal to obtain a judicial decision on his continued detention. Judicial review was not available for the same reasons as applied to the deprivation of access to the mental health review tribunal for the incompetent patient under s 2. The appropriate remedy was a declaration of incompatibility for the reasons which applied to the appropriate remedy for the incompetent patient under s 2. Accordingly, the appeal would be allowed and declarations of incompatibility granted (see [21], [23], [24], [26], [28]–[30], [50], [53]–[56], [59], below).

Notes

For general review of the Mental Health Act 1983, for compulsory admission for assessment, for appointment by the county court of an acting nearest relative, and for cases in which applications may be made to a Mental Health Review Tribunal, see 30 *Halsbury's Laws* (4th edn reissue) paras 1206, 1255, 1259, 1355, and for the right to liberty and security of the person, and justifications for deprivation of liberty, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 127, 132.

For the Mental Health Act 1983, ss 2, 29, 66, see 28 *Halsbury's Laws* (4th edn) (2001 reissue) 836, 885, 930.

For the Human Rights Act 1998, Sch 1, Pt I, art 5, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 705.

Cases referred to in judgments

F (adult: court's jurisdiction), Re [2000] 3 FCR 30, [2000] 3 WLR 1740, CA.

Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557, [2004] 3 WLR 113.

HL v UK (2004) 17 BHRC 418, ECt HR.

R v Secretary of State for the Home Dept, ex p Daly [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.

R (on the application of N) v Doctor M [2002] EWCA Civ 1789, [2003] 1 FCR 124, sub nom *R (N) v M* [2003] 1 WLR 562.

R (S) v Plymouth City Council [2002] EWCA Civ 388, [2002] LGR 565, [2002] 1 WLR 2583.

R (on the application of Wilkinson) v Responsible Medical Officer, Broadmoor Hospital [2001] EWCA Civ 1545, (2001) 65 BMLR 15, sub nom *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 WLR 419.

Shirlaw v Southern Foundaries and Federated Foundries Ltd [1939] 2 All ER 113, [1939] 2 KB 206, CA; *affd* sub nom *Southern Foundries (1926) Ltd and Federated Foundries Ltd v Shirlaw* [1940] 2 All ER 445, [1940] AC 701, HL.

Tam v Slovakia [2004] ECHR 50213/99, ECt HR.

TW v Malta, Aquilina v Malta (2000) 29 EHRR 185, ECt HR.

Winterwerp v Netherlands [1979] ECHR 6301/73, (1979) 2 EHRR 387, ECt HR.

X v UK (1981) 4 EHRR 188, [1981] ECHR 7215/75, ECt HR.

Cases referred to in skeleton arguments

Benjamin v UK (2003) 13 BHRC 287, (2003) 36 EHRR 1, ECt HR.

Croke v Ireland App No 33267/96 (15 June 1999, unreported), ECt HR.

E v Norway (1994) 17 EHRR 30, [1990] ECHR 11701/85, ECt HR.

Khawaja v Secretary of State for the Home Dept [1983] 1 All ER 765, [1984] AC 74, [1983] 2 WLR 321, HL.

Megyeri v Germany (1992) 15 EHRR 584, [1992] ECHR 13770/88, ECt HR.

Pereira v Portugal (2003) 36 EHRR 865, [2002] ECHR 44872/98, ECt HR.

R (on the application of Adebambo) v Mental Health Review Tribunal (12 January 2001, unreported), QBD.

R (on the application of D) v Secretary of State for the Home Department [2002] EWHC 2805 (Admin) [2003] 1 WLR 1315.

R (on the application of KB) v Mental Health Review Tribunal [2003] EWHC 193 (Admin), [2003] 2 All ER 209, [2004] QB 936, [2003] 3 WLR 185.

R v Central London County Court ex p London [1999] 3 All ER 991, [1999] QB 1260, [1999] 3 WLR 1, CA.

R v Secretary of State for the Home Dept, ex p Muboyayi [1991] 4 All ER 72, [1992] QB 244, [1991] 3 WLR 442, CA.

R v Secretary of State for the Home Dept, ex parte Cheblak [1991] 2 All ER 319, [1991] 1 WLR 890, CA.

Rakevich v Russia App No 58973/00 (28 October 2003, unreported), ECt HR.

Re Whitbread [1999] COD 370.

Stafford v UK 13 BHRC 260, (2002) 35 EHRR 1121, ECt HR.

Appeal

The claimant, MH, appealed from the decision of Silber J on 22 January 2004 ([2004] EWHC 56 (Admin), [2004] All ER (D) 188 (Jan)) refusing her application for declarations of incompatibility pursuant to s 4 of the Human Rights Act 1998 against the Secretary of State for Health. The facts are set out in the judgment of Buxton LJ.

Paul Bowen (instructed by *Elliott Bridgman*) for MH.

Timothy Morshead (instructed by the *Office of the Solicitor* to the *Department of Health* and the *Department for Work and Pensions*) for the Secretary of State.

Cur adv vult

3 December 2004. The following judgments were delivered.

BUXTON LJ.

[1] This appeal concerns the compatibility with art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the ECHR) of various arrangements made by the Mental Health Act 1983 (the 1983 Act) for dealing with persons with mental disorder.

THE STATUTORY STRUCTURE

[2] No issue arises as to the construction of the 1983 Act, so it will be sufficient to describe its relevant provisions in summary form.

• Section 2 provides for the admission and detention for assessment of a person on the ground that he is suffering from mental disorder of a nature warranting such detention, and that he needs to be detained in the interests of the health or safety of himself or others. By s 2(4), such detention can only last for 28 days.

• Section 3 provides for the compulsory detention of a person for treatment, for a period of initially up to six months.

• Section 7 provides for the making of a guardianship order in respect of a person suffering from mental disorder.

• In all of the foregoing cases, s 66 permits the patient to make an application for the discharge of the order to a Mental Health Review Tribunal (MHRT).

• Additionally, an order for discharge from a s 2 detention may be made either by the hospital authorities or by the patient's nearest relative (s 23). However, the patient's responsible medical officer (RMO) may make what is colloquially called a barring order preventing a discharge by the nearest relative if he thinks that the patient if discharged would be liable to be a danger to himself or to others (s 25).

• Under s 29 an authorised social worker may apply to the county court for the removal of the nearest relative from the performance of his functions under the 1983 Act, inter alia if he considers that the nearest relative is unreasonably failing to agree to a guardianship order. When such an application is made, the 28-day period under s 2(4) is, by s 29(4), extended automatically until the proceedings have been finally disposed of.

THE CASE OF MH

[3] MH is 32 years of age, and has the misfortune to suffer from Down's Syndrome. Until comparatively recently she lived at home with her mother, her nearest relative, but on 31 January 2003 she was admitted to detention under s 2. Shortly thereafter the mother sought a s 23 discharge, but MH's RMO issued a barring order under s 25. The s 2 order was to expire automatically on 28 February 2003, but on 27 February 2003 a s 29 application was made to the Telford County Court to displace the mother as nearest relative. By s 29(4), therefore, MH remained subject to detention under the s 2 order.

[4] When the present application came before Silber J, in January 2004 ([2004] EWHC 56 (Admin), [2004] All ER (D) 188 (Jan)), he was very surprised indeed to find that still no date had been fixed for the hearing of the s 29 application that had been made 11 months previously. We may add that that history of delay has been extended, in that even at the date of this judgment, some 20 months after the s 29 application, those proceedings still have not been 'finally disposed of' for the

purposes of s 29(4), because the nearest relative has appealed to this court against the decision of the county court judge. In the meantime, however, the local authority had succeeded in finding suitable accommodation for MH other than in the psychiatric hospital to which she had been admitted only for a 28-day assessment, and MH moved to that accommodation on 21 July 2003. On 7 August 2003 a guardianship order was made in respect of her. That order now authorises her continued restriction.

[5] MH makes two complaints. First, her disability is sufficiently serious for her to have been unable either herself to make an application to the MHRT in respect of the s 2 detention, or to authorise others to make an application on her behalf. Second, because of what she contends is the adventitious fact of the application under s 29 she has been detained under s 2 very well beyond the normal period of 28 days. The first complaint affects the interests of all patients suffering from a disability as serious as that of MH. The second complaint potentially affects all persons in respect of whom a s 2 detention is prolonged under s 29(4). It was for those reasons that Silber J accepted, and with respect was right to accept, that the proceedings should not be stayed because MH herself has long ago passed out of the ambit of s 2. It was for those reasons that this court gave permission to appeal from Silber J's rejection of MH's application on its merits. And, quite apart from the general importance of the issues, MH was by the operation of the statutory scheme kept for over six months in a form of detention that the statute itself assumes to require only 28 days to fulfil its statutory purposes.

THE ISSUE IN THIS APPEAL

[6] The objections to the statutory scheme have already been indicated in outline. They are:

- A competent s 2 patient has access to the MHRT, whereas an incompetent patient such as MH does not.
- Section 29(4) may extend a s 2 detention for many months after the expiry of its statutory term, and neither the competent nor the incompetent patient has any recourse to the MHRT in respect of that extension.

These, however, are the express and intended rules of a statutory scheme. If MH is going to displace them, her only recourse is under the ECHR; but there are serious difficulties in applying the jurisprudence, and more particularly the detailed wording, of the relevant article, art 5, to the facts of the present case.

[7] Before turning to those difficulties, however, I must address the judgment below of Silber J, who in a detailed and if I may say so careful review of the available authority found himself unable to afford MH any relief. Some part of the judge's reasoning addressed the art 5 difficulty that I have mentioned at [6], above, and to which I return below. The judge was, however, also persuaded that aspects of the statutory scheme provided the patient with sufficient protection for ECHR purposes even though her right to recourse to the MHRT was limited, or in practice non-existent. These considerations were, in respect of access to the MHRT in respect of the initial detention under s 2 the automatic expiry of that detention after 28 days; and in respect of the s 29(4) extension the fact that it was supervised, at least indirectly, by the county court. I am not persuaded on either of those points, which I deal with in turn.

AUTOMATIC RELEASE AFTER 28 DAYS

[8] The judge, (at [36]), accepted the argument of the Secretary of State that automatic discharge at the end of the 28-day period (absent, of course, a s 29 application) was a better safeguard for the patient than an 'automatic review'. The latter expression reverts to the jurisprudence of art 5, and I shall have to come back to it. The problem about the argument at this stage is, however, that it does not address the imbalance between the competent patient, who can apply to the MHRT under s 66 within 14 days of his detention, and the incompetent patient who, because he is not mentally able to make or promote such an application, has no recourse to an outside body: except through the agency of the nearest relative, who can be, and in this case was, barred under s 25. If the 28-day limit is a sufficient safeguard in the case of incompetent patient, why is it not so in the case of the competent? Why in his case is recourse to the MHRT given at all? And, further, even a 28-day period of detention without review by a judicial body at least raises questions under the ECHR. Whilst I would agree that no rule of thumb can be laid down either in respect of detention generally or in respect of particular categories of detention, nevertheless it is impossible to say that the ECHR organs neither could have nor should have any concern about a 28-day detention without judicial review.

[9] Mr Bowen, for MH, added a further point. The incompetent patient will not be able to apply to the MHRT in respect of a s 3 detention any more than he will in respect of a s 2 detention. The initial span of a s 3 detention is six months, not 28 days. An argument that there also lack of access to a judicial tribunal is offset by the limited time-span of the initial order would not seem to be very promising.

COUNTY COURT SUPERVISION

[10] The context of s 29 proceedings is not directly the interests of the patient, but rather issues as to the suitability of her nearest relative. The patient has no *locus* within them except as a witness in the contest between the referring social worker and the nearest relative. The judge pointed out (at [54]), that wherever the patient remains in detention during s 29 proceedings that will be because, as in the present case, the RMO has issued a barring order to a s 23 application by the nearest relative because the patient is likely to act in a manner dangerous to other persons or to himself. While I see the force of that argument in most cases, it is in my view not a complete answer to the problem of the s 29(4) extension either as a matter of fact or as a matter of civil rights.

[11] As to fact, it cannot be assumed without further consideration that the patient remains throughout the (in this case) year-long process in the same condition as she was when the banning order predated that process. As to civil rights, the patient's complaint is that her condition does not justify detention, or at least that that question should be answered by a court. That is not the issue before the county court, which is why the judge, rightly, held that the county court is not performing a function under art 5 of the ECHR.

[12] A further problem arises in connection with the emphasis placed by the ECHR on the *speedy* review of detention. Not only is the county court not reviewing the lawfulness of the patient's detention, but also questions must arise about its promptitude in performing the task that it does undertake. The judge (at [41]) cited and relied on the requirement stated by Hale LJ, a judge of unparalleled authority in the field of mental health law, in *R (S) v Plymouth City Council* [2002] EWCA Civ 388 at [39], [2002] LGR 565 at [39], [2002] 1 WLR 2583

that 'applications under section 29 have to be dealt with quickly'. The history of the present case may be unfortunate and unusual, but unfortunate it indeed is in the context of the obligation set out by Hale LJ. Silber J suggested that any undue delay by the county court would involve a breach of its obligations under art 6 of the ECHR. But that is of no help to the patient. The standard of promptitude in such an application will be that appropriate to the condition of the nearest relative, not that appropriate to the condition of the patient. Moreover, the patient is not party to the proceedings: as Hale LJ pointed out in her judgment in the *Plymouth City Council* case, he is the one person whom the County Court Rules do not permit to be joined (see ([2002] LGR 565 at [24]). Thus, the proceedings are not and cannot be concerned with the determination of his civil rights and obligations, so it is difficult to see how he can complain under art 6 of delay in pursuing them.

ARTICLE 5 OF THE ECHR

[13] For these reasons, therefore, we are obliged directly to confront the issue of whether the statutory scheme conforms to art 5 of the ECHR.

[14] MH's argument was that to accommodate her difficulty a generous reading was required of art 5(4) of the ECHR:

> 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

MH, though deprived of her liberty, was in practice unable, as the state knew, to take proceedings in the form of an application to the MHRT that would otherwise be available to her. Therefore the state, in accordance with the spirit of art 5(4), should make that application on her behalf, or otherwise ensure that her case was brought before the MHRT. The judge ([2004] All ER (D) at [25]–[26], and elsewhere, rejected this contention on the simple wording of the article. The art 5(4) right is a right to take proceedings, not a right to be brought before a court. The latter is the language not of art 5(4) but, in significant contrast, of art 5(3): which applies to persons arrested on criminal charges as envisaged by art 5(1)(c), and not to persons such as MH who are detained as being of unsound mind as envisaged by art 5(1)(e). I return to this verbal problem below. Before that, however, I must address a number of additional arguments advanced by the Secretary of State in support of the judge's conclusion, none of which I found convincing.

[15] First, the Secretary of State argued that a person such as MH still had the *right* to apply to the MHRT: it was her condition, rather than any action on the part of the state that either the ECHR or the court should control, that prevented her from exercising that right. This approach seems to me to be excessively formalistic. MH finds herself in the position that she is because the state, perfectly properly, has taken action on her behalf because of her actual or reasonably perceived mental condition. The state having asserted that reason to justify its engagement with MH, it is difficult to see that it can properly rely on a (severe) aspect of that mental condition to justify the withholding from MH of the protection that she would otherwise have.

[16] Second, for the Crown Mr Morshead showed us dicta in various cases in the European Court of Human Rights (ECt HR) that stressed that the right under art 5(4) was indeed a right on the part of the patient to bring proceedings himself:

see for instance the judgment of the ECt HR in *Winterwerp v Netherlands* [1979] ECHR 6301/73, (1979) 2 EHRR 387 at 409 (para 61), and in *Tam v Slovakia* [2004] ECHR 50213/99 at para 66. Such observations were however made in the context of a competent applicant, and to stress that the art 5(4) obligation is not discharged if the applicant is dependent on the discretionary decision of a non-judicial body before he can get before the appropriate judicial body. In the present context, the Secretary has a default power under s 67 of the 1983 Act to refer cases to the MHRT if he thinks fit, and in the event did so refer the case of MH. The MHRT, in March 2003, upheld the continuing s 2 detention. However the judge correctly held, (at [33]), that the discretionary default power of the Secretary of State cannot meet the requirement set out in *Wintwerp*'s case and *Tam*'s case that recourse under art 5 should not controlled by a non-judicial body.

[17] Third, reliance was placed on the availability of habeas corpus or judicial review. That argument raises issues that are specific to the problem that arises under s 29(4), and will be dealt with under that heading.

SECTION 2 ORDERS AND THE INCOMPETENT PATIENT

[18] As we have seen, there are undoubted, and as the judge thought conclusive, difficulties in applying art 5(4) to oblige the state to act on the incompetent patient's behalf. We also have to remember that the ECHR provides the court with a set of guiding principles, and not with a palm tree. Nevertheless, I cannot think that the scheme of protection for persons detained in cases of suspected unsound mind can have been intended to exclude, simply because of their mental inability, persons who find themselves in the position of MH. The matter may perhaps be tested by asking what reply the authors of the ECHR would have given had they been asked whether the particular language that they adopted in art 5(4) was intended to exclude from the protection of art 5 a person who, solely because of lack of capacity to do so, was unable to take proceedings. At least if they were English lawyers I suspect that they would have replied with a testy 'of course not' worthy of the hypothetical parties in *Shirlaw v Southern Foundaries and Federated Foundries Ltd* [1939] 2 All ER 113 at 124, [1939] 2 KB 206 at 227.

[19] We have not been shown any ECHR authority that impedes that approach. Mr Morshead took us to the judgment of the ECt HR in *TW v Malta, Aquilina v Malta* (2000) 29 EHRR 185 at 203 (para 43), where the court pointed to the difference of wording between art 5(3) and art 5(4), already observed. But that was a case of detention on a criminal charge, where the court was at pains to stress that recourse in an art 5(1)(c) case cannot be dependent on any initiative by the prisoner. That is far from concluding that in the converse case, where relief is in the first instance in the hands of the subject, but the subject is unable to obtain that relief, the court would hold that assistance to the subject in asserting the right was excluded.

[20] I am therefore of the opinion that the state is obliged by the general principles of protection that inform art 5 to place the incompetent patient in the same position as the competent patient, as nearly as it is possible to do so, with regard to access to the MHRT. How that should be done; and what exact relief this court should provide; are issues of more difficulty, which I address at the end of this judgment under the heading of remedies.

THE SECTION 29(4) PROBLEM

[21] This case is more straightforward. The patient detained under s 2, whether competent or incompetent, is detained beyond the 28-day limit without adequate judicial supervision. When that occurs, the justification for his original detention, whether or not it has been approved by the MHRT, has expired, and he is detained just because of the existence of proceedings in respect of which he is a spectator. That will be so even if the county court judge finds in favour of the nearest relative if the approved social worker appeals: see [4], above. I have no doubt that in those circumstances he should have the right to return to the MHRT to obtain a judicial decision on his continued detention. If the state wishes to avoid what it may think to be unnecessary and wasteful use of the MHRT it must find some way of disposing of s 29(4) proceedings in the way expounded by Baroness Hale of Richmond in the passage quoted at [12], above, rather than in the manner in which they appear to have been pursued in the present case.

HABEAS CORPUS AND JUDICIAL REVIEW

[22] The Secretary of State said that any such added relief was unnecessary. In an appropriate case the patient could bring either habeas corpus or judicial review proceedings. That of course would not avail the incompetent patient who could not bring any proceedings, whether before the MHRT or otherwise; but it was an appropriate means of recourse for the competent patient faced with detention under s 29(4). Perhaps unsurprisingly, we did not hear much in argument about habeas corpus, but Mr Morshead strongly urged the merits of judicial review as a substitute for recourse to the MHRT.

[23] Until the incorporation of the ECHR into domestic law judicial review could not have served the necessary purpose, as the ECt HR recognised in its judgment in *HL v UK* (2004) 17 BHRC 418 at 459 (para 139). Those limits were, however, said to have been removed by the decision of this court in *R (on the application of Wilkinson) v Responsible Medical Officer, Broadmoor Hospital* [2001] EWCA Civ 1545, (2001) 65 BMLR 15, [2002] 1 WLR 419 where, on an application to cross-examine treating doctors in proceedings under arts 3 and 8 of the ECHR, the court held that it was entitled to reach its own view as to the compliance of the treatment with the ECHR, and that for that purpose the doctors should be cross-examined. That, however, was all that the court decided. As this court further held in *R (on the application of N) v Doctor M* [2002] EWCA Civ 1789 at [39], [2003] 1 FCR 124 at [39], [2003] 1 WLR 562, citing the well-known warning of Lord Steyn in *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26 at [28], [2001] 3 All ER 433 at [28], [2001] 2 AC 532, whatever the intensity or intrusiveness of intervention required of the court by the ECHR its role remains one of review, and it must not allow itself to be drawn into a merits challenge. But the proceedings before the MHRT, which the incompetent patient is deprived of under s 2, and all patients are deprived of under s 29(4), are indeed a merits challenge. Witholding of access to the MHRT cannot therefore be justified by substituting a process that by definition is not a merits challenge.

[24] There is a further reason why recourse to judicial review, even if it were available, is quite inappropriate in this case. What the patient seeks is access to a skilled and specialist tribunal, the MHRT, which is uniquely able to make a professional assessment of his medical condition. It cannot possibly be sensible to substitute for that specifically targeted relief the general process of judicial

review, conducted according to different rules by a judge who has no medical knowledge whatsoever.

REMEDIES

[25] It was suggested that to place the state under an obligation to refer the case of an incompetent s 2 patient to the MHRT would both raise practical difficulties, and also involve some patients in unwelcome investigation of their cases. I do not understand the first of these problems. The doctors who examine the patient on admission should be able to determine whether he is competent to give instructions in relation to the MHRT. That is little different from other important and difficult decisions that they have to make about the patient's welfare and state of mind. If they conclude that he is incompetent, a mechanism must be provided for an automatic referral to the MHRT. There may be some cases where a patient positively does not want such a referral, and is competent to form that view. The MHRT, if so satisfied, would simply not proceed with the reference. It is difficult to see how that or any other related circumstance is unreasonable or unreasonably intrusive, given the considerable intrusion into the patient's life already caused by the original s 2 order.

[26] I therefore consider, first, that a mechanism must be provided for the reference of the case of an incompetent patient to the MHRT in circumstances where a patient has a right to apply to the MHRT; and, second, that all patients should have a right to apply to the MHRT in respect of an extension of their s 2 detention by reason of the operation of s 29(4).

[27] The two sources of remedy under the Human Rights Act 1998 are either a 'reading down' of the statutory provisions under s 3; or a declaration of incompatibility under s 4. This aspect of the case was not dealt with satisfactorily, the argument for MH initially contenting itself with saying that she was 'neutral' as to which course was taken. That will not do. As, for instance, the speeches in the House of Lords in *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557 graphically illustrated, the issue of remedy is often the most difficult question in a human rights case. Parties who assert, as does MH, that the court must provide a remedy for a breach of the ECHR must, as in the case of any other remedy sought from a court, specify in detail what that remedy should be, so that it can be tested by argument and review.

[28] Such consideration however rapidly reveals that the complaint in the present case, which I have found to be justified, is not that any part of the present 1983 Act positively offends against the ECHR; but that there is lacking from the scheme of the 1983 Act provisions that are necessary to make that scheme compliant with the ECHR. Although I am well aware of the guidance given by Lord Steyn in his speech in *Ghaidan v Mendoza* (see [2004] 3 All ER 411 at [50], that s 3 is the first resort, and s 4 only a last resort, I do not see how a process of reading down can be used to add to a statute provisions that it does not contain. What is needed in this case is amendment to add those provisions to the statutory scheme.

[29] We had the benefit of submissions, principally from the Secretary of State, as to what declarations should be made in the light of the conclusions set out in these judgments, copies of which were provided to the parties in draft. The declarations that follow largely reflect the Secretary of State's submissions. I would merely draw notice to the fact that the declarations require reference to 'a court', rather than specifically to the MHRT. That form is adopted in deference to the Secretary of State's submission that it would be consistent with his

obligations under art 5 to provide effective relief through a court other than the MHRT, however unlikely that method would be in practice. I would therefore declare that: (i) s 2 of the Mental Health Act 1983 is incompatible with art 5(4) of the ECHR in that it is not attended by adequate provision for the reference to a court of the case of a patient detained pursuant to s 2 in circumstances where a patient has a right to make application to a Mental Health Review Tribunal but the patient is incapable of exercising that right on his own initiative; (ii) s 29(4) of the Mental Health Act 1983 is incompatible with art 5(4) of the ECHR in that it is not attended by provision for the reference to a court of the case of a patient detained pursuant to s 2 of that Act whose period of detention is extended by the operation of the said s 29(4).

WALL LJ.

[30] I have had the advantage of reading Buxton LJ's judgment in draft. I agree with it, and with the declarations of incompatibility he proposes. I add a short judgment of my own on the two principal questions raised by the appeal. I do so because of the importance of the issues raised, and because we are disagreeing with the judge in relation to them. I do not wish to add anything to what Buxton LJ says in relation to habeas corpus and judicial review.

[31] In *Re F (adult: court's jurisdiction)* [2000] 3 FCR 30, [2000] 3 WLR 1740, this court identified a lacuna in s 1(2) of the Mental Health Act 1983 (the 1983 Act) which it held the court could cure by reference to the common law doctrine of necessity and the use of declaratory relief. T, the incapable adult in that case, was mentally impaired, but her impairment was not 'associated with abnormally aggressive or seriously irresponsible conduct' on her part. As a consequence she did not fall within the criteria for 'mental impairment' laid down in s 1(2) of the 1983 Act, and it was not possible for the court to make a guardianship order in relation to her under s 7. As she would otherwise have been unprotected, however, this court held that the High Court had an inherent jurisdiction to make declarations as to what was in her best interests. It had jurisdiction, accordingly (if such a course was warranted by the facts) to make a declaration that it was in her best interests to remain in local authority accommodation and for the local authority to restrict and supervise her contact with her mother.

[32] This appeal raises a distinct but related topic. In the instant case, MH was initially admitted to hospital on 31 January 2003 following the execution of a warrant under s 135(1) of the 1983 Act, and she was then detained for assessment under s 2. The local authority was able to invoke s 135(1) and s 2 of the 1983 Act because, as the medical report prepared by MH's responsible medical officer (RMO) stated in his report for the Mental Health Review Tribunal (MHRT) which was finally held on 26 March 2003 on a reference by the Secretary of State under s 67 of the 1983 Act, there was both 'past and present evidence of abnormally aggressive and seriously irresponsible conduct'. Unlike T in *Re F*, therefore, MH's condition fell within the restrictive definition of '(severe) mental impairment' in s 1(2) of the 1983 Act.

[33] MH's detention was due to expire after 28 days on 28 February 2003. However, as Buxton LJ relates at [3], above, that detention was automatically extended by the operation of s 29(4) of the 1983 Act, although the application to displace MH's mother as nearest relative never seems to have been listed and, meanwhile, a guardianship order under s 7 of the 1983 Act was made on 7 August 2003.

THE FIRST QUESTION IN THIS APPEAL

[34] I turn immediately to the first of the two issues we are asked to decide. The judge formulated it in the following way: 'Does Article 5(4) of ECHR require there to be an automatic review of the lawfulness of a patient's detention where the patient lacks the capacity to make her own application for a review of the lawfulness of her detention?'

[35] Articles 5(1) and (4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) read as follows:

> '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law—(e) the lawful detention ... of persons of unsound mind ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided by a court and his release ordered if his detention is not lawful.'

[36] The judge addressed this question after having first decided that s 66(1) of the 1983 Act, which provides for applications to MHRTs, was not incompatible with art 5(4) of the convention. In so doing, he accepted the argument advanced by the Secretary of State that the wording of art 5(4) gave the right 'to take proceedings' and that the wording of art 5(4) did not include a requirement for, or a right of automatic review. A citation from *X v UK* [1981] ECHR 7215/75, (1981) 4 EHRR 188 reinforced his view that:

> 'Article 5(4) does not require there to be an automatic review of the lawfulness of a patient's detention but it will be satisfied if the detainee can institute proceedings to challenge the lawfulness of his detention'. (See [2004] All ER (D) 188 (Jan) at [27]).

[37] In addressing the applicability of art 5(4) to the case of an incompetent patient, the judge accepted the submission made by Mr Bowen for MH that the power given by s 67 of the 1983 Act to the Secretary of State to refer the case of any patient to a MHRT at any time 'if he thinks fit' did not, in itself, provide an adequate safeguard. The judge gave two reasons for this. The first was that the Secretary of State could only exercise the power after a request had been made to him. Thus since a patient in MH's position lacked the capacity to make the request and had nobody to make it for her, the power would not be exercised. The second was that the exercise of a right by a patient under art 5(4) could not be dependent upon the exercise of another power by a member of the executive which may or may not be exercised in the patient's favour.

[38] I respectfully agree with the judge on both points. However, when he addresses the specific question which I have set out at [34], above, the judge goes on to give two reasons for rejecting Mr Bowen's submission in relation to it. Firstly, he relies on his previous finding that art 5(4) does not confer a right on the part of a patient to an automatic review. Secondly, he finds that there are adequate procedural safeguards in place for the protection of patients detained under s 2 of the 1983 Act. He accepts the submission made on behalf of the Secretary of State that of critical importance is the fact that this was a s 2 detention which, he says (at [35]):

a '... for two reasons by its nature is of an inherently short duration. First, as I have explained, the patient could apply to the tribunal within the first 14 days of his or her detention pursuant to s 66(1)(a) and (2)(a) of the 1983 Act. Second, it is more important that s 2(4) of the 1983 Act *requires* that the patient be released at the end of the 28-day period, regardless of whether any application has been made to the Tribunal in the meantime unless a different b legal basis for the patient's continuing detention has since emerged.'

[39] The judge accordingly regarded the safeguard of automatic release at the end of 28 days as a better safeguard for a patient detained under s 2 of the 1983 Act than an 'automatic review', and rejected the argument that there should be an automatic review for a patient who lacks the capacity to make his own c application.

[40] I find myself unable to accept the judge's reasoning in relation to the first issue on a number of grounds. The first and most fundamental is that I do not regard what may be an unlawful detention of 28 days in a hospital under s 2 of the 1983 Act without access to a MHRT as being 'of an inherently short duration' so as to render art 5(4) safeguards against its unlawfulness otiose in the case of the d mentally incapable.

[41] In testing the proposition that 28 days is a period of inherently short duration, it seems to me appropriate to look at the length of time which the 1983 Act regards as the appropriate duration of emergency procedures, the implementation of which the person affected has no right of challenge. Such e periods are measured in hours, not days. Section 135 of the 1983 Act provides a good example. By s 135(3) a patient who has been removed to a place of safety in the execution of a warrant issued by a justice of the peace under s 135 may be detained there under the warrant for a period not exceeding 72 hours. If, within that period no other lawful basis for his detention is created, he must be released.

f [42] To take another example from a different jurisdiction, an emergency protection order taken under s 44 of the Children Act 1989 for the protection of a child may last for up to eight days in the first instance, but the maximum period allowed before the order can be challenged in court is 72 hours: see s 45(9) of the Children Act 1989.

[43] Speaking for myself, I would measure periods of 'inherently short g duration' in terms of hours rather than days, and I would regard 72 hours in the context of s 135 as such a period. That is not, of course, to say that such a period of detention may not be unlawful if s 135 has been improperly applied: the significance of the time frame is that the person detained is released at the end of it unless a lawful cause of further detention is created. Thus in cases of suspected h serious mental illness, as with suspected child abuse, it is not unacceptable and may well be necessary for the state to use its powers of detention for a period of hours before either an alternative system of lawful detention is created (which must itself be capable of challenge) or the patient is released. In my judgment, it is not possible to extend the concept of inherently short duration to 28 days.

j [44] The second, and equally powerful objection to the judge's approach lies in the fact that the state has recognised and implemented a means of challenge to the 28 days period for those capable of making the challenge. In this context, there is, I think, no answer to the questions Buxton LJ poses at [8], above in relation to the imbalance between the competent and the incompetent patient. It is, to my mind, simply not tenable to suggest that protection under the 1983 Act is only afforded to those capable of asking for it. Indeed, the fact that the state has

in s 66(1)(a) and (2)(a) provided a careful structure for swift access by competent patients to MHRTs (which themselves have to be constituted within a period of seven days from the application being made) reinforces, in my judgment, the need for equivalent provision to be put in place for the incompetent patient who, by definition, is more vulnerable and is incapable of making such an application.

[45] It may be a trite or simplistic observation, but art 5(1) and (4) apply to 'everyone'. Article 5(4) entitles everyone deprived of his or her liberty to take proceedings to challenge the lawfulness of their detention. The right to apply to a MHRT is not given only to those who are capable of exercising it. So to hold, it seems to me, depletes the right of any meaning so far as the incompetent patient is concerned.

[46] I have already pointed out that in accepting Mr Bowen's submission that a reference to a MHRT by the Secretary of State under s 67 of the 1983 Act is an inadequate safeguard, the judge gives as one of his reasons the fact that, because the Secretary of State can only react to an application, the tribunal will not take place because the patient is incapable of making the request. In my judgment, the same reasoning applies to an application for a tribunal within the 28 days period. If the incompetent patient is incapable of making the application, the patient has no safeguard. Furthermore, of course, as the events of this case demonstrate, there was no automatic release at the end of the 28-day period.

[47] For all these reasons, I am in complete agreement with Buxton LJ that the absence of any mechanism enabling an incompetent patient to apply to a MHRT within the 28-day period of admission and detention for assessment provided by s 2 of the 1983 Act renders it in this respect inconsistent with art 5(4) of ECHR, and I would make a declaration of incompatibility under s 4 of the Human Rights Act 1998 in the terms proposed by Buxton LJ at [29], above.

THE SECOND QUESTION IN THIS APPEAL

[48] Buxton LJ neatly describes this as 'the section 29(4) problem'. It only arises, of course, where there is an application to the county court to replace the patient's nearest relative on the grounds provided by s 29(3)(c) or (d) of the 1983 Act, namely:

> '(c) that the nearest relative of the patient unreasonably objects to the making of an application for admission for treatment or a guardianship application in respect of the patient; or (d) that the nearest relative of the patient has exercised without due regard to the welfare of the patient or the interests of the public his power to discharge the patient from hospital or guardianship under the Part of this Act, or is likely to do so.'

[49] The judge's principal answer to the proposition (at [59]) that s 29(4) left the patient (whether competent or incompetent) without recourse to a MHRT until the application to replace the nearest relative had been finally disposed of (s 29(4)(a)) was that:

> ' ... where the s 29 application is made with a view to a guardianship application rather than for the purpose of an admission for treatment, the existence of the duty of the county court to exercise its powers under s 29 of the 1983 Act in accordance with its duties as a public body under s 6(1) HRA 1998 is of critical importance. Those duties, which require the county court "not to act in a way which is incompatible with a convention right" would and should prevent the s 29(4) procedure from becoming so protracted so as

to require a new and fresh right to another art 5(4) review. This answers the claimant's complaints about the lack of sufficiency of the grounds of appeal to the tribunal under s 66 of the 1983 Act or as a consequence of the s 29(4) procedure. Thus, this claim also fails."

[50] Like Buxton LJ, I am not persuaded by this reasoning. On the practical front, the application to displace MH's mother was lodged on 27 February 2003. Although the circuit judge gave directions on 27 March 2003 for the hearing of the application with a view to all the evidence necessary for its disposal being in place by 1 May 2003, no date had been fixed for it by the time the proceedings for judicial review came before the judge on 22 January 2004. By that time, MH had been admitted into guardianship.

[51] Not only, of course, did MH not have any right of recourse to an MHRT throughout this period, she was also not a party to the s 29 application, and had no control over the timing or the manner in which it was processed. And as Buxton LJ points out, the issue before the county court is not directly related to the patient, but to the suitability of the nearest relative.

[52] I cannot but contrast the procedure under s 29 with that under the inherent jurisdiction, where the patient is represented by the Official Solicitor with all the resources at his command, and both the nearest relative and the local authority can be represented in a hearing before a High Court judge of the Family Division which is both fully informed and swiftly convened.

[53] I therefore find myself in complete agreement with Buxton LJ's analysis on the s 29(4) point, and like him, would grant the declaration of incompatibility identified at [29], above.

REMEDIES

[54] It is plainly not for this court to re-write the statute. In practical terms, however, and subject to any further argument on the point, I do not see any major difficulty in ensuring access to MHRT's for incompetent patients admitted under s 2 of the 1983 Act and patients whose cases fall within s 29(4). Unfortunately, the mental health charity MIND, (which initially applied to intervene in the appeal but, in the event, provided only written material for us to consider) was unable to provide any statistics identifying the extent of the problems thrown up by this case. But in any event, it is plain that in its operation of s 2, the system is able to convene a MHRT swiftly for any patient who applies for one. I accept that not every competent patient admitted under s 2 necessarily requires a MHRT. However, under s 68 of the 1983 Act, the managers of the hospital have a duty to refer particular cases to a MHRT, and it would not seem to me to be administratively very difficult to devise a system in which hospital managers were under a duty to refer incompetent patients admitted under s 2 to a MHRT within the time limits laid down by s 66(2)(a). I would equally have thought that it would be possible at the same time for the hospital managers to identify a solicitor from the panel of solicitors regularly representing patients at MHRT's at the particular hospital to represent the patient. A similar obligation could be placed on hospital managers in a situation to which s 29(4) applied.

[55] I would therefore allow the appeal and make the two declarations of incompatibility identified by Buxton LJ.

LINDSAY J.

[56] I agree with the judgment of Buxton LJ, which I have had the advantage of reading in draft. I add only two matters.

[57] First, like Wall LJ (see [40]–[43], above) I cannot regard a detention of 28 days as being 'of an inherently short duration'. But I would go further. Reference to any such period would father a notion that there is some tolerable period, determined by rule of thumb on what would be, so to speak, a 'one size fits all' basis, during which a detention could in all mental health cases properly be regarded as unchallengeable, irremediable by or on behalf of the patient and not requiring review. Even worse, such a notion, were it to be called to into existence, could pass by analogy, like a disease transmissible across species, to detentions on grounds other than mental health. But the legislation, which (enacted, as it was, before the Human Rights Act 1998) could so easily have provided some such 'safe' period, makes no such provision. There is no express fixing of some such period for general applicability nor room to imply one, nor any mention of any period of 'inherently short duration'. Further, I would doubt that any such 'safe' period, even were there to be one, could be fixed simply by reference to clock or calendar; the period appropriate, if any were, to, say, violent or self-harming, tranquillised or sedated patients would surely need to reflect their particular respective and different conditions. Even the broadest guidance (such, for example, that the 'safe' period should be a matter of hours not days) could mislead; one could hardly have 72 hours being acceptable but three days being not. Any search for what I have called a 'safe' period is, in my judgment, misconceived; the subject is so intensely fact-sensitive, case-by-case, that the creation of a general rule should not even be attempted.

[58] Secondly, I need to comment upon an argument advanced by the Secretary of State. It depends on a distinction being drawn between the language of art 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act) ('Everyone .... detained in accordance with the provisions of paragraph 1 (c) .... shall be brought promptly before a Judge ...') and the language of art 5(4) ('Everyone who is deprived of his liberty ... shall be entitled to take proceedings ...'). That distinction led Mr Morshead to argue that under art 5(4) it was only he or she who was deprived of his or her liberty that was to be entitled, him—or herself, to take proceedings by which the lawfulness of the detention was to be decided. Were a rigorously literal approach to be appropriate some force could be attributed to such an argument but it has to be remembered that the convention of which art 5(4) forms part is intended to cope with the whole range of those deprived of their liberty by arrest or detention throughout the numerous jurisdictions which have subscribed to the convention, many deploying a more purposive approach than was traditionally used here. Within those jurisdictions there will doubtless be many different circumstances in which one person is entitled or required to bring proceedings in the name of or on behalf of another. If one restricts art 5(4) so that only the very person detained or deprived of liberty can 'take proceedings' to determine the lawfulness of the detention then one would have arrived at a construction as if the convention had read 'Everyone who has capacity himself to bring such proceedings ... shall be entitled to take proceedings'. That is not what art 5(4) says and, in its context, the word 'Everyone' is plainly shorthand intended to enable not only the very person who is deprived of liberty to take proceedings but, where some other is, by the relevant domestic law, authorised or required to

proceed in that person's name or on that person's behalf, to ensure that he, too, should be entitled to take the proceedings. The Crown's construction would or might preclude art 5(4) applications in all sorts of cases, including the detention of persons under 18, well beyond those with mental disorder. I cannot think that that was intended either by those subscribing to the convention or by Parliament in its enacting of the 1998 Act.

[59] As for relief, I agree the form proposed by Buxton LJ.

Appeal allowed.

Kate O'Hanlon Barrister.

HSS Hire Services Group plc v BMB Builders Merchants Ltd and another

[2005] EWCA Civ 626

COURT OF APPEAL, CIVIL DIVISION

WALLER, MANCE LJJ AND SIR WILLIAM ALDOUS

6 APRIL, 24 MAY 2005

Practice – Payment into court – Costs – Trial judge determining liability issue in favour of claimant – Disclosure to judge that payment in by defendants but not its amount – Judge awarding claimant its costs on issue of liability – Whether possible to disclose actual amount of payment in to judge – CPR 36.19, 44.3(4).

The claimants issued proceedings, seeking damages for alleged anticipatory repudiatory breach of a licence agreement, and against the second defendant for the alleged tort of inducing such a breach. The deputy High Court judge split the issue of liability and found in favour of the claimants. When considering the question of costs, the judge was informed that a Pt 36 payment had been made by the defendants prior to any order being made splitting the issue of liability from the issue of damages, but the amount of the payment in was not disclosed. The judge ruled that as the CPR encouraged an issue based approach to costs, and that since the claimants had expended money on the issue of liability which they had won, they were entitled to their costs under CPR 44.3[a]. The defendants sought permission to appeal that ruling, contending that if when damages came to be assessed it was found that they had beaten the payment in, a serious injustice would be done to them if they still had to pay, as per the judge's order, the claimants' costs of the liability issue. The Court of Appeal granted permission and reversed the judge's exercise of his discretion. The claimants argued that at the end of a trial on liability it would be appropriate under r 36.19(3)(c)[b] to disclose both the payment in and the quantum thereof so that the judge could exercise his discretion in relation to the award of costs of the preliminary issue and properly fulfil his obligation under r 44.3(4) at that stage. By virtue of r 36.19(3)(c) the restriction on disclosure of a Pt 36 payment was lifted where the issue of liability had been determined before any assessment of the money claimed and where the fact that there had been a payment might be relevant to the question of the costs of the issue of liability. Rule 44.3(4)(c) provided that in deciding what order to make about costs the court had to have regard to any payment into court.

Held – On its language r 36.19 did not allow for the disclosure of the amount of a payment in. It allowed simply the disclosure of the fact that there had

a CPR 44.3, so far as material, is set out at [32], below

b CPR 36.19, so far as material, is set out at [31], below

been one or the fact that there had not. If the court was told that there had been no payment in, then the court was free to exercise its discretion to award costs in relation to the preliminary issue and there was no difficulty with r 44.3(4)(c). If, however, it was told that there was a payment in, then, in any but perhaps the most exceptional case, it would be difficult to think there could be circumstances where if the issue of damages remained to be decided, the judge could do otherwise than to reserve the question of costs until after the determination of that issue. Until the court knew how generous or otherwise the payment in was, it would not normally be fair to exercise a discretion in relation to costs. In any event because the court was not allowed to know the quantum, it could not act as required under r 44.3(4) at that stage. It followed that in the instant case the judge had not been entitled to deal with costs in the way he had. He should have reserved the same, pending determination of quantum, and his order would be reversed to reflect that finding. Accordingly, the appeal would be allowed (see [35]–[37], [40], [41], below).

Notes

For restriction on disclosure of a Pt 36 payment, see 37 *Halsbury's Laws* (4th edn reissue) 824.

Case referred to in judgments

Beoco Ltd v Alfa Laval Co Ltd [1994] 4 All ER 464, [1995] QB 137, [1994] 3 WLR 1179, CA.

Application for permission to appeal

The defendants, BMB Builders Merchants Limited and Grafton Group (UK) plc, applied for permission to appeal against the ruling on costs of Simon Brown QC sitting as a deputy High Court judge delivered on 29 July 2004 ([2004] EWHC 2013 (QB), [2004] All ER (D) 537 (Jul)) in favour of the claimants, HSS Hire Services Group plc. The facts are set out in the judgment of Waller LJ.

Geraint Jones QC (instructed by *Ormerods*, Croydon) for BMB.
Graham Dunning QC and *Michael King* (instructed by *Fladgate Fielder*) for HSS.

Cur adv vult

24 May 2005. The following judgments were delivered.

WALLER LJ.

INTRODUCTION

[1] This is an application for permission to appeal the judgment of Simon Brown QC sitting as a deputy High Court judge delivered on 29 July 2004, and

his ruling on costs made on the same day (see [2004] EWHC 2013 (QB), [2004] All ER (D) 537 (Jul)). No attack is sought to be made on the judge's findings of fact, and I can therefore set out the essential facts quite briefly.

THE FACTS

[2] On 12 June 2001, the claimants (HSS) and the first defendants (BMB) entered into a five-year licence agreement which permitted HSS to run a tool hire agency in five branches of BMB in the north of England. By cl 7.2 HSS was entitled to terminate (ie had an option whether to terminate) the licence if and when there was an event of default. By cl 8.2 a change of control of BMB was an event of default 'unless previously agreed in writing'.

[3] On 23 May 2002 Mr Harrison of BMB telephoned Mr Pidgeon of HSS with the news that he was selling BMB to the second defendant (Grafton). That sale was due to be completed on 31 May. Mr Pidgeon asked 'Where does that leave us?', and he was told that it was not clear whether Grafton would continue with the agency, and that Mr Pidgeon should speak to Grafton's acquisitions director Mr Sowton. After consultation with his own superiors, Mr Pidgeon spoke to Mr Sowton and discussed the possibilities of the agency continuing. Mr Sowton told him there was 'no possibility as they had their own hire operation and were committed to it'.

[4] Mr Pidgeon then had a second conversation with Mr Harrison of BMB. He asked for a letter confirming the decision, and he asked Mr Harrison when would be the best time to bring the operation to a close ie collect from the one branch of BMB where an agency had been set up, HSS' materials. Mr Pidgeon suggested 28 or 29 May. Mr Harrison chose the 29th and it was agreed that on that day HSS would collect its materials from the BMB branch.

[5] On 24 May at 16.19 hours BMB sent a letter 'open to mischievous interpretation' as the judge said. It purported to confirm the conversation of the 23 May stating:

> 'I understand that you would wish not to continue our existing agency agreement at Pontefract, nor the Barnsley agency due to come on stream imminently. The feeling is apparently mutual as far as Grafton is concerned.'

The response to that letter from HSS was:

> 'It appears that there is a fundamental misunderstanding on your part concerning the discontinuance of the agency arrangements. The agreement of 12th June 2001 refers specifically to termination conditions, one of which covers the change of ownership situation now being described by you. Such change of ownership by your firm is an event of default and HSS must reserve its rights accordingly. For the avoidance of doubt, HSS is more than willing to continue the agency arrangement, which has been successful to date, but the agreement does not allow this, as mentioned above.'

[6] The suggestion that the agreement 'did not allow it' was not accurate. But it reflected the reality in this sense. Although HSS had an option whether

to terminate or not, if they wished not to terminate and continue, there would be nothing they could do about it if BMB did not agree. The agency was a personal contract in relation to which, for example, there would be no chance of a court ordering specific performance. Furthermore once HSS had made plain they were willing to go on, whatever the agreement said BMB could have come back and said they also were willing but they did not do so. They did not do so both because the position had been made plain by Mr Sowton, and because Mr Harrison (because he had no choice) had adopted Mr Sowton's decision. That was the context in which BMB and HSS had accepted that the agency would not continue when arrangements were made on 23 May for HSS to collect its materials from the Pontefract branch. That position was confirmed by BMB allowing the collection to proceed despite the letter stressing HSS' willingness to continue.

JUDGE'S HOLDING

[7] The judge held:

> '[58] ... I am satisfied on the facts that all the events on 23rd May took place as described by the HSS witnesses. In my judgment, taking those events as a whole the two statements and conduct of Mr Harrison with Mr Pidgeon constituted a clear and unequivocal refusal on the part of BMB to perform the licence agreement ... The anticipatory repudiatory breach became clear and unequivocal to HSS when Mr Sowton gave him the answer to the question Mr Pidgeon had posed to Mr Harrison and Mr Harrison had disingenuously avoided in the hope that the licence agreement would subsist until after 31st May. The anticipatory breach was appreciated by both HSS and BMB at 1720 hours on 23rd May when Mr Pidgeon told Mr Harrison what he had been told by Mr Sowton after his referral and it was accepted that the sale had inevitably brought the licence agreement to an end. Accordingly I find that BMB by the words and conduct of Mr Harrison on 23rd May were in repudiatory breach of contract that HSS had to accept as terminating the licence agreement between them.'

[8] He also found (at [59]) that 'Grafton wrongfully interfered with the contract between HSS and BMB'.

DISCUSSION

[9] From the facts as found by the judge a finding that there was an anticipatory breach by BMB by words or conduct on 23 May, accepted by HSS on that date was an inevitable finding. I say that in the light of considering the alternatives. First there can be no doubt that the licence agreement came to an end in the conversation between Mr Harrison and Mr Pidgeon in which arrangements were made for BMB to collect their materials on 29 May. There is equally no doubt that that was not a consensual arrangement Mr Pidgeon having made clear that HSS wished to continue if BMB was agreeable to doing so. The attempt by BMB to suggest mutual termination by letter of 24 May post-dated the termination conversation. In any event it

was immediately refuted, and still BMB allowed the materials to be collected on 29 May well aware that HSS were treating BMB as refusing to continue. The misinterpretation of the agreement by HSS had no practical significance.

[10] Equally it is not open to argument that HSS in some way repudiated the licence agreement. The argument would have to be that Mr Pidgeon by seeking the return of HSS's materials was repudiating the licence which repudiation BMB accepted either through Mr Harrison in the same conversation or by allowing the materials to be collected. Neither argument is tenable. Mr Pidgeon's request to be able to collect the materials was as Mr Harrison was well aware not because HSS did not wish to continue but because BMB were not going to continue. By the time the materials were collected BMB had received the letter of 24 May demonstrating that HSS wished to continue, but BMB simply allowed the collection to go ahead knowing the basis on which HSS were acting.

[11] Mr Geraint Jones QC for BMB argued that what Mr Sowton said to Mr Pidgeon in the conversation on 23 May was simply a statement of future intent, and thus was not capable of being a repudiatory statement. Mr Jones argued that all Mr Sowton was saying was 'this will be Grafton's attitude from 31st May, but Grafton cannot go further because the take over is not complete'. It was therefore argued by Mr Jones that it would have still been open to Grafton to continue with the licence and negotiate a discontinuance; no conduct was repudiatory as at 23 May and in the result it was HSS' conduct which was a repudiation accepted by BMB before 31 May.

[12] The difficulty for Mr Jones is that Mr Sowton was not saying that Grafton would allow the continuation or would allow continuation pending negotiation. He was adamant that the licence would not continue, and it was to him that Mr Pidgeon had been referred by Mr Harrison to find out what the position would be. Having discovered what the position was going to be ie that BMB would not be continuing with licence from 31 May, HSS were entitled to treat BMB as in repudiatory breach, and were not forced to wait until 31 May. The above view accords with that of Clarke LJ when dealing with permission to appeal on paper.

[13] I now turn to the grounds of appeal. The first ground of appeal of BMB is that the judge decided the case on a basis not pleaded, and it was because of that criticism and because he did not find it easy to determine the strength of that point that Clarke LJ adjourned the permission hearing for an inter partes hearing with appeal to follow if permission granted. He clearly did not think that any of the points taken by BMB in relation to what they in their notice of appeal called the 'unpleaded case', seeking to attack the finding of repudiation and acceptance, were valid. I agree with him and it is convenient to deal with those points before coming back to the pleading point.

[14] It is suggested that the judge allowed himself to be influenced by Mr Harrison's state of mind, and did not approach the issue by applying a purely objective test. The judge does refer to Mr Harrison's state of mind ([2004] All ER (D) 537 (Jul) at [58]) quoted at [7], above, but the facts objectively viewed supported the judge's conclusion that BMB were content to allow HSS to discover from Grafton what BMB's position was in relation

to continuing with the licence. There was no room for any other conclusion than that BMB, by their conduct on 23 May, evinced an intention not to continue with the licence following the take over by Grafton and that was an anticipatory breach which HSS were entitled to accept.

[15] It is then suggested that the judgment is contradictory in that it held that Mr Harrison did not intend to repudiate the contract hoping that any repudiation would take place after 31 May, but then held that that was exactly what he did. Mr Harrison's intentions are not relevant. It is his conduct on behalf of BMB and the conduct of Grafton on which he was content for Mr Pidgeon to act which is relevant. Indeed this ground of appeal is inconsistent with that just discussed at [14], above.

[16] It is then sought to argue that the judge was not entitled to find what Mr Sowton told Mr Pidgeon as being of any relevance to the question whether BMB were repudiating unless he found that Mr Sowton was acting as 'agent' for BMB. This leads to consideration of the pleading point in that it is asserted that HSS had themselves pleaded agency and must therefore have contemplated that they could not succeed unless Mr Sowton was acting as 'agent'.

[17] It is true that HSS in their pleading did allege that Mr Sowton was acting as agent. Paragraphs 10 and 11 of the points of claim were in the following terms:

> '10. By telling the claimant to speak to Joe Sowton to find out what was going to happen as regards the licence agreement, the first defendant constituted the second defendant as its agent for the purpose of communicating with the claimant in connection with the licence agreement.
>
> 11. By informing the claimant by Joe Sowton (the second defendant's director) that the first defendant was not going to continue its agency arrangements with the claimant and that those arrangements would come to an end the first defendant was in anticipatory repudiatory breach of the licence agreement. Further or alternatively the first defendant was in anticipatory repudiatory breach of the licence agreement by permitting and/or authorising Joe Sowton so to inform the claimant.'

[18] But in his opening, counsel for HSS made clear that his case was no longer based on agency. He put the matter this way:

> 'My Lord, I think I should say immediately that I am not nearly so sure that we would characterise it in that way, and my Lord, the way that we would put the case on it is this: that in the first instance I would say that this is not really to be analysed as a true agency at all, because a true agency is where an agent—another party—acts on behalf of and in the interests of his principal. This case could be equated with something rather different, because what we say is that the effect of Mr Harrison talking to Mr Pidgeon was in the first relevant phone call saying "We are selling to Grafton; I don't know where you stand so far as your HSS agency is concerned, ask Mr Sowton. Effectively whatever Mr Sowton says, we adopt". So in one

view that is not an agency at all, it is just as if a person had said "I will either repudiate or not repudiate if someone comes in in the morning dressed in a green sweater". I know that is a very foolish example, but the point is made that it is not somebody acting on behalf of somebody else, it is a mere statement of what is Mr Sowton going to do with this agreement.'

[19] Mr Jones protested as to the way that the case was now being put, but in an interchange with the judge, during which the judge was seeking to discover whether Mr Jones' clients were prejudiced in anyway, Mr Jones made clear that he was not in difficulty, and the outcome was that the judge put to him that what was in issue between the parties was in reality the facts and that having determined the facts 'then you work out what the law is which arises from it in terms of agency, and then you can use the correct terminology'. Mr Jones' response was not to make any further objection but to be grateful for what the judge had said.

[20] What is clear from these interchanges is that HSS were not in opening their case relying on agency in the sense of Mr Sowton having been appointed an agent with authority to repudiate or not a contract. The way the case was being put was that Mr Harrison for BMB was saying to Mr Pidgeon of HSS that they 'would go along with whatever Mr Sowton said'. As appears from what I have already said HSS established on the facts that that is what BMB through Mr Harrison conveyed to Mr Pidgeon. Thus I reject any argument that it was necessary for Mr Sowton to be appointed an agent for HSS' case to succeed.

[21] Furthermore although it can be said that some minor modification of the pleadings to reflect the case which HSS ultimately made might have been appropriate, there cannot be any doubt but that the essential facts were pleaded, and that Mr Jones on behalf of BMB was content to deal with the case as it was being opened. BMB were in no way disadvantaged by the different way in which the case was being opened. The essential dispute between the parties was whether the telephone conversations had taken place, as HSS asserted and as BMB denied.

[22] I would therefore refuse permission to appeal any of the matters raised in paras 2–7 of the grounds of appeal.

INTERFERENCE WITH CONTRACT

[23] In their skeleton for the Court of Appeal HSS set out in para 57 the admissions which (they say) were made on behalf of the second defendants that the cases against the two defendants stood or fell together. I was not persuaded by Mr Jones that there was any basis on which the second defendants should now be entitled in the Court of Appeal to resile from their position taken in the court below. I would therefore refuse the second defendants permission to appeal.

COSTS

[24] The judge ordered BMB to pay the costs of the trial on liability. BMB make two attacks on that order. First they suggest that since HSS succeeded on an unpleaded basis, far from HSS being entitled to their costs, they, BMB,

should have their costs. Reliance is placed on *Beoco Ltd v Alfa Laval Ltd* [1994] 4 All ER 464, [1995] QB 137 and the words of Stuart-Smith LJ ([1994] 4 All ER 464 at 477–480, [1995] QB 137 at 153–156). Second they rely on the fact that they BMB had made a Pt 36 payment into court prior to any order being made splitting the issue of liability from the issue of damages. The judge was informed of this but not of its amount. He ruled that it was not of any relevance to the exercise of his discretion. BMB submit that if when damages come to be assessed it is found they have 'beaten' the payment in it will turn out to be a serious injustice if they still have to pay, as per the judge's order, HSS' costs of the liability issue.

[25] As we made clear at the hearing we were not persuaded that there was anything in the suggestion that this was a case where the words of Stuart-Smith LJ were apposite. This was not a case where an amendment 'substantially' altered the case. The facts were clearly pleaded and the contest in the case was whether the facts were as HSS was asserting. The legal consequences which flowed from those facts were opened on a slightly different basis than was asserted in the pleading, but BMB were in no difficulty dealing with that basis.

[26] However as again we made clear there is great force in the payment in point and we granted permission to appeal on that aspect. Indeed we stated that we were going to reverse the judge's exercise of his discretion enabling us to deal with a point which then arose on the costs of the appeal. The question is—what is the right approach to the question of costs at the conclusion of a preliminary issue if there has been a Pt 36 payment in covering the trial as a whole?

[27] The judge's approach was to reason that under the CPR the court is encouraged to have an issue-based approach to costs. So he reasoned the issue of liability was 'a completely separate issue'. Having been informed that there had been a payment into court he stated:

> 'It does not matter how much, if anything, the defendants have to pay the claimants. The claimants have expended money on this particular issue and they have, as I have found in my judgment, won on this particular issue.'

So he held the claimants were entitled to their costs under the rules of court under r 44.3(f).

[28] In defending the judge's approach and in answer to the question as to what apart from paying into court the defendants could do to protect themselves against an order for costs on the liability issue, Mr Dunning QC robustly argued, it was open to them to concede liability, and if they chose not to do so then liability for costs followed if they lost the issue. If that approach is right it seems to discourage the arguing of preliminary points.

[29] The contrary approach is that parties should be encouraged to make Pt 36 payments in and/or offers; they should also be encouraged to try preliminary points if that could lead to the saving of costs overall. If payments in are to be totally ignored at the conclusion of the trial of a

preliminary issue, that will discourage applying for the trial of the same, and may even discourage Pt 36 offers where preliminary issues have been ordered. The proper approach at the conclusion of a trial of a preliminary issue where there has been a Pt 36 payment in or a Pt 36 offer, should therefore normally be to adjourn the question of costs pending the resolution of all the issues including damages, at which stage the quantum of the Pt 36 offer can be revealed and the discretion in relation to costs exercised in the knowledge of it.

[30] I have no doubt that the provisions of Pt 36 and of Pt 44 encourage the latter approach. Mr Dunning strove manfully to argue that the provisions allowed the judge to take the view he did. He argued: (1) even where there had been a payment in, there was no rule which expressly prevented the judge dealing with the costs of the trial of the issue of liability or which required him to reserve the question of costs until after the issue of damages had been resolved; (2) the modern approach was to encourage stage based orders; (3) it was the defendants who wanted a split trial and the claimants resisted it; (4) the defendants could have admitted liability but chose to fight it; (5) the claimants were entirely successful; (6) it was a case where the dispute was about what was said, and the evidence of HSS had been entirely accepted, and the witnesses of the defendants had been severely criticised—Mr Harrison was described as 'disingenuous' and Mr Sowton as 'totally unreliable', and reference was made to CPR 44.3(4) under which it was material to take into account the conduct of the parties; (7) it is the judge who has heard the issue who is based placed to deal with the costs. Thus he argued that the judge having been correctly informed of the fact that there had been a payment in as he was entitled to be under r 36.19(3)(c), was equally entitled to hold that it was immaterial.

[31] Rule 36.19 is an important provision and some time was spent debating precisely what it meant. It provides as follows:

> '**36.19 Restriction on disclosure of a Part 36 offer or a Part 36 payment**
>
> (1) A Part 36 offer will be treated as "without prejudice except as to costs".
>
> (2) The fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided.
>
> (3) Paragraph (2) does not apply—(a) where the defence of tender before claim has been raised; (b) where the proceedings have been stayed under r 36.15 following acceptance of a Part 36 offer or Part 36 payment; or (c) where—(i) the issue of liability has been determined before any assessment of the money claimed; and (ii) the fact that there has or has not been a Part 36 payment may be relevant to the question of the costs of the issue of liability.'

[32] It must in my view be construed together with r 44.3 particularly sub-r (4) which provides as follows:

'**44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs** ...

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—(a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).'

[33] The following points need consideration. Why is it provided that the fact that there has been a Pt 36 payment is something that r 36.19(3)(c)(i) allows to be revealed to the trial judge where the issue of liability has been determined before the assessment of the money claimed? Why does r 36.19(3)(c)(ii) contemplate both that the fact that a payment has been made or the fact that one has not been made may be relevant to costs? Is what is contemplated as being disclosable to the trial judge simply the fact of payment in or would it be proper to disclose the actual amount? How does the provision fit with the obligation (the word in r 44.3(4) is 'must') to take into account any payment into court or an admissible offer to settle?

[34] At one moment it was being suggested in argument that at the end of a trial on liability it would be appropriate under r 36.19(3)(c) to disclose both the fact of a payment in and the quantum thereof so that a judge could exercise his discretion in relation to the award of costs on the preliminary issue taking the view, for example, that the amount paid in was on any view too low. In that way it could be argued he could properly fulfil his obligation under r 44.3(4) at that stage. Indeed Mr Dunning went so far as to offer to show us the terms of the payment in so that if we took the view the judge had erred we could exercise the discretion afresh.

[35] In my view r 36.19 does not allow for the disclosure of the amount of a payment in. On its language it allows simply the disclosure of the fact that there has been one or the fact that there has not. The consequences of that being the correct interpretation of r 36.19 seem to me to be as follows. If the court is told that there has been no payment in, then the court is free to exercise its discretion to award costs in relation to the preliminary issue and there is no difficulty with r 44.3(4)(c). If however it is told that there has been a payment in, then, in any but perhaps the most exceptional case, I find it very difficult to think that there could be circumstances where if the issue of damages remains to be decided, the judge can do otherwise than to reserve the question of costs until after the determination of that issue.

[36] The points that Mr Dunning makes, for example in relation to the conduct of the witnesses, can be made at the later stage but until the court knows how generous or otherwise the payment in was, it would not, as I see it, normally be fair to exercise a discretion in relation to costs. In any event because the court was not allowed to know the quantum, it could not act as required under r 44.3(4), at that stage.

[37] In my view, accordingly, the judge was not entitled to deal with costs in the way he did. He should have reserved the same, pending determination of quantum, and his order should be reversed to reflect that finding.

COSTS OF THE APPEAL

[38] At the conclusion of the appeal we were asked to deal with costs. Mr Dunning QC produced a letter from his instructing solicitors sent in January 2005 which offered a settlement of the appeal on a basis that precisely follows the conclusion that I have reached, and which is a conclusion with which all members of the court agree. The offer did not comply with the provisions of r 36.5 because it was expressed to be open for only 14 days and not 21. Mr Jones argued that the offer should therefore be ignored, and that since his client had succeeded in reversing the judge on the costs issue, they were entitled to have that success reflected in any order for costs.

[39] We rejected Mr Jones' submission. Rule 44.3(4) is quite clear in obliging a court to take into account any admissible offer 'whether or not made in accordance with Part 36.' The offer made was one that Mr Jones' clients should have accepted. For those reasons we ordered BMB to pay all the costs of the appeal.

SIR WILLIAM ALDOUS.

[40] I agree.

MANCE LJ.

[41] I also agree.

Appeal allowed.

Dilys Tausz Barrister.

Secretary of State for Work and Pensions v Bobezes

[2005] EWCA Civ 111

COURT OF APPEAL, CIVIL DIVISION
PILL, BUXTON LJJ AND LORD SLYNN OF HADLEY
14 DECEMBER 2004, 16 FEBRUARY 2005

European Community – Workers – Freedom of movement – Social security – Income support dependent child allowance – Member of same household – Child not treated as member of same household where child continuously absent for period of more than four weeks – Portuguese national residing in United Kingdom as migrant worker – Child spending periods of time exceeding four weeks with grandparent in Portugal – Allowance refused – Whether discrimination on grounds of nationality – Nature of proof required to establish discrimination – Income Support (General) Regulations 1987, SI 1987/1967, reg 16(5).

The claimant, a Portuguese national, had come to the United Kingdom as a 'worker' under European Community law. He received income support dependent child allowance (the allowance) in respect of one of his children as, inter alia, a member of the same household for whom he was responsible. Regulation 16(5)[a] of the Income Support (General) Regulations 1987 had the effect that a child was not to be treated as a member of the same household where the child was not living with the income support claimant and he or she had been continuously absent from Great Britain for a period of more than four weeks. The Secretary of State ruled that the allowance was recoverable on the basis that the child had spent certain periods with her grandmother in Portugal. That decision was revised by an appeal tribunal to the extent that the allowance was recoverable where the child's various periods of presence in Portugal had exceeded four weeks. However, the Social Security Commissioner set the tribunal's decision aside on the basis that it was arguable that the application of reg 16(5) of the 1987 regulations had indirectly discriminated against the claimant on grounds of nationality since, whereas the grandparents of a Portuguese family residing in the United Kingdom were to be expected to reside in Portugal, the grandparents of a British family residing in the United Kingdom were to be expected to reside in Britain. He held that discrimination was not obviously there, 'but that is not to say that the claimant, given the chance, cannot establish it'. He referred the matter back to the tribunal to consider whether the claimant could establish, in fact, the existence of such discrimination, and, if so, whether it could be justified by the Secretary of State. Both parties appealed to the Court of Appeal. The issues raised by the Secretary of State's appeal were resolved between the parties in the course of the hearing. In the claimant's cross-appeal the Secretary of State contended (i) that the allegation that reg 16(5) indirectly discriminated on grounds of nationality because it was more likely to disqualify from benefit claimants who were

a Regulation 15, so far as material, is set out at [7], below

migrant workers than it was to disqualify claimants who were British nationals could only be made good by statistical analysis comparing the actual incidence of the limitation in cases of migrant workers on one hand and British nationals on the other; and (ii) that there was no difference in principle between children of migrant workers and children of parents who had come to the United Kingdom from the Caribbean or from India. The claimant submitted that the jurisprudence of the Court of Justice of the European Communities enabled him to demonstrate that reg 16(5) was inherently discriminatory without recourse to actual figures.

Held – The commissioners and the court were entitled to take a broad approach and to find that indirect discrimination was liable to affect a significant number of migrant workers on the ground of nationality without statistical proof being available. The proper approach was to compare the children of migrant workers with British children whose families were normally resident in the United Kingdom. It was intrinsically likely that significantly more of the former than the latter would be prejudiced by reg 16(5) of the 1987 regulations. In view of the greater proximity of the families of European migrant workers than those from the Caribbean or India it was in any event probable that the former rather than the latter were more likely to be discriminated against by reg 16(5). Accordingly, the cross-appeal would be allowed (see [24]–[27], [29], [46], below).

O'Flynn v Adjudication Officer [1996] All ER (EC) 541, *Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1, *Commission v France* [1998] ECR I-5341 and *Biehl v Administration des contributions du grand-duché de Luxembourg* [1990] ECR I-1779 considered.

Notes

For the treatment of families for income support, for social security: nature of European Community law, non-discrimination on grounds of nationality, and for social security for migrant persons, see 44(2) *Halsbury's Laws* (4th edn reissue) paras 182, 451, 453–460.

For the Income Support (General) Regulations 1987, SI 1987/1967, see 18 *Halsbury's Statutory Instruments* (2003 issue) 145.

Cases referred to in judgments

Biehl v Administration des contributions du grand-duché de Luxembourg [1990] ECR I-1779, [1991] STC 575.

Collins v Secretary of State for Work and Pensions [2004] All ER (EC) 1005, [2005] QB 145, [2004] 3 WLR 1236.

Commission v France [1998] ECR I-5341, ECJ.

Meints v Minister van Landbouw, Natuurbeheer en Visserij [1997] ECR I-6689.

O'Flynn v Adjudication Officer [1996] All ER (EC) 541, [1996] ECR I-2617.

Perry v Chief Adjudication Officer [1999] 2 CMLR 439, CA.

Pinna v Caisse d'allocations familiales de la Savoie [1986] ECR 1.

Snares v Adjudication Officer [1997] All ER (EC) 886, [1997] ECR I-6057.

Social Security Decision R2/03 50/99, Tribunal of Comrs.

Sotgiu v Deutsche Bundespost [1974] ECR 153.

Appeal and cross-appeal

The Secretary of State for Work and Pensions appealed, and Carlos Bobezes cross-appealed, from the decision of the Social Security Commissioner, on Mr Bobezes' appeal from the Social Security Appeal Tribunal relating to his claim for income support dependent child allowance for his stepdaughter, that discrimination against Mr Bobezes on grounds of nationality in the application of reg 16(5) of the Income Support (General) Regulations 1987 could not be ruled out and referring the matter back to the tribunal for consideration. The facts are set out in the judgment of Lord Slynn of Hadley.

James Maurici (instructed by the *Public Law Project*) for Mr Bobezes.

Eleanor Sharpston QC (instructed by the *Office of the Solicitor* to the *Department for Work and Pensions* and the *Department of Health*) for the Secretary of State.

Cur adv vult

16 February 2005. The following judgments were delivered.

LORD SLYNN OF HADLEY.

[1] Mr Bobezes, a married Portuguese national, came to the United Kingdom as a 'worker' pursuant to what is now art 39 of the EC Treaty. Whilst here he became permanently incapable of work; by virtue of art 2(b) and art 7 of Commission Regulation (EEC) 1251/70, (OJ English Sp Edn 1970 (II) p 402) he retained his rights as a 'worker'. Accordingly at the time relevant to this appeal he received severe disablement allowance, child benefit for two children and income support as a supplement to the other two benefits.

[2] He also claimed and received until 10 September 1998 income support dependent child allowance (the allowance). The Secretary of State, however, decided that the allowance in respect of Sonia, a stepdaughter of Mr Bobezes and Mrs Bobezes' daughter, should not have been paid for the period from 10 September 1998 to 9 September 2000. The Secretary of State ruled that the amount overpaid, £525, was recoverable under s 71 of the Social Security Administration Act 1992. The basis of his decision was that Sonia had spent periods with her grandmother in Portugal between August 1998 and November 1998 and then from January 1999 when she attended a course of study in Portugal, returning to her home in England on a number of occasions.

[3] Mr Bobezes appealed to the appeal tribunal which revised the decision of the Secretary of State to the extent that 'Mr Bobezes shall submit a list of dates within the period 10/9/98 to 3/3/99 when Sonia was (a) in Great Britain (b) in Portugal. Income support for her will only be overpaid and recoverable when her various periods of presence in Portugal respectively exceed 4 weeks.' It is agreed that it is implicit in that order that the Secretary of State could terminate entitlement to support in principle under the regulation but that the question arose as to the precise dates when payment was not due.

[4] Mr Bobezes appealed to the Social Security Commissioner on the ground that the decision of the tribunal was erroneous in law because it discriminated against him on the ground of his nationality. It is accepted that para 15 of the commissioner's decision accurately summarises the appellant's argument before him.

> 'Had Sonia been sent to stay with her grandparents and had they lived somewhere else in Britain, Mr Bobezes would have continued to be entitled to, and would not have been overpaid, the income support dependent child allowance for Sonia. If the claimant and family had been British, then the grandparents would probably have lived in Britain. But Mr Bobezes and family and the grandparents were Portuguese, and the grandparents lived, as would be expected, in Portugal. To stop the income support for Sonia while she was with her grandparents in Portugal, and to demand its repayment in these circumstances, was contended to be indirect discrimination against Mr Bobezes and his family on the grounds of their Portuguese nationality.'

[5] The commissioner having reviewed in detail the domestic and EC legislation and European case law concluded that: 'the claimant is entitled to argue that he is being discriminated against under 7(2) of Council Regulation 1612/68 (EEC) (OJ English Sp Edn 1968 (II) p 475), and that Article 42(2) does not block that right. It follows that I must set aside the decision of the Tribunal'. He accepted that discrimination, even if not obvious, could not be ruled out and referred the matter to the tribunal to consider whether the claimant could establish discrimination and if he could whether that can be justified. In particular he must have the chance to contend for any period when he cannot claim under domestic law that he is the subject of indirect discrimination under art 7 of Regulation 1612/68 in the application of reg 16(5) of the domestic Income Support (General) Regulations 1987, SI 1987/1967. He ruled that Council Regulation (EEC) 1408/71 (OJ 1971 L149 p 2) is not relevant to this.

[6] In British domestic law income support was available at the relevant time under s 124 of the Social Security Contributions and Benefits Act 1992 and reg 17 of and para 2 of Sch 2 to, the Income Support (General) Regulations 1987. Under reg 17 the amount was payable in respect of 'any child or young person who is a member of his family' and by s 137(1) of the 1992 Act 'family' means 'a married or unmarried couple and a member of the same household for whom one of them is or both are responsible and who is a child or a young person of a prescribed description.' The section defines 'child' as meaning a person under the age of 16. Regulation 14 of the 1987 regulations defines 'a person of a prescribed description' for the purposes of s 137 of the 1992 Act as: 'a person aged 16 or over but under 19 who is treated as a child for the purposes of [section 142 of the Social Security Contributions and Benefits Act 1992] (meaning of child [for the purposes of child benefit]), and in these regulations such a person is referred to as a "young person"'. From 10 February 1998 on her sixteenth birthday Sonia was a young person until her nineteenth birthday.

[7] Part III of the 1987 regulations deals with membership of the family. The person responsible for a child is a person who has primary responsibility for the child or, if there is a question as to who has primary responsibility, 'the person

who is receiving child benefit in respect of him' (reg 15). Mr Bobezes was at the relevant time responsible for Sonia under reg 15 since he was receiving child benefit for her. By reg 16(1) the claimant for income support and any partner and, where the claimant or his partner is treated as responsible under reg 15 for a child or young person, that child or young person 'shall be treated as members of the same household where any of them is absent from the dwelling occupied as his home'. In the circumstances specified in para 5 of reg 16 the provisions of reg 16(1) are not to apply to the child or young person who is not living with the claimant and he (a) has been continuously absent from Great Britain for a period of more than four weeks commencing (i) where he went abroad before the date of claim for income support, with that date; '(ii) in any other case, with the date on which he went abroad ...'

[8] It is contended by the Secretary of State that because Sonia was continuously absent from Great Britain for a period or periods of more than four weeks within the meaning of reg 16(5) she is not entitled to be treated as a member of the same household as Mr Bobezes by virtue of para 1 of reg 16.

[9] If the facts as to her absences are as the appeal tribunal accepted, this on the face of it is correct, but it is contended that this is discriminating against him as a migrant worker so that he cannot be excluded from the allowance by virtue of reg 16(5).

[10] Before the commissioner and on this appeal the Secretary of State contended that this question is to be decided by reference to Regulation 1408/71, on the application of social security schemes to self-employed persons and to members of their families moving within the community, and in particular art 3 which provides that 'subject to the special provisions of this Regulation persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

[11] As has been seen the commissioner ruled that the question had to be decided under Regulation 1612/68 on freedom of movement of workers within the Community and in particular under art 7 which provides:

> '1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;
>
> 2. He shall enjoy the same social and tax advantages as national workers ...'

[12] Miss Sharpston QC on behalf of the Secretary of State has forcefully contended that it is essential that the court should decide under which of the two regulations this question has to be resolved. As a matter of principle since Regulation 1408/71 was adopted later than Regulation 1612/68 it should be applied and the two regulations cannot be applied simultaneously. Further Regulation 1612/68 specifically provides in art 42 that: '2. This Regulation shall not affect measures taken in accordance with Article 51 [42] of the Treaty.' Moreover income support is a special non-contributory benefit for the purpose of Regulation 1408/71 (Annex IIa (para Y(e)). Accordingly it falls specifically

within the provisions of art 4(2a) and art 10a(1) of that regulation. It is not just a 'social [or] tax advantage' within the meaning of 7(2) of Regulation 1612/68. a

[13] Despite these arguments the Secretary of State accepts that if this appeal is allowed Mr Bobezes can seek to pursue his claim under art 3 of Regulation 1408/71 since that regulation applies to him and he seeks the benefit under 'the legislation of any Member State' namely the allowance under the 1987 regulations. b

[14] Mr Bobezes initially relied on both art 7 of Regulation 1612/68 and art 3 of Regulation 1408/71 but at the hearing before the commissioner he abandoned art 3 and relied only on art 7. The commissioner raised the question whether if neither applied, or in any event, Mr Bobezes could rely on art 12 read with art 39 of the EC Treaty. On this appeal Mr Bobezes does not dispute c that his claim falls within Regulation 1408/71 both as to his position as a claimant and as to the substance of his claim and he does not dispute that the issue is whether, if the claim falls within both regulations, art 42 of Regulation 1612/68 excludes the application of that regulation and means that only Regulation 1408/71 applies. This, it is said, was held in *R2/03 50/99* by the Northern Ireland commissioner purporting to follow but, in Mr Bobezes' d contention, misunderstanding, the European Court of Justice's judgment in *Snares v Adjudication Officer* [1997] All ER (EC) 886, [1997] ECR I-6057. Having reviewed a number of decisions in Mr Bobezes' skeleton argument it is concluded that he is 'entitled to rely on art 7(2) of Regulation 1612/68 notwithstanding that his claim also falls within Regulation 1408/71'.

[15] Despite all these arguments based on the European Court's authorities e the real point for the purpose of this case is that, when considering whether there is discrimination against Mr Bobezes in the application of art 16 of the United Kingdom regulation, there is no difference between art 3 and art 7 of the respective EC regulations. Both unequivocally prohibit the different treatment of migrant workers and national workers in the grant and payment f of the allowance. It matters not whether that is treated as a condition of employment, a social advantage or a benefit under legislation of the member state. Mr Maurici having ultimately accepted that the claim could fall under both art 3 and art 7 finally recognised the practical reality and he conceded that if the case went back to the tribunal for the discrimination question to be g investigated he would not rely on art 7 of Regulation 1612/68. Both parties are, therefore, fully agreed that the issue is to be decided under Regulation 1408/71. There is thus no issue between the parties for the court to decide. Despite the Secretary of State's argument I do not consider that it would be appropriate in the circumstances for the court to review all the authorities and to express an h opinion on what is at best a theoretical question with no consequences for the parties to this appeal.

[16] The Secretary of State contended before the commissioner that the Court of Appeal's decision in *Perry v Chief Adjudication Officer* [1999] 2 CMLR 439 was fatal to Mr Bobezes' claim. Before the commissioner Mr Maurici accepted that on its face this was correct though he reserved the right to argue j that *Perry*'s case was wrongly decided by this court. The Secretary of State said that even if *Perry*'s case was rightly decided it is distinguishable. Mr Maurici accepts that the *Perry* point only arises if Regulation 1408/71 does not apply to Mr Bobezes' claim. Since it is now accepted that Regulation 1408/71 is applicable, and is the only regulation to be relied on, this question again does

not arise and it is not appropriate to review the scope of *Perry*'s case or its application to the facts in this case. I express no view about that matter.

[17] The third issue on this appeal is whether if Mr Bobezes cannot rely on either regulation he can rely on arts 12, 17 and 39 of the Treaty in the light of the European Court's decision in the case of *Collins v Secretary of State for Work and Pensions* [2004] All ER (EC) 1005, [2004] QB 145. Since it is accepted that he can rely on Regulation 1408/71 this question again does not arise and I express no view on it.

[18] The respondent's cross-appeal challenges the commissioner's finding that 'discrimination is not obviously there, but that is not to say that the claimant, given the chance cannot establish it'. That according to the Secretary of State means that Mr Bobezes must produce statistical evidence to prove that there was in fact discrimination against him as a migrant worker. The respondent contends that this is an impossible task and in any event is one which he is not required to undertake. It is contrary to the principles set out in the European Court's judgment in *O'Flynn v Adjudication Officer* [1996] All ER (EC) 541, [1996] ECR I-2617. In *O'Flynn v Adjudication Officer* a grant to cover funeral expenses was available, but only in an amount needed for a burial near to the deceased's home. It did not cover the cost of transporting the body to a distant place where there was no good reason for doing so. The European Court accepted that it was more likely that a migrant worker would wish to be buried near his original home (where members of his family might be buried or might still live). They would be intrinsically less likely to qualify on that ground alone for the funeral grant which was essentially only available for burials in England. That in itself was discriminatory. As the court put it ([1996] All ER (EC) 541 at 555, [1996] ECR I-2617 at 2638):

> '18. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers (see *Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1 at 25–26 (para 24) [et al], or the great majority of those affected are migrant workers ... where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers ... or where there is a risk that they may operate to the particular detriment of migrant workers ...
>
> 20. It follows from all foregoing case law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.
>
> 21. It is not necessary in this respect to find that the position in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.'

[19] Advocate General Lenz put it bluntly at para 16 ([1996] All ER (EC) 541 at 546, [1996] ECR I-2617 at 2623):

> ' ... the decisive question is in my opinion whether it is more probable for nationals of other member states than for nationals of the United

Kingdom that they or their relatives will be buried in another *member state*. That question must be answered in the affirmative.' a

[20] In the case of *Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1 which is referred to in the judgment in *O'Flynn v Adjudication Officer*, the Caisse had refused to pay benefits to the children (who stayed in Italy) of an Italian who moved to France. Advocate General Mancini said (at 11): b

'6B ... the family unit of a person working in his country of origin is generally united whereas the migrant worker's family is generally separated. That some members of his family should reside in countries other than the one in which he is employed is in fact a normal effect of a worker moving within the Community.' c

[21] The court said (at 25):

'24 ... Although as a general rule the French legislation employs the same criterion to determine the entitlement to family benefits of a French worker employed in French territory, that criterion is by no means equally important for that category of worker, since the problem of members of the family residing outside France arises essentially for migrant workers.' d

[22] It is to be said that there is nothing new in this approach. This case illustrates the application of a well recognised principle. Thus in *Commission v France* [1998] ECR I-5341 the court said (at 5351): e

'37 The Court has consistently held that the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, leads in fact to the same result (see, inter alia, *Sotgiu v Deutsche Bundespost* [1974] ECR 153...) f

38 Unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage ... [*Meints v Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6689]'. g

h

[23] In *Biehl v Administration des contributions du grand-duché de Luxembourg* [1990] ECR I-1779, [1991] STC 575, where the repayment of employers deductions varied according to whether the taxpayer had been resident in Luxembourg for the whole of the year, the court said at para 14 (at [1990] ECR I-1779 at 1793, [1991] STC 575 at 583): j

'Even though the criterion of permanent residence in the national territory referred to in connection with obtaining any repayment of an overdeduction of tax applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers

a who are nationals of other Member States. It is often such persons who will in the course of the year leave the country or take up residence there.'

[24] In these cases neither the Advocate General nor the court has insisted on statistical evidence. It was enough in cases of discrimination based on nationality that the effect of the provision is 'essentially' 'intrinsically' b 'susceptible by its very nature' 'by its own nature' liable to be discriminatory. These cases are dealing with different statutory provisions and I do not suggest that any of them applies directly to the provisions in this legislation. *O'Flynn v Adjudication Officer* is a more obvious example of indirect discrimination than e g *Biehl*'s case or *Collins*'s case but the drift is the same, and it seems to me that the commissioners and the court are entitled to take a broad approach and to c find that indirect discrimination is liable to affect a significant number of migrant workers on the ground of nationality without statistical proof being available. This is of course quite different from the position where discrimination on the ground of sex is alleged and where the discrimination in many cases will not be obvious and so that it is necessary to establish that more d women than men are liable to be affected.

[25] The Secretary of State suggested that there is no difference in principle between children of migrant workers of member states and children of parents who came here from the Caribbean or India and who are all likely to stay with family members in their countries of origin for periods of more than four weeks so that they will not be entitled to the payment. There is thus no discrimination e against the former.

[26] There is some force in this but it seems to me that the proper approach is to compare the children of migrant workers with British children whose families are normally resident here. It is intrinsically likely that significantly more of the former than the latter will be prejudiced by para 16(5) of the f regulation. In view of the greater proximity of the families of European migrant workers than those from the Caribbean or India it seems to me in any event probable that the former rather than the latter are more likely to be discriminated against by reg 16(5) in any event.

[27] I would therefore allow the cross-appeal. The tribunal should now proceed, on the basis of the judgments of this court, to decide whether the g discrimination can be justified by the Secretary of State.

BUXTON LJ.

[28] I gratefully adopt the account of the facts of and background to the case given by Lord Slynn of Hadley. I respectfully agree with him that the court h should not entertain what were, in the context of this case, the hypothetical issues sought to be ventilated in the Secretary of State's appeal. That is not just on technical grounds, but also because it became clear in the course of argument that the Secretary of State would wish to deploy whatever might fall from this court in cases thought to be analogous to, but not the same as, that of j Mr Bobezes. There was therefore plainly a danger that the court might reach conclusions that were not informed by the proper range not only of legal authority but also of policy considerations.

[29] I respectfully agree with Lord Slynn that the cross-appeal should be allowed. Since we are differing from the tribunal below I venture to add some words of my own.

[30] Mr Bobezes alleges that the provision in reg 16(5) that excludes from qualification for benefit a child who, although still a member of the same household as the claimant, has been continuously absent from Great Britain for a period of more than four weeks indirectly discriminates on grounds of nationality. That is because the limitation is more likely to disqualify from benefit claimants who are migrant workers than it is to disqualify claimants who are British nationals.

[31] The Secretary of State contends that this allegation can only be made good by statistical analysis comparing the actual incidence of the limitation in the cases of migrant workers on the one hand and British nationals on the other. Mr Bobezes replies that that would present him with an impossible task; but he does not need to undertake it, because the jurisprudence of the European Court of Justice (ECJ) enables him to demonstrate that reg 16(5) is inherently discriminatory, without recourse to actual figures.

[32] Before embarking on a review of that jurisprudence, it is necessary to recall two general considerations. First, the prohibition of discrimination on grounds of nationality is one of the basic principles of the Community legal order, laid down by art 12 (ex art 6) of the EC Treaty. Second, we are concerned with the rights and interests of migrant *workers*, who in that capacity have rights in Community law to remain in the state of migration during and after their period of employment, as provided by art 39.3 (c) and (d) (ex art 48) of the Treaty.

[33] Mr Bobezes relied on two authorities of the ECJ. The earlier, *Pinna v Caisee d'Allocations Familiales de la Savoie* [1986] ECR 1, concerned an exemption provided to the French Republic in the then art 73(2) of Regulation 1408/71 from the general rule of that regulation that a worker subject to the legislation of state A was entitled to family benefits under the provisions of state A in respect of his family members residing in (Community) state B. The ECJ held that exemption to be invalid, in that it authorised French legislation that withheld child benefits from residents of France if the children stayed outside France for more than three months in any calendar year. That provision necessarily extended to a migrant worker from, *in casu*, Italy, whose children either remained behind in Italy or visited that country for periods of more than three months.

[34] The court held that the French legislation, although not expressed in terms of nationality, in fact discriminated against migrant workers. The court reached that conclusion on the basis of its own assessment of the necessary incidents of the position of a migrant worker. Advocate General Mancini said at para 6B ([1986] ECR 1 at 11) of his opinion:

> 'the family unit of a person working in his country of origin is generally united whereas the migrant worker's family is generally separated. That some members of his family should reside in countries other than the one in which he is employed is in fact a normal effect of a worker's moving within the Community.'

Taking up that theme, the court said, at paras 23 and 24 ([1986] ECR 1 at 25) of its judgment, that covert discrimination arose when the French legislation was used to assess the family benefits of a migrant worker. That was because—

a 'Although as a general rule the French legislation employs the same criterion to determine the entitlement to family benefits of a French worker employed in French territory, that criterion is by no means equally important for that category of worker, since the problem of members of the family residing outside France arises essentially for migrant workers'

b [35] The court was therefore persuaded, and without recourse to statistical analysis, that migrant workers, because of their family situation as described by the Advocate General, were characteristically the category of worker that would be affected by the limitations in the legislation, in a way that would not apply, or at least which could not be demonstrated characteristically to apply, c in the case of French nationals. That was necessarily discrimination on grounds of nationality.

[36] Mr Maurici sought to persuade us that the decision in *Pinna's* case could be applied directly and without more to our case. I do not agree. The contrast as perceived by the court between the factual position of a migrant worker in d leaving his family behind in his country of origin on the one hand; and the likely factual position of an original resident of the state granting the benefits on the other; was relevant to the issue of discrimination because of the circumstances of those claiming the particular benefit in question. The court considered it entirely straightforward that many migrants and few Frenchmen would have dependants outside France. But the provision in our case, because it imposes a e more extensive disqualification, in terms of only four weeks absence from Britain, much less obviously has as its characteristic target the families of migrant workers, as opposed to the families of British nationals.

[37] It is therefore necessary to revisit this question in the light of developments in the jurisprudence of the court.

f [38] For that, Mr Maurici relied on *O'Flynn v Adjudication Officer* [1996] All ER (EC) 541, [1996] ECR I-2617. The facts were far different from those in our case. A social provision for financial assistance with funeral expenses was held to discriminate against migrant workers by requiring burial or cremation to take place within the territory of the providing state, the court holding, at para 22 ([1996] All ER (EC) 541 at 555, [1996] ECR I-2617 at 2639) of its g judgment, that—

'it is above all the migrant worker who may, on the death of a member of the family, have to arrange for burial in another member state, in view of the links which the members of such a family generally maintain with h their state of origin.'

However, in the course of reaching that conclusion the court entered upon a survey of the current jurisprudence, which it is difficult not to regard as general guidance extending well beyond the facts of the case before them.

[39] In para 18 ([1996] All ER (EC) 541 at 555, [1996] ECR I-2617 at 2638) the j court surveyed a number of categories of case where conditions imposed by national law, although applicable irrespective of nationality, must be regarded as indirectly discriminatory. Those different categories involved conditions:

- that affect essentially migrant workers (*Pinna's* case being cited as an example);
- where the great majority of those affected are migrant workers;

- that can more easily be satisfied by national workers than by migrant workers;
- where there is a risk that they may operate to the particular detriment of migrant workers.

Perhaps of particular interest for the issue in our case is one of the authorities cited by the court in support of the last of those categories. In *Biehl v Administration des contributions du grand-duché de Luxembourg* [1990] ECR I-1779, [1991] STC 575 Luxembourg tax legislation made differential provision for the repayment of employer's deductions according to whether the taxpayer had been resident in that country for the entire tax year. The court said, at para 14 ([1990] ECR I-1779 at 1793, [1991] STC 575 at 583):

> 'Even though the criterion of permanent residence in the national territory referred to in connection with obtaining any repayment of an overdeduction of tax applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States. It is often such persons who will in the course of the year leave the country or take up residence there.'

That last observation was not based on any statistical analysis, but (like the conclusion in *Pinna*'s case as to the essential effect of the provision there in question) upon the court's own assessment.

[40] The court in *O'Flynn v Adjudication Officer* then summarised what it thought to be the overall effect of the authorities. It said in paras 20 and 21 ([1996] All ER (EC) 541 at 555, [1996] ECR I-2617 at 2638–2639) of its judgment:

> '20. It follows from all the foregoing case law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.
>
> 21. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.'

[41] I venture to draw from those observations that statistical analysis of the actual incidence of a provision as between migrant and national workers, such as is demanded by the Secretary of State, will not be necessary if the court is able to conclude that the provision is 'intrinsically liable' (in the French text, 'susceptible par sa nature même') to operate in a discriminatory manner. The court approaches that question by applying the terms of the provision to its likely effect upon migrant workers as compared with nationals of the home state. The court performs that operation using its common sense and understanding of the general position of migrant workers as, with respect, did the Court of Justice in *Pinna*'s case, *Biehl*'s case and *O'Flynn v Adjudication Officer*. That is what this court is equally obliged to do in the present case.

[42] Addressing that question, the Secretary of State pointed out that many British subjects now retain substantial ties with their countries of origin, characteristically in the old Commonwealth. They are no less likely to send

their children home to see their grandparents, or for other reasons connected with national ties, than was a migrant worker such as Mr Bobezes. Secondly, there are a myriad of reasons why a teenage child might be absent from the United Kingdom for more than four weeks, for study, recreation, 'gap years' and so on. There was no reason to think that type of displacement was more likely to occur in the case of a migrant worker than in the case of a British national.

[43] I would be minded to accept that latter point, within the limited cases to which it applies. Mr Bobezes himself is to be judged as a migrant worker, established in or at least entitled to remain in this country, and such of his children as accompany him may, ordinarily, be assumed to follow the pattern of behaviour of their British contemporaries who are equally the children of people established here. There is however an extra dimension in the case of a migrant worker, because he can be assumed to be likely to retain ties in his country of origin. Take this very case. The reason for the child's absence from the United Kingdom was that Mr and Mrs Bobezes considered that it would be advantageous for her to spend a significant period away from influences in her home situation of which they disapproved, and to that end were able to arrange for her to go to live with her grandmother who had remained behind in Portugal. Such an opportunity, and other occasions of prolonged visits abroad, over and above the normal teenage displacements, is much more likely to be available to children of a migrant worker than it is to the children of British nationals.

[44] Nor is the latter point displaced by the argument based on the origins overseas of many British nationals. The comparison for present purposes must be between the totality of migrant workers and the *totality* of British subjects. Here again no figures are available, or at least have not been put in evidence, but I can certainly take judicial notice of the fact that the proportion of the total of all British subjects who do or may retain significant connections with a country of origin is still comparatively modest. And it is also relevant to bear in mind the observation of Advocate General Lenz in *O'Flynn v Adjudication Officer*, at para 16 ([1996] All ER (EC) 541 at 546, [1996] ECR I-2617 at 2623) of his opinion, that to have assumed United Kingdom nationality suggests that the former migrant now feels primarily linked to the United Kingdom. Since the comparison is with migrant workers who, by definition, have retained the nationality of their country of origin, I have little difficulty in saying, in the language of the court in *O'Flynn v Adjudication Officer*, that the limitation based on four weeks' absence of the child from the United Kingdom is intrinsically liable to affect migrant workers more than national workers, and that there is certainly a risk that it will place migrant workers at a particular disadvantage.

[45] These are not particularly demanding tests, and they certainly do not require statistical evidence, or evidence of the actual effect of the provision in practice. It is not, however, a matter of accident that the Court of Justice has adopted that approach. As Advocate General Lenz pointed out in para 26 ([1996] All ER (EC) 541 at 549, [1996] ECR I-2617 at 2626) of his opinion in *O'Flynn v Adjudication Officer*, only a broad interpretation of rules about discrimination can—

'do justice to the fundamental importance of the prohibition of discrimination based on nationality in the system of Community law.' a

I would have found it uncomfortable in the present case if Mr Bobezes had only been able to make a case in relation to one of the fundamental pillars of the Community legal order by adducing evidence that is plainly never going to be available either to him or to any other migrant worker. I am not surprised to b find that the jurisprudence of the ECJ does not force him into that position.

PILL LJ.

[46] I agree with the judgment of Lord Slynn of Hadley.

c

Cross-appeal allowed.

Stephen Leake Barrister.

Mitsui & Co Ltd v Nexen Petroleum UK Ltd

[2005] EWHC 625 (Ch)

CHANCERY DIVISION
LIGHTMAN J
12, 13, 29 APRIL 2005

Disclosure and inspection of documents – Defendant for purposes of disclosure only – No reasonable cause of action against party from whom disclosure sought – Whether availability of pre-action disclosure ground for refusing exercise of jurisdiction to order disclosure from third parties.

The claimant applied for *Norwich Pharmacal* orders (see *Norwich Pharmacal Co v Comrs of Customs and Excise* [1973] 2 All ER 943) against the defendant for disclosure of documents and for provision of an affidavit by the former managing director of the defendant and its former holding company (H). The application arose out of the entry by H and other company, N, into an agreement for the sale by H to N of the entire issued share capital of the defendant. The claimant alleged that H's parent company, E, had by a prior oral agreement with the claimant agreed not to solicit offers from third parties in relation to the defendant's primary asset, an oilfield, and suspected that in breach of that agreement E had solicited from N's holding company an offer to purchase the defendant. The claimant contended, inter alia, that it would not be able to obtain pre-action disclosure from E, and that the availability of an application for such disclosure was not a ground for refusing *Norwich Pharmacal* relief.

Held – The exercise of the court's jurisdiction to order *Norwich Pharmacal* relief against third parties who were mere witnesses innocent of any participation in the wrongdoing being investigated was a remedy of last resort. The jurisdiction was only to be exercised if the innocent third parties were the only practicable source of information. The basis of the jurisdiction against them was that, unless and until they disclosed what they knew, there could be no litigation in which they could give evidence. On the material before the court in the instant case the claimant could, or ought to be able to, obtain the necessary pre-action disclosure from E. Accordingly the application would be dismissed (see [18], [23], [24], [28], [37], [40], below).

Norwich Pharmacal Co v Comrs of Customs and Excise [1973] 2 All ER 943 applied.

Notes

For procedure for pre-action disclosure, and for claim for pre-action disclosure otherwise than under statutory provisions, see 37 *Halsbury's Laws* (4th edn reissue) paras 201, 208.

Cases referred to in judgment

Aoot Kalmneft v Denton Wilde Sapte (a firm) [2002] 1 Lloyd's Rep 417.

Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29, [2002] 4 All ER 193, [2002] 1 WLR 2033.

AXA Equity & Law Life Assurance Society plc v National Westminster Bank plc [1998] CLC 1177, CA.

Black v Sumitomo Corp [2001] EWCA Civ 1819, [2003] 3 All ER 643, [2002] 1 WLR 1562. a

Carlton Film Distributors Ltd v VCI Plc [2003] EWHC 616, [2003] FSR 876.

CHC Software Care Ltd v Hopkins and Wood [1993] FSR 241.

Harrington v North London Polytechnic [1984] 3 All ER 666, [1984] 1 WLR 1293, CA.

MacKinnon v Donaldson Lufkin & Jenrette Securities Corp [1986] 1 All ER 653, [1986] Ch 482, [1986] 2 WLR 453. b

Norwich Pharmacal Co v Comrs of Customs and Excise [1973] 2 All ER 943, [1974] AC 133, [1973] 3 WLR 164, HL.

P v T Ltd [1997] 4 All ER 200, [1997] 1 WLR 1309.

Case referred to in skeleton arguments

Totalise plc v Motley Fool Ltd [2001] EWCA Civ 1897, [2003] 2 All ER 872, [2002] 1 WLR 1233. c

Application

The claimant Mitsui & Co Ltd applied for *Norwich Pharmacal* orders against the defendant Nexen Petroleum UK Ltd for disclosure of documents and provision of an affidavit by the former managing director of the defendant and of its former holding company, Encana UK Holdings Ltd. The facts are set out in the judgment. d

Christopher Carr QC (instructed by *Herbert Smith LLP*) and *David Sulan* of that firm for the claimant.

Ian Glick QC (instructed by *Norton Rose*) and *Philip Reed* of that firm for the defendant. e

Cur adv vult

29 April 2005. The following judgment was delivered. f

LIGHTMAN J.

INTRODUCTION

[1] By the application before me dated 14 January 2005, the claimant Mitsui & Co Ltd (the claimant) a very substantial company incorporated in Japan seeks orders pursuant to the principles established in *Norwich Pharmacal Co v Comrs of Customs and Excise* [1973] 2 All ER 943, [1974] AC 133 (*Norwich Pharmacal*) (as subsequently developed) against the defendant Nexen Petroleum UK Ltd (formerly EnCana UK Ltd) (the defendant) for disclosure of documents and for provision of an affidavit by Mr Alan Booth (Mr Booth) the former managing director of the defendant and of its former holding company, EnCana UK Holdings Ltd (Holdings). g h

[2] The application arises out of the entry by Holdings and Nexen Energy Holdings International Ltd (Nexen Energy) into an agreement dated 28 October 2004 (the sale agreement) for the sale by Holdings to Nexen Energy of the entire issued share capital of the defendant for $2·1 billion and the completion of the sale agreement on 1 December 2004. The claimant contends that EnCana Corp (Holdings' parent company) had by a prior oral agreement with the claimant agreed not to solicit offers from third parties in relation to the primary asset of the defendant, namely its interest in the Buzzard Field, and strongly suspects that in breach of that agreement EnCana Corp solicited from Nexen Energy's holding company Nexen Inc (Nexen) an offer to purchase the defendant. The purpose of the j

claimant's application is to obtain from the defendant information required to enable it to determine whether to sue EnCana Corp for such breach of contract.

FACTUAL BACKGROUND

[3] The defendant and Holdings are both incorporated in England and Wales. Both EnCana Corp and Nexen are incorporated in Canada. EnCana Corp has registered here as an overseas company. Nexen Energy is incorporated in the Channel Islands.

[4] In early 2004 the defendant owned (together with interests in the Scott and Telford Fields) a 43·2% interest in the Buzzard Field, the most significant oil field to be discovered in the North Sea in the past decade. The other parties interested in the Buzzard Field were Intrepid Energy North Sea Ltd (Intrepid), which held a 29·9% interest, BG Group, which held a 21·7% interest, and Edinburgh Oil and Gas plc, which held a 5·1% interest.

[5] Between January and April 2004 the claimant attempted to purchase Intrepid's interest in the Buzzard Field. It was unsuccessful in doing so, but the claimant remained keen to acquire an alternative interest in the Buzzard Field at the first available opportunity. It retained JP Morgan to assist it to do so. JP Morgan advised the claimant that EnCana Corp was currently re-evaluating its North Sea strategy. As a result the claimant approached EnCana Corp and expressed an interest in acquiring its interest in the Buzzard Field.

[6] EnCana Corp responded positively. An initial meeting was held between the senior executives of the parties in Calgary, Canada on 4 August 2004. During the 4 August 2004 meeting a confidentiality agreement (of which the applicable law was English law) was entered into between: (1) EnCana Corp, Holdings and the defendant; and (2) the claimant (the confidentiality agreement). The confidentiality agreement imposed on EnCana Corp, Holdings and the defendant a duty of confidence in respect of the proposed transaction and in particular the identity of the claimant, the offer price and the financing arrangements. In its skeleton argument the claimant raised the question whether EnCana Corp breached its obligations under the confidentiality agreement, but it is common ground that this question is not relevant on this application. The proposed purchase was a significant transaction for the claimant and, since a large amount of senior management time was to be invested in the negotiations and the claimant was to incur significant external consultant fees, it was very important to the claimant to complete the deal successfully. To that end, the claimant attempted to obtain EnCana Corp's agreement to negotiate exclusively with the claimant. But EnCana Corp would not agree to this.

[7] None the less the claimant contends that EnCana Corp did agree on a lesser form of protection for the claimant and that for this purpose entered into an oral agreement with the claimant referred to as the protocol agreement (the protocol). The claimant does not suggest that the applicable law of the protocol was other than English law and I must proceed on that basis. The claimant says that by the protocol EnCana Corp agreed: (i) not to solicit offers from third parties in relation to the defendant's interest in the Buzzard Field (the first limb); and (ii) to advise the claimant of any bona fide offers from third parties in relation to the Buzzard Field assets and to allow the claimant an appropriate time to respond to any such offers (the second limb). EnCana Corp denies that it entered into any such agreement and denies that, if any such agreement was entered into, it had or was intended to have any legal effect. It is common ground that it is not for me on this application to examine the merits of this dispute and I must proceed on the basis that the claimant

has a real prospect of establishing the existence and enforceability of the protocol. I must however later say a word about the first limb. a

[8] Negotiations between the parties continued from August 2004 to the end of October 2004 and were conducted on behalf of EnCana Corp by Mr Brian Ferguson and on behalf of Holdings and the defendant by Mr Booth. Both of these persons were at all key meetings between the parties. All key terms of the proposed deal (including price) were agreed. The proposed deal was to the b effect that the claimant should purchase the entire share capital of the defendant and that arrangements would be made to strip out of the defendant assets which the claimant did not wish to purchase (which included part of the defendant's interest in the Buzzard Field and the defendant's interest in two other fields). During the negotiations, (according to the claimant in accordance c with the second limb) EnCana Corp notified the claimant on or about 7 October 2004 of an offer made by Oil and National Gas Corp Ltd for the interest of the defendant in the Buzzard Field.

[9] Towards the end of October 2004 the claimant and EnCana Corp were in an advanced stage of negotiation and were due to sign the legal documentation in London in the week beginning 1 November 2004. But on d 29 October 2004 EnCana Corp announced that it had entered into the sale agreement. By cl 20(1)(a) of the sale agreement, Holdings and Nexen Energy covenanted with each other that they and their affiliate companies (a term which included their subsidiaries) would keep confidential information relating to the negotiations leading to the sale agreement. EnCana Corp did not e previously at any stage advise the claimant of Nexen's interest in purchasing the defendant's interest in the Buzzard Field or of any offer by Nexen or allow the claimant to respond to such offer. JP Morgan subsequently advised the claimant that Mr Booth had said that Nexen became interested in purchasing the defendant's interest in the Buzzard Field on or around 19 October 2004. f This would mean that Nexen formulated the bid by its subsidiary from start-to-finish in approximately ten days. On 1 December 2004 the sale to Nexen Energy was completed. On 2 December 2004, the defendant (now a subsidiary of Nexen) was renamed Nexen Petroleum UK Ltd.

[10] The claimant's representative Mr Tsuruta had discussions with Mr Ferguson on 5 November 2004 in an attempt to establish why EnCana Corp g had decided to sell its UK business to Nexen, why EnCana Corp had failed to comply with the protocol and how Nexen had been able to complete the deal so quickly. Mr Ferguson said that Nexen had originally negotiated to purchase the assets of the defendant other than its interest in the Buzzard Field, but had then made an unsolicited offer for the defendant together with all its assets at a h much better price than the claimant had offered and that there had been no point in referring that offer to the claimant because the claimant had made plain that its previous offer was its final offer.

[11] Between 5 November 2004 and 26 November 2004 Herbert Smith LLP, solicitors acting on behalf of the claimant, corresponded with EnCana Corp's j solicitors, Freshfields. The primary purpose of the correspondence was to attempt to understand how EnCana Corp completed the transaction with Nexen so quickly, and why EnCana Corp failed to notify the claimant about Nexen's offer. EnCana Corp failed to provide details satisfactory to the claimant of how Nexen's bid came about. EnCana Corp and Nexen regard the

information sought as confidential. The claimant commenced these proceedings on 14 January 2005.

[12] By this application the claimant seeks orders for: (i) disclosure of all documents within the defendant's control which contain information relating to EnCana Corp's negotiations with Nexen, including but not limited to: (a) documents which tend to show how Nexen came to know that the defendant's interest in the Buzzard Field was on the market for sale; (b) documents which tend to show whether EnCana Corp assisted Nexen in formulating its bid for the defendant including (but not limited to) documents which indicate that EnCana Corp in breach of its obligations under the confidentiality agreement advised, or in any way notified Nexen of the claimant's identity as a bidder or the price which the claimant had offered; (c) communications between representatives of EnCana Corp (including but not limited to Mr Ferguson and Mr Booth) in relation to Nexen's bid for EnCana UK; (d) communications between representatives of EnCana Corp (including but not limited to Mr Ferguson and Mr Booth) and representatives of Nexen in relation to Nexen's bid for the defendant; (e) communications between representatives of EnCana Corp (including but not limited to Mr Ferguson and Mr Booth) and EnCana Corp's advisors in relation to Nexen's bid for the defendant; (f) communications between representatives of EnCana Corp (including but not limited to Mr Ferguson and Mr Booth) regarding the protocol and/or the confidentiality agreement; (g) any board minutes or board documents which refer to Nexen's bid for the defendant; (h) any confidentiality agreement(s) entered into between Nexen and EnCana Corp; (i) documents which show which parties were in the Buzzard Field data room, and when they were granted access; and (j) a list of contents of the data room set up for the Scott and Telford Fields and/or a list of documents provided to prospective purchasers in that sale process such as Nexen. (ii) Mr Booth to provide the claimant with an affidavit which sets out and explains in chronological order the stages of negotiations between EnCana Corp and Nexen which identifies: (a) how Nexen came to know that the defendant's interest in the Buzzard Field was on the market for sale; (b) when EnCana Corp and Nexen began negotiations in relation to Nexen's purchase of that interest; (c) which parties were in the Buzzard Field data room, and when they were granted access; (d) when agreement in relation to the purchase price of the entire shareholding in the defendant was reached during the negotiations between EnCana Corp and Nexen; (e) whether EnCana Corp indicated to Nexen that EnCana Corp was in advanced discussions with another party (with or without naming the claimant) in relation to its interest in the Buzzard Field; (f) whether EnCana Corp indicated to Nexen the price which had been offered for its interest in the Buzzard Field (with or without identifying the claimant as the bidder); (g) whether during EnCana Corp's negotiations with Nexen, EnCana Corp's representatives considered and/or referred to the protocol and/or the confidentiality agreement and if so, the nature of the consideration that was given; and (h) whether during EnCana Corp's negotiations with Nexen, EnCana Corp discussed with Nexen the protocol it had entered into with the claimant and/or its obligations pursuant to the confidentiality agreement, and if so, the nature of these discussions.

[13] At the hearing the parties agreed that I should first decide as a matter of principle the claimant's entitlement to relief and that, if I decided that question

in favour of the claimant, I should then hear argument as to the nature and extent of the relief to be granted. a

[14] I should make two observations in relation to the relief sought. The first is that I suggested to counsel during the hearing that, if I held that the claimant was entitled to relief, rather than order the onerous disclosure of documents requested by the claimant, it might be appropriate to order instead interrogatories requiring the defendant to answer the questions which it had b declined to answer in correspondence. Both parties indicated agreement in principle to this course. The second is that the ambit of any order for disclosure must depend upon the ambit of the first limb and what may or may not constitute solicitation in breach of the obligation imposed.

AMBIT OF FIRST LIMB c

[15] It is common ground that I must determine this application on the assumed basis that the claimant can properly plead and has a real prospect of establishing the existence of the protocol and that the protocol is lawful and enforceable. The claimant asserts that it needs the assistance of the court to establish whether or not EnCana Corp solicited an offer in breach of the first limb. It is common ground that, if the claimant establishes the existence and d legal enforceability of the protocol, there is established a breach of the second limb.

[16] The claimant's case is that it has grounds for strong suspicion that EnCana Corp 'tipped off' Nexen about its proposed sale of its interest in the Buzzard Field and thereby or otherwise solicited interest and an offer by Nexen; e and that, even if (as alleged by EnCana Corp) Nexen made an unsolicited approach and offer, EnCana Corp thereafter 'solicited an offer' from Nexen in breach of the first limb by negotiating and providing information designed to lead, and which did lead, to the sale agreement. The claimant contends that it is entitled by this application to obtain the necessary evidence to establish whether or not this suspicion is well-founded. I raised at the hearing the f question of the meaning and ambit of the obligation assumed by EnCana Corp under the first limb (assuming that the protocol constitutes a valid and enforceable contract). There was little (if any) argument on this issue. When in the course of preparing this judgment the importance of this issue became apparent, I invited both counsel to make written submissions on it and they did g so.

[17] On the material before me I am of the view that the first limb cannot have been intended to preclude EnCana Corp from proceeding to negotiate a deal with a third party which has initiated negotiations by making an unsolicited offer: the restriction is imposed on solicitation, not responding to h solicitations and thereafter negotiating, furnishing information and concluding a sale. It is the claimant's case that the protocol was entered into to provide lesser protection when EnCana Corp had refused to grant to the claimant exclusive negotiating rights. EnCana Corp was insisting on retaining the right to negotiate with third parties. As it seems to me, once a third party has made an unsolicited approach to EnCana Corp, so far as dealing with that third party j the first limb ceases to have effect and the second limb comes into play in its place. EnCana Corp is free to exercise its retained right to negotiate with the third party, but the second limb affords to the claimant the right to respond to any offer before EnCana Corp accepts it. This question (as I have said) has some importance both on the issue whether to grant relief (and in particular whether

the defendant was 'mixed up' in wrongdoing against the claimant) and on the ambit of any relief to be granted to the claimant. The relief must be confined to the disclosure of information relating to the breach of the first limb and accordingly to whether EnCana Corp solicited an offer and cannot extend to whether (an unsolicited offer having been received from a third party) EnCana Corp subsequently negotiated with or provided information to the third party.

THE *NORWICH PHARMACAL* PRINCIPLE

[18] The principles established in *Norwich Pharmacal* (as subsequently developed) are the basis of the claimant's application for relief. In its original form, the *Norwich Pharmacal* jurisdiction allowed a claimant to seek disclosure from an 'involved' third party who had information enabling the claimant to identify a wrongdoer so as to be in a position to bring an action against the wrongdoer where otherwise he would not be able to do so. Lord Reid described the principle as follows ([1973] 2 All ER 943 at 948, [1974] AC 133 at 175):

> '... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.'

The required disclosure may take any appropriate form. Usually it takes the form of production of documents, but it may also include providing affidavits, answering interrogatories or attending court to give oral evidence.

[19] In subsequent cases, the courts have extended the application of the basic principle. The jurisdiction is not confined to circumstances where there has been tortious wrongdoing and is now available where there has been contractual wrongdoing: *P v T Ltd* [1997] 4 All ER 200, [1997] 1 WLR 1309; *Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616, [2003] FSR 876 (*Carlton Films*); and is not limited to cases where the identity of the wrongdoer is unknown. Relief can be ordered where the identity of the claimant is known, but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw: see *AXA Equity & Law Life Assurance Society plc v National Westminster Bank plc* [1998] CLC 1177 (*Axa Equity*); *Aoot Kalmneft v Denton Wilde Sapte (a firm)* [2002] 1 Lloyd's Rep 417; see also *Carlton Films*. Further the third party from whom information is sought need not be an innocent third party: he may be a wrongdoer himself: see *CHC Software Care Ltd v Hopkins and Wood* [1993] FSR 241 and Hollander, *Documentary Evidence* (8th edn, 2003) p 78, footnote 11.

[20] *Norwich Pharmacal* relief is a flexible remedy capable of adaptation to new circumstances. Lord Woolf CJ noted in *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29 at [57], [2002] 4 All ER 193 at [57], [2002] 1 WLR 2033:

> 'New situations are inevitably going to arise where it will be appropriate for the [*Norwich Pharmacal*] jurisdiction to be exercised where it has not

been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.' a

The development of the jurisdiction is illustrated by the disclosure relief ordered by McGonigal J in *Aoot Kalmneft v Denton Wilde Sapte (a firm)* [2002] 1 Lloyd's Rep 417 at 423 where he said: b

'17. ... In *Norwich Pharmacal* the information required was the identity of the wrongdoer (the applicant knew what wrong had been done but not who had done it) but I see no reason why the principle is limited to disclosure of the identity of an unknown wrongdoer and does not extend to information showing that he has committed the wrong.

18. ... The information held by [the respondent] ... may not conclusively reveal an alternative defendant to [one of the alleged wrongdoers] nor conclusively disclose who received any part of the prepayment moneys, but I am satisfied that there is a sufficient prospect that the information they hold will assist [the applicant] in its search for wrongdoers and the funds paid away ... to justify making the orders sought ... c d

20. ... The potential advantages to [the applicant] of seeing this part of the jigsaw and the potential disadvantages in being denied a sight of that part outweigh, in my view, any detriment to [the respondent].'

[21] The three conditions to be satisfied for the court to exercise the power to order *Norwich Pharmacal* relief are: (i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and (iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued. e f

[22] I have accordingly to determine whether these three conditions are satisfied. There is no issue that the first condition has been satisfied. Attention needs to be concentrated on the second and third.

'NECESSITY' g

[23] I consider first whether the second condition is satisfied. I proceed in this judgment on the basis that the claimant needs further information which the defendant is likely to be able to provide before it can fully and properly plead a breach of the first limb and sign on the pleading the statement of truth required by CPR 22.1(1)(a) confirming that the facts pleaded are believed to be true. In a word the information sought is necessary to enable the action to be brought. The critical question raised is whether this is sufficient to satisfy the second condition or whether satisfaction of the second condition also requires the claimant to establish that it cannot obtain this information elsewhere and in particular from EnCana Corp, the likely defendant in any proceedings for breach of the first limb. EnCana Corp can be no less in possession of the information sought than the defendant. h j

[24] In my judgment despite the argument of Mr Carr QC that there is no authority directly in point, it is clear that the exercise of the jurisdiction of the court under *Norwich Pharmacal* against third parties who are mere witnesses innocent of any participation in the wrongdoing being investigated is a remedy

of last resort. (It is the claimant's case that the defendant is such an innocent third party.) The jurisdiction is only to be exercised if the innocent third parties are the only practicable source of information. The whole basis of the jurisdiction against them is that, unless and until they disclose what they know, there can be no litigation in which they can give evidence: see eg Lord Kilbrandon in *Norwich Pharmacal* [1973] 2 All ER 943 at 973, 975, [1974] AC 133 at 203, 205. Whilst there is a public interest in achieving justice between disputing parties, there is also a public interest in not involving third parties if this can be avoided: see John Donaldson MR in *Harrington v North London Polytechnic* [1984] 3 All ER 666 at 670–671, [1984] 1 WLR 1293 at 1299. The jurisdiction is both exceptional and only to be exercised when it is necessary: Lord Woolf CJ in *Ashworth Hospital Authority v MGN Ltd* [2002] 4 All ER 193 at [57]. The necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information.

AVAILABILITY OF OTHER SOURCES OF INFORMATION

[25] The answer to the first question accordingly requires consideration of the second question whether the information required by the claimant can be obtained elsewhere than from the defendant.

[26] The first suggested alternative source of information is from EnCana Corp on an application for pre-action disclosure under CPR 31.16. Rule 31.16(3) (so far as material) provides as follows:

> 'The court may make an order under this rule only where—(a) the respondent is likely to be a party to subsequent proceedings; (b) the applicant is also likely to be a party to those proceedings; (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and (d) disclosure before proceedings have started is desirable in order to—(i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs.'

[27] This rule has been the subject of an authoritative exposition by the Court of Appeal in *Black v Sumitomo Corp* [2001] EWCA Civ 1819, [2003] 3 All ER 643, [2002] 1 WLR 1562. A purpose of pre-action disclosure is to assist those who need disclosure as a vital step in deciding whether to litigate at all or to provide a vital ingredient in the pleading of their case ([2003] 3 All ER 643 at [68]). The purpose must include enabling a party to sign the required statement of truth. Consideration whether disclosure is 'desirable' (as required by r 31.16(3)(d)) involves a two-stage process. For jurisdictional purposes the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order disposing fairly of the anticipated proceedings or of assisting the parties to avoid litigation or of saving costs in any event. If there is such a real prospect (and the jurisdictional threshold is low), then the court should go on to consider the question of discretion which has to be decided on all the facts and not merely in principle but in detail.

[28] On the material before me it seems to me quite clear that the claimant can, or should be able to, surmount both the jurisdiction and discretion hurdles

required to obtain the necessary disclosure from EnCana Corp. It must be quite exceptional where necessary information is available both from a likely party to proceedings and an innocent third party (in this case the defendant) that an order for disclosure should be made against the innocent third party and not the likely party to proceedings (in this case EnCana Corp). Yet that is the position which the claimant says prevails in this case.

[29] Mr Carr contends that there are three insuperable obstacles to obtaining pre-trial disclosure from EnCana Corp and I must consider each in turn.

[30] The first is the decision of Hoffmann J in *MacKinnon v Donaldson Lufkin & Jenrette Securities Corp* [1986] 1 All ER 653, [1986] Ch 482. In that case the court had to decide the propriety of an order made without notice under s 7 of the Bankers' Books Evidence Act 1879 against an American bank which was not a party to the action and of the issue of a subpoena against an officer of the bank, each of which required the production of documents held at its head office in New York. Hoffmann J discharged the order and subpoena, holding that (save in exceptional circumstances) the court should not require a foreigner who was not a party to an action (and in particular a foreign bank which would owe a duty of confidence to its customers regulated by the law of the country where the customer's account was kept) to produce documents outside the jurisdiction concerning business transacted outside the jurisdiction and that the order and subpoena taking effect in New York were infringements of the sovereignty of the United States.

[31] Mr Carr submits that the principles so stated are applicable to any application for pre-action disclosure against EnCana Corp, for it is a foreign company and no action has been commenced against it. He accordingly argues that pre-action disclosure is not available against EnCana Corp.

[32] In my judgment the principles stated by Hoffmann J relied on by Mr Carr and his decision have no application on the facts of this case. EnCana Corp is the likely defendant in the proceedings and not a mere witness. Further EnCana Corp has registered here as a foreign company and accordingly submitted to the jurisdiction, and submission to the jurisdiction must embrace submission to exercise of the court's powers to order pre-action disclosure. Further the litigation and the disclosure relate to enforcement of private rights of property (and in particular rights under the protocol of which the applicable law was English) which are the subject of the jurisdiction of this court. That this is the law accords with the passage in the judgment of Hoffmann J ([1986] 1 All ER 653 at 659, [1986] Ch 482 at 494–495).

[33] The second objection raised by Mr Carr is that the claimant would have insuperable difficulty in satisfying condition (c) in r 31.16(3) and in particular in establishing that EnCana Corp's duty of standard disclosure, if proceedings had started, would extend to the documents of which disclosure is now required. The reason he gives is that the ambit of standard disclosure is regulated by reference to the pleadings and that the claimant cannot adequately plead until the documents sought are obtained. In my judgment this objection is totally unreal. The rule must necessarily assume and accept the present deficiencies and lack of particularity in any pleadings in the prospective litigation which the application for disclosure is designed to enable the claimant to cure. I cannot see how or why the claimant cannot draft a pleading in the prospective litigation sufficient for the purposes of the application under r 31.16 (even if not

for the actual commencement of proceedings) alleging breach of the first limb which is such as to bring the documents sought within the reach of standard disclosure as required by the rule.

[34] The third objection taken is that only documentary disclosure is available under r 31.6 and not disclosure for example by interrogatories or affidavit which is available under *Norwich Pharmacal*. Cases may occur where the information required cannot be furnished by documents and can only be furnished for example by interrogatories or affidavits, in which case pre-action disclosure will be no substitute or alternative for an order under *Norwich Pharmacal*. But there is no reason to believe that that is the situation here.

[35] Mr Carr went on to submit that, even if pre-action disclosure was available again to EnCana Corp, the availability of an application for pre-action disclosure cannot be a ground for refusing *Norwich Pharmacal* relief because of the terms of r 31.18. This rule reads as follows:

> **'Rules not to limit other powers of the court to order disclosure**
> Rules 31.16 [Disclosure before proceedings start] and 31.17 [Orders for disclosure against a person not a party] do not limit any other power which the court may have to order—(a) disclosure before proceedings have started; and (b) disclosure against a person who is not a party to proceedings.'

[36] In my view r 31.18 merely preserves the *Norwich Pharmacal* jurisdiction: r 31.18 provides that r 31.16 and r 31.17 in no way limit the court's pre-existing jurisdiction under *Norwich Pharmacal*. It in no way modifies the established principles governing the exercise of that jurisdiction. Those established principles require regard to be had to the existence of other means available for obtaining the information needed and accordingly require regard to be had to rr 31.16 and 17. It is entirely in accord with r 31.18 that, if r 31.16 provides an alternative means of obtaining the information required by the claimant, the *Norwich Pharmacal* jurisdiction should not be exercisable. The power to grant *Norwich Pharmacal* relief continues to subsist but in accordance with the established principles governing its exercise in cases where its exercise is no longer necessary, it no longer should be invoked. In short the existence of the new powers conferred by rr 31.16 and 17 may limit substantially the need for exercise of the *Norwich Pharmacal* jurisdiction and (in the circumstances such as present where there is no such need) on established principles its exercise is precluded. This situation is entirely in harmony with r 31.18.

[37] In my judgment accordingly this application should be dismissed because the claimant can obtain the information sought by other means and in particular by pre-action disclosure from EnCana Corp. I should add that the claimant's solicitors Herbert Smith LLP (through counsel) have told me that they advised the claimant that one reason for making this application rather than the application for pre-action discovery against EnCana Corp was that the costs incurred on an application under *Norwich Pharmacal* were more likely to be recoverable from EnCana Corp if the claimant subsequently succeeds in proceedings against EnCana Corp than the costs of an application for pre-action disclosure. This, if correct, would be most surprising. I cannot think that it is correct. But even if it is it cannot justify the course taken.

[38] That is a sufficient ground to dismiss the application. But the application should also be dismissed for two other reasons. The first is that,

even if recourse is required to *Norwich Pharmacal* to obtain the information sought, the obvious party from whom the information could be obtained and against whom the application under *Norwich Pharmacal* should have been made was (if not EnCana Corp) Holdings. Holdings was the seller and the defendant merely the target. Further, Holdings continues to be the wholly-owned subsidiary of EnCana Corp. The defendant has no continuing connection with EnCana Corp. In the exercise of my discretion whether to grant the relief sought I am surely entitled to have regard and do have regard to the respective involvements of the available sources of information in the impugned sale and their relationships with the likely defendant in proceedings. There is no explanation for the choice of the defendant in place of Holdings as the defendant to this application. The proper respondent to the application should surely be the party more closely involved in the events which are the subject of the likely proceedings and more closely connected with the likely defendant.

[39] A further ground on which I would (if this were necessary) refuse the application would be the absence of evidence that the defendant was mixed up in or facilitated the alleged breach of the first limb. As it seems to me, the only available breach of the first limb is solicitation (ie asking for or encouraging an offer or invitation to treat) and not the subsequent negotiation or provision of information after an unsolicited offer or invitation to treat has been received. There is no reason to believe that the defendant was involved or mixed up in the suspected breach of contract and accordingly that the third condition for exercise of the *Norwich Pharmacal* jurisdiction is not satisfied.

[40] I accordingly dismiss this application.

Application dismissed.

Celia Fox Barrister.

R v May and others

[2005] EWCA Crim 97

COURT OF APPEAL, CRIMINAL DIVISION
KEENE LJ, HODGE J AND JUDGE JONES QC
14, 15, 16 DECEMBER 2004, 28 JANUARY 2005

Privilege – Public interest immunity – Production contrary to public interest – Sentencing – Confiscation order – Judge ruling in favour of Crown on public interest immunity in relation to certain material – Judge subsequently making confiscation order – Whether special counsel required to be appointed.

Sentence – Confiscation order – Proceeds of crime – Benefit – Person benefiting from offence if he obtained property – Companies obtaining property fraudulently – Companies jointly controlled by offenders – Whether each offender obtaining benefit of whole of property obtained – Criminal Justice Act 1988, s 71(4).

Each of the defendants had been charged with conspiracy to cheat the public revenue. The conspiracy had involved the creation of limited companies solely for the purpose of dishonestly retaining and reclaiming value added tax (VAT). Before the date fixed for trial, the judge considered whether certain material should be disclosed by the prosecution or whether that material was covered by public interest immunity (PII). Having ruled in the Crown's favour, certain of the defendants had pleaded guilty and others were convicted in due course. There followed confiscation proceedings under the Criminal Justice Act 1988 before the same judge, during which further PII hearings were held. Thereafter, the judge had found, inter alia, that the companies retaining the VAT fraudulently had been jointly controlled by various of the defendants. In assessing the defendants' benefits from the conspiracy, the judge ruled that the starting point was the amount of VAT of which the Revenue had been cheated by the companies. He then ruled that, for the purposes of s 71(4)[a] of the 1988 Act, under which a person benefited from an offence if he obtained property as a result, the amount of benefit which a particular defendant was to be treated as having obtained from the offence was the value of the VAT of which the Revenue had been cheated by any corporate entity in respect of which the defendant had, at the material time, been in a controlling position. Accordingly, it was unnecessary to apportion between the relevant conspirators the VAT which the relevant company had obtained. When the judge came to deal with the issue of whether the defendants had withheld some of their realisable assets from view, he ruled that he was entitled to have regard to the information disclosed by the Crown, but he stated that he had ignored anything that had been revealed to him which had attracted PII. Confiscation orders were made according to that approach and the defendants appealed. Issues arose, inter alia, concerning: (i) the fact that, in the course of PII hearings before the judge, he might have been provided with evidence relevant to the confiscation proceedings, which evidence might have

a Section 71, so far as material, is set out at [25], below

influenced him against the defendants in such a way that he should either have recused himself or have appointed special counsel to explore before him on the defendants' behalf the weaknesses in the undisclosed material; and (ii) whether, where the corporate veil had been pierced for the purposes of determining benefit under the 1988 Act, the court should seek to ascertain the benefit obtained by each individual defendant or conspirator by determining their respective shares of the total benefit obtained by the company. The defendants submitted, inter alia, in relation to benefit, that making an order in the full amount against several defendants would be disproportionate and contrary to the right to property contained in art 1[b] of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

Held – (1) Where a judge was confident that he could put undisclosed material, which he had seen, but which was covered by PII, out of his mind for the purposes of a later decision, then he was neither obliged to recuse himself nor to appoint special counsel. Where a judge formed the view that, despite his best efforts, he was unlikely to be able to ignore that undisclosed material, to the detriment of a defendant, then consideration as to the appointment of special counsel might have to be given. The test was fairness. In the instant case, there was no reason not to accept the judge's statement that, for the purposes of the confiscation proceedings, he had ignored the undisclosed material (see [21], [22], below); *Edwards v UK* (2003) 15 BHRC 189 and *Edwards v UK* [2004] ECHR 39647/98 explained; *R v H* [2004] 1 All ER 1269 considered.

(2) Property held by a company, once the corporate veil had been pierced, was to be regarded as the joint property of those controlling it, and each person who had joint control of that property had 'obtained' that property within the meaning of s 71(4) of the 1988 Act. It was well-established that money which had passed through a defendant's hands was to be treated as his benefit, even though that money was a much greater amount than his personal profit, and it was not necessarily any more unjust for the whole of the jointly controlled property to be treated as an individual defendant's benefit. The requirements of art 1 of the First Protocol to the convention might in some circumstances lead the court to adopt an apportionment approach but that was not so in the circumstances of the instant case where the total value of the confiscation orders had been well below the amount of the VAT of which the Revenue had been cheated. Accordingly, the first defendant's appeal against the confiscation order would be dismissed, and the appeals of the third, fourth, and fifth defendants against the confiscation orders would be allowed on different grounds. The second defendant's appeal, which was against sentence, would also be dismissed (see [37]–[42], [107]–[111], below); *R v Porter* [1990] 3 All ER 784, *R v Chrastny (No 2)* [1992] 1 All ER 193, *R v Simpson* [1998] 2 Crim App R (S) 111, *R v Dimsey, R v Allen* [2000] 2 All ER 142, *R v Smith (David)* [2002] 1 All ER 366, *R v McKechnie* [2003] 2 Cr App R (S) 169 and *R v Olubitan* [2004] Cr App R (S) 70 considered.

b Article 1, so far as material, provides: 'Every ... person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of this possessions except in the public interest and subject to the conditions provided for by law ...'

Notes

For confiscation orders, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1284.

Section 71(4) of the Criminal Justice Act 1988 was repealed by the Proceeds of Crime Act 1995, s 15(1), (4), Sch 1, para 1, Sch 2.

Cases referred to in judgments

Edwards v UK (2003) 15 BHRC 189, ECt HR.
Edwards v UK [2004] ECHR 39647/98, ECt HR.
Jasper v UK (2000) 30 EHRR 441, [2000] ECHR 27052/95, ECt HR.
R v Ahmed [2004] EWCA Crim 2599, [2005] 1 All ER 128, [2005] 1 WLR 122.
R v Atkinson (1993) 14 Cr App R (S) 182, CA.
R v Barwick [2001] 1 Crim App R (S) 129, CA.
R v Chrastny (No 2) [1992] 1 All ER 193, [1991] 1 WLR 1385, CA.
R v Currey (1995) 16 Cr App R (S) 421, CA.
R v Dimsey, R v Allen [2000] 2 All ER 142, CA.
R v H, R v C [2004] UKHL 3, [2004] 1 All ER 1269, [2004] 2 AC 134, [2004] 2 WLR 335; *affg* [2003] EWCA Crim 2847, [2003] 1 WLR 3006.
R v Khan (Janghir) [2004] EWCA Crim 1982.
R v Lazarus [2004] EWCA Crim 2297, [2005] 1 Cr App R (S) 552.
R v Lee [1996] 1 Cr App R (S) 135, CA.
R v Lunnon [2004] EWCA Crim 1125, [2005] 1 Cr App R (S) 111.
R v McDonald [2004] EWCA Crim 2614, (2004) 148 Sol Jo LB 1218.
R v McKechnie [2002] EWCA Crim 3161, sub nom *R v Gibbons* [2003] 2 Cr App R (S) 169.
R v Metcalfe [2001] EWCA Crim 1343.
R v Olubitan [2003] EWCA Crim 2940, [2004] Cr App R (S) 70.
R v Patel [2000] 2 Cr App R (S) 10, CA.
R v Porter [1990] 3 All ER 784, [1990] 1 WLR 1260, CA
R v Simpson [1998] 2 Crim App R (S) 111, CA.
R v Smith (David) [2001] UKHL 68, [2002] 1 All ER 366, [2002] 1 WLR 54.
R v Smith (Terence) [1990] 1 All ER 634, [1990] 1 WLR 1311, CA.
R v Taigel [1998] 1 Cr App R (S) 328, CA.
R v Turner [1970] 2 All ER 281, [1970] 2 QB 321, [1970] 2 WLR 1093, CA.

Appeals

Raymond May, Herbert Fowles, Vincent Stapleton and Jacques Bravard appealed with leave of the single judge against confiscation orders under the Criminal Justice Act 1988 made on 2 August 2002 by Judge Samuels QC in the Central Criminal Court. May also appealed with leave of the full court against the sentence of five years' imprisonment for the offence of conspiracy to cheat imposed by Judge Samuels in the same court on 24 September 2001 following his plea of guilty; Steven Lawrence appealed with leave of the full court against his sentence of four-and-a-half years' imprisonment for the offence of conspiracy to cheat made after his conviction on 11 December 2001 after a trial before Judge Samuels in the same court. The facts are set out in the judgment of the court.

Andrew Campbell-Tiech QC (assigned by the *Registrar of Criminal Appeals*) for May.
Keith Mitchell (assigned by the *Registrar of Criminal Appeals*) for Lawrence.
Peter Martin (assigned by the *Registrar of Criminal Appeals*) for Bravard.

Timothy Owen QC and *Andrew Bodnar* (assigned by the *Registrar of Criminal Appeals*) for Stapleton.

Andrew Bodnar (assigned by the *Registrar of Criminal Appeals*) for Fowles.

Oliver Sells QC and *Ivan Pearce* (instructed by the *Customs and Excise Prosecution Office*) for the Crown.

Cur adv vult

28 January 2005. The following judgment of the court was delivered.

KEENE LJ.

INTRODUCTION

[1] On 24 September 2001 the appellants Raymond May, Vincent Stapleton and Jacques Bravard pleaded guilty at the Central Criminal Court before Judge Samuels QC, to one count of conspiracy to cheat. On 3 October 2001 they were each sentenced to five years' imprisonment.

[2] On 11 December 2001 the appellant Steven Lawrence was convicted after a trial of the same offence in the same court and before the same judge. He was sentenced to four-and-half years' imprisonment. The appellant Herbert Fowles pleaded guilty on 24 April 2002 to the same offence and was given a two-and-half-year prison sentence.

[3] On 2 August 2002, confiscation orders under the Criminal Justice Act 1988 were made in the following sums: against May, £3,264,277 with six years' imprisonment in default; against Stapleton, £2,365,789 with five years' imprisonment in default; against Bravard, £1,386,383 with four years in default; and against Fowles, £66,000 with 18 months' imprisonment in default. All now appeal against those orders with the leave of the single judge. May and Lawrence appeal against their sentences of imprisonment, with the leave of the full court. There was an agreed confiscation order made in the case of Lawrence, against which there is no appeal.

[4] Two others pleaded guilty to the same offence, and another pleaded guilty at separate proceedings in Scotland. A number of other co-conspirators were named on the indictment but were not before the court, and others unknown or at least unidentified were alleged to have been part of the conspiracy.

THE FACTS

[5] The conspiracy involved the wrongful withholding and reclaiming of VAT from Her Majesty's Customs and Excise, resulting in a loss to public funds of around £12m. The conspirators created limited companies solely for the purpose of dishonestly retaining and reclaiming the VAT element of sales of computer processing units and other computer components. Over a period from February 1999 to September 2000, four companies in sequence imported such goods from the European Union, with VAT not being payable thereon. The goods were then sold on to a trader based in this country, thereby attracting a liability to VAT at the standard rate of 17·5%. The United Kingdom-based trader paid the purchase price plus VAT for the goods, but the importing company, instead of accounting for the VAT received as required by law, retained that money and then disappeared as a trading entity before any

enforcement action could be taken against it. This 'missing trader' fraud involved the following importing companies during the period of the conspiracy: (1) Lomond Services Ltd, which traded from February 1999 to July 1999 and which was responsible for around £5·2m in unpaid VAT; (2) Lyndon Global Ltd, which traded from 31 August 1999 to November 1999, with £1·4m VAT unpaid; (3) Beachshand Ltd, trading from February to July 2000, with some £1·7m of VAT unpaid; and (4) Elysee Consulting Ltd, trading from July to 5 September 2000, with unpaid VAT of about £2·7m. The different periods during which each of these four companies operated were referred to during the proceedings as the four phases of the conspiracy.

[6] In the scheme as it developed, the same goods would be exported by the United Kingdom purchaser, which was also part of the fraud and known as a 'buffer company', back to the dishonest foreign supplier. The buffer company would claim back the VAT it had paid from the Customs and Excise, and the process of importation and re-exportation would begin again with the same goods, a process known as a 'carousel fraud'.

[7] The prime movers behind the initial phases of the conspiracy were Stapleton and Bravard, who were involved in all four phases of the conspiracy. May became involved during the Beachshand and Elysee periods but was regarded by the judge as the moving spirit in those latter periods and as a joint principal during that time. In his ruling on the confiscation orders, the judge found that Fowles was in control of Lyndon Global Ltd and Beachshand Ltd as the 'minder' for Stapleton. That finding is challenged in these proceedings and we return to it in due course. Lawrence was described by the judge in his sentencing remarks as having been actively involved during the last ten-and-a-half months of the conspiracy and as a 'key participant' though not a principal.

THE PROCEEDINGS BELOW

[8] In the period before the date fixed for trial, there were a number of hearings before the judge. Much of the prosecution's evidence against Stapleton, May and Bravard was in the form of taped conversations which had taken place within the offices of Lomond Services Ltd and in motor vehicles used by Stapleton and May. This evidence had been obtained through the use of intrusive surveillance devices applied for and authorised under the provisions of Pt III of the Police Act 1997. An application was made by the defendants to exclude such evidence under s 78 of the Police and Criminal Evidence Act 1984, it being argued that the evidence had been obtained in breach of art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). On 5 April 2001 the judge declined to exclude such evidence, and his decision was upheld by this court in a judgment dated 3 August 2001 ([2001] EWCA Crim 1829).

[9] It had also been contended before the judge that there should be further disclosure by the prosecution, first in respect of surveillance and other material prior to April 1999, the start date of the surveillance material disclosed by the prosecution, and secondly of material which had been deleted from the disclosed material. The judge had by this stage already heard an application ex parte by the Crown for an order for non-disclosure of the deleted passages, this taking place on 19 February 2001. He ruled that those passages were, in accordance with the authorities, covered by public interest immunity (PII) and

again on this aspect also he was upheld by this court in its judgment of 3 August 2001.

[10] There were other PII hearings held on an ex parte basis on 4 June 2001 and on 11 September 2001. After the pleas of guilty and the conviction of Lawrence, confiscation proceedings began on 4 March 2002. The judge gave a ruling on certain issues, including the ascertainment of benefit under the 1988 Act, on 22 March 2002, and after further hearings he gave his final decision on the confiscation proceedings on 2 August 2002. In the meantime there had been both inter partes hearings and three further short ex parte hearings on 9 July, 17 July and 18 July 2002, those three again being concerned with disclosure and PII issues.

[11] We propose to deal with the four appeals against the confiscation orders before turning to the appeals against the sentences of imprisonment by May and Lawrence. We do this principally because the bulk of the argument before us concerned the confiscation orders and they give rise to a number of issues of principle affecting more than one appellant. In considering the confiscation order appeals, we shall deal with those more general issues first before turning to those grounds which raise points peculiar to the individual appellant. We shall then seek to summarise the effect of our decision on each of the individual confiscation orders. The issues affecting more than one appellant can be conveniently divided into three groups: first, those concerning PII and the use of special counsel; secondly, those which relate to the approach to be adopted to the assessment of benefit under the 1988 Act, Pt VI; thirdly, those concerning the effect of statements made by the judge, before pleas of guilty were entered, on the way in which realisable assets should have been calculated. We shall take those issues in that order.

PII AND THE USE OF SPECIAL COUNSEL

[12] As already indicated, the judge held a number of ex parte hearings both before and after the pleas of guilty by the main conspirators. His decisions not to order disclosure of certain material were challenged before us and, in accordance with the decisions of this court in *R v McDonald* [2004] EWCA Crim 2614, (2004) 148 Sol Jo LB 1218, we reviewed the material put before him by the prosecution. We were satisfied that nothing in that material might have weakened the prosecution case or strengthened that of the defence, either on the issue of guilt of the offences charged or on the issues arising under the confiscation order proceedings. In so deciding, we were applying the well-established test for disclosure, now reflected in the Criminal Procedure and Investigations Act 1996, ss 3(1)(a) and 7(2)(a), and indorsed in the recent House of Lords decision in *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269, [2004] 2 AC 134. It is a test of relevance or materiality, which has to be met before any question arises of the judge having to consider the extent to which disclosure would damage the public interest.

[13] However, it was submitted on behalf of the appellants that, both in this court and in the court below, such an approach was not sufficient in the present case. It was emphasised that in dealing with the confiscation order proceedings the judge was acting as a judge of issues of fact, which creates a different situation from that which normally exists in a criminal trial where such issues of fact are for the jury. Yet in the course of the ex parte PII hearings he may have been provided with evidence relevant to the confiscation proceedings, in the

sense that it may have influenced the judge *against* the defendants on a number of issues arising in those proceedings. Mr Campbell-Tiech QC, who appeared both below and in this court for May, contended before us that the judge may have seen material, not disclosed to the defence, which could have affected his view of May's credibility. Since May gave evidence during the confiscation proceedings and was found by the judge to be an unreliable witness, credibility was clearly a vital issue, relevant both to May's identifiable assets and to his so-called 'hidden assets'.

[14] It was argued that the judge may have been provided with evidence or allegations on an ex parte basis that May had been a highly successful professional criminal for many years before April 1999, and that this could well have coloured the judge's view both as to May's credibility and as to the amount of hidden assets he had been able to accumulate. This line of argument was supported by counsel on behalf of Stapleton, although necessarily limited to the issue of hidden assets, since Stapleton chose not to give evidence during the confiscation proceedings, and also by counsel on behalf of Bravard.

[15] The appellants rely upon the decision of the Fourth Section of the European Court of Human Rights, subsequently indorsed by the Grand Chamber, in *Edwards v UK* (2003) 15 BHRC 189; [2004] ECHR 39647/98. There the trial judge (in *Edwards'* case) ruled in favour of non-disclosure on PII grounds of material indicating that the defendant had been involved in the supply of heroin before the start of a police undercover operation. He also rejected a s 78 application by the defence to exclude certain evidence on the ground that the defendant had been entrapped into committing the offence by an undercover officer. Lewis also alleged entrapment and again certain material was withheld from the defence on PII grounds. The Court of Human Rights distinguished its own earlier decision in *Jasper v UK* (2000) 30 EHRR 441 on the basis that there the jury had been the tribunal of fact and had not seen the undisclosed material, which the judge had dealt with on the established legal principles. In contrast, the present cases were ones where the undisclosed evidence related or may have related to an issue of fact decided by the trial judge, namely the issue of entrapment. The defence were denied the opportunity to counter the allegation contained in the undisclosed material about prior involvement in drug dealing. As a result the Court of Human Rights found a violation of art 6(1) of the convention.

[16] Before us it has been submitted by the appellants that the material seen by the judge below is likely to have been damaging to their interests and in that sense relevant to the confiscation proceedings. However much the judge may have tried to put it out of his mind, it may none the less have influenced him. Mr Campbell-Tiech argued that *Edwards v UK* 'abolishes compartmentalism of the judicial mind'. Therefore the trial judge should have recused himself or at least appointed special counsel to explore before him the weaknesses in the undisclosed material so as to protect the interests of the defendants.

[17] In addition, it was submitted that this court should itself appoint special counsel for the same reasons. It was accepted that in *R v H* [2004] 1 All ER 1269 the House of Lords indicated (at [22]) that the appointment of special counsel should be a course of last resort but none the less it was recognised in that decision that cases would sometimes arise where such a course is the only way of meeting the interests of justice.

[18] During the course of the appeal hearing and inevitably at an early stage, this court ruled that it was not persuaded that it was necessary for special counsel to be appointed to assist in these appeals. We said that we would give our full reasons in this judgment and we do so. But it is convenient to deal first with the situation in which the judge below found himself.

[19] The context is that a great deal of material adverse to the appellants or some of them and derived from the surveillance operation, sometimes referred to as the 'probe material' or the 'background intelligence material', was disclosed to the defence, albeit in a redacted form. For example, the disclosed material contained allegations that May had been behind a massive importation of cocaine in the mid-1990s, had rebuilt a criminal empire and had been involved in a range of criminal activities including armed robbery, money-laundering and other drug importations. He was suspected of involvement in a number of murders. He also enjoyed a lavish lifestyle, owning a house valued at £1·5m. Whatever weight might be attached to such allegations, those to which we have just referred, and more besides, were disclosed to the defence. When the judge came to deal with the issue of whether or not the conspirators had withheld some of their realisable assets from view, he stated that he could not properly ignore the probe material, and he referred in particular to recorded conversations between various of the conspirators in which they referred to various sums of money being obtained by them. He ruled that he was entitled to have regard to the information disclosed by the Crown and obtained by the surveillance operation.

[20] But he went on to say at para 8.5 of his decision of 2 August 2002: 'I emphasise that I ignore anything revealed to me which attracts public interest immunity.' It is this statement by the judge which has forced the appellants to argue that *Edwards v UK* no longer allows 'judicial compartmentalisation', in other words that neither the judge below nor this court can be relied upon to put such material out of their minds when making a decision. We do not accept that. *Edwards v UK* was not a case where the judge had made any statement comparable to the one quoted above from para 8.5 of this judge's decision. Indeed, it is implicit in the Court of Human Rights' statement ((2003) 15 BHRC 189 at 203 (para 58)) that the defence had been denied 'the opportunity to counter this allegation' that the Strasbourg court was proceeding on the basis that the trial judge had taken the allegation into account. Thus the Strasbourg court was not pronouncing upon the situation where the judge has expressly stated that he has ignored the undisclosed material for the purpose of a subsequent ruling.

[21] This construction of the *Edwards v UK* decision accords with that adopted by another constitution of this court in *R v H* at the Court of Appeal stage and not criticised by the House of Lords. In the Court of Appeal (Criminal Division) decision ([2003] EWCA Crim 2847 at [35], [2003] 1 WLR 3006 at [35]) the Vice-President, Rose LJ, referred to the *Edwards* situation as being one 'where a determinative ruling on an issue of fact ... has to be decided by the trial judge *by reference to undisclosed material.*' (Our emphasis.) In such a situation we would entirely accept that consideration should be given to the appointment of special counsel. Indeed, if the trial judge forms the view that, despite his best efforts, he is unlikely to be able to ignore the undisclosed material he has seen, to the detriment of the defendant, then such consideration may have to be given. As so often, the test will be one of fairness. But there will be many cases where the

judge is confident that he can put such material out of his mind for the purposes of a later decision. That is a familiar process in judicial decision-making in this country. It is, to take only one example, a process which has to be gone through whenever this court has to consider an appeal both against conviction and against sentence: the court in preparing for the hearing may have seen material relevant to the sentence appeal which it must ignore for the purpose of the conviction appeal. It does so conscientiously.

[22] We note that an appellant does have the advantage of a safeguard in practice. If the disclosed material provides no proper basis for a judge's ruling, in circumstances where he has seen undisclosed material, this court may be the more ready to infer that the judge was influenced by the latter, perhaps unconsciously. In reality there will be little need for such an inference, because the absence of any proper evidential foundation for the judge's ruling will itself be enough to indicate that something has gone wrong.

[23] In the present case this court can see no reason not to accept the judge's statement that, for the purposes of the confiscation proceedings, he ignored the undisclosed material. So do we, and we are satisfied that we can successfully put that material out of our minds when dealing with the substantive issues arising in the confiscation appeals. In those circumstances we conclude that the judge below did not require the assistance of special counsel nor was he obliged to recuse himself, and as we indicated during argument these appeals do not require special counsel to be involved.

THE ASSESSMENT OF BENEFIT

[24] These appeals are concerned with the law as it stood after the 1988 Act had been amended by the Criminal Justice Act 1993 and the Proceeds of Crime Act 1995 but before the coming into force of the Proceeds of Crime Act 2002. The relevant statutory provisions dealing with confiscation orders provide for what is in essence a three-stage process: determining whether the offender has benefited from any relevant criminal conduct; determining the amount of that benefit; and determining the amount 'appearing to the court' to be the amount of his realisable assets. The order is then to be made in the amount of the benefit or the amount of the realisable assets, whichever is the less. There is provision in s 72AA for the court to take into account, in certain circumstances, benefit obtained by the offender from criminal conduct other than the offence for which he has been convicted in the current proceedings, a process sometimes described as 'extended benefit'. That process was not relied upon by the Crown in the present case. These appeals concern what is, in contrast, often called 'simple benefit', a term which as will soon be appreciated is in cases like this something of a misnomer.

[25] The relevant statutory provisions in the 1988 Act as amended are as follows:

> '**71.**— ... (1A) The court shall first determine whether the offender has benefited from any relevant criminal conduct.
>
> (1B) Subject to subsection (1C) below, if the court determines that the offender has benefited from any relevant criminal conduct, it shall then—(a) determine in accordance with subsection (6) below the amount to be recovered in his case by virtue of this section, and (b) make an order under this section ordering the offender to pay that amount ...

(1D) In this Part of this Act "relevant criminal conduct", in relation to a person convicted of an offence in any proceedings before a court means (subject to section 72AA(6) below) that offence taken together with any other offences of a relevant description which are either—(a) offences of which he is convicted in the same proceedings, or ...

(4) For the purpose of this Part of this Act a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained.

(5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Part of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.

(6) Subject to subsection (1C) above the sum which an order made by a court under this section requires an offender to pay shall be equal to—(a) the benefit in respect of which it is made; or (b) the amount appearing to the court to be the amount that might be realised at the time the order is made, whichever is the less.

(7A) The standard of proof required to determine any question arising under this Part of this Act as to—(a) whether a person has benefited from any offence; or (b) [repealed by 1995 Act, s 1(5)]; or (c) the amount to be recovered in his case ... shall be that applicable in civil proceedings.'

Section 74 contains the definition of 'realisable property' which subject to certain exceptions means any property held by the defendant, together with certain gifts made by the defendant after the commission of the offence.

[26] In the present case, when dealing with the benefit obtained by the appellants, the judge rejected an argument by the Crown that the benefit should be calculated by reference to the turnover of the corporate entities incorporated for the purpose of the fraud. He accepted a defence submission that the starting point was the amount of VAT of which the Revenue had been cheated by the companies, which was in the region of £12m. The issue which then arose was whether, having thus pierced the corporate veil, each conspirator who had controlled a company or companies (albeit jointly with another conspirator or conspirators) was to be seen as having obtained the whole of the amount obtained by that company or those companies, or alternatively whether the VAT which each company had fraudulently obtained was to be apportioned between the relevant defendants or the relevant conspirators. The judge considered a number of authorities and ruled that for the purposes of s 71(4) the amount of benefit which a particular defendant would be treated as having obtained from his commission of the offence was the value of the VAT of which the Revenue had been cheated by any corporate entity in respect of which that defendant was at the material time in a controlling position. That, he said, would be the starting point for the assessment of benefit, whether or not other defendants were similarly assessed in whole or in part by reference to a similar starting point. In essence, his conclusion on the law was that where several defendants were jointly responsible for a fraud, and the property thus obtained was jointly held by them, each benefited in the amount jointly held and there was no requirement to apportion that amount between them.

[27] The proposition was vigorously challenged before us. Mr Owen QC, on behalf of Stapleton advanced contentions which the other appellants were largely content to adopt. He relied on the decision in *R v Porter* [1990] 3 All ER 784, [1990] 1 WLR 1260, a decision under the Drug Trafficking Offences Act 1986, where this court quashed joint and several confiscation orders made against two defendants and substituted several orders, each being for half the total amount of the joint benefit. Reliance was also placed on *R v Olubitan* [2003] EWCA Crim 2940, [2004] Cr App R (S) 70 and on *R v McKechnie* [2002] EWCA Crim 3161, [2003] 2 Cr App R (S) 169, a conspiracy case where confiscation orders had been made under the 1988 Act. There this court indicated (at [62]) that, where there was no evidence as to how the benefit of the conspiracy has been divided between individuals, 'dividing the total amount between those identified is as good a starting point as any'.

[28] Mr Owen accepted that, where a corporate entity was used for the purposes of the fraudulent conspiracy, it was right for the court to pierce the corporate veil when determining benefit under the 1988 Act. But he submitted that the court should then go on to seek to ascertain the benefit obtained by each individual defendant or conspirator by determining their respective shares of the total benefit obtained by the company. In the absence of evidence as to the amount each received, the court should apportion on an equal footing. *R v Olubitan* shows that the court is concerned with the benefit actually obtained by the individual.

[29] It was also argued in support of these contentions that the approach adopted by the judge could lead to multiple recovery by the Revenue where the defendants each had substantial assets which did not limit the amount of the eventual confiscation order. While Mr Owen recognised that that can happen, according to a number of authorities, where property passes through a succession of hands, the position (he argued) is different where one has a group obtaining jointly rather than a 'chain' situation. Moreover, multiple recovery could lead to injustice and to a breach of the human rights convention because the penalty would be disproportionate.

[30] This court recognises that there are a number of decisions under both the drug trafficking legislation and under the 1988 Act which are not always easy to reconcile. The drugs cases need to be treated with some caution for present purposes, because the statutory wording is not identical to that in the 1988 Act when it comes to ascertaining benefit. None the less the drugs cases may provide some assistance, and we begin with those.

[31] *R v Porter* was a case where this court was first and foremost concerned to rule out the making of joint confiscation orders, for the reason that—

> '[t]here must be certainty in sentencing. A convicted person is entitled to know the extent of his monetary liability; a fortiori when he is liable to lose his liberty if he fails to discharge a monetary penalty.' (See [1990] 3 All ER 784 at 786, [1990] 1 WLR 1260 at 1263.)

The court could not countenance a defendant's liability fluctuating, depending upon how much a co-defendant paid towards the joint order. So the outcome was the substitution of several orders. It is right that the court then apportioned the joint benefit between the two defendants, Garland J stating:

'It appears to us that, in assessing benefit in accordance with the provisions of s 1 of the 1986 Act, the court must, as between co-defendants, determine their respective shares of any joint benefit that they may have received as a result of drug trafficking.'

However, it would appear from an earlier passage in the judgment that the court was not asked to apply its mind to the propriety of several orders being made in the full joint benefit. Nor is there any analysis in the judgment of why apportionment was more appropriate than such orders.

[32] In contrast, in *R v Chrastny (No 2)* [1992] 1 All ER 193, [1991] 1 WLR 1385 it seems to have been the view of the court that someone with joint control of the property representing the benefit can be made liable for the total, if he is the only person before the court. Glidewell LJ said ([1992] 1 All ER 193 at 201, [1991] 1 WLR 1385 at 1394) that—

'where only one defendant has been convicted and has sufficient control to realise the property, we see no reason why an order in the total sum should not be made against him or her.'

Although that makes the order dependent on the defendant's assets, it is clearly implicit in that passage that the one defendant's benefit has already been determined as extending to the total sum, for otherwise an order in the total sum could not be made against him. The other drug trafficking case of relevance is *R v Simpson* [1998] 2 Crim App R (S) 111, where this court held that the aggregate of the money or property passing through the hands of a defendant amounted to his benefit and not the profit he made out of the transactions. The possibility that that might lead to multiple recovery of the same sums passing through several hands did not persuade the court to take a contrary view, Dyson J saying (at 117–118):

'Thus, in construing the Act the Court is not required to strain to find an interpretation which is favourable to defendants, or to start from the presumption that Parliament did not intend to deprive defendants of their property. In the line of cases concerning drug dealers of which *Banks* ([1997] 2 Cr App R (S) 110) is the latest, the phrase "any payments or other rewards received in connection with drug trafficking" has been interpreted literally, notwithstanding that such an interpretation means that there can be multiple recovery of the same sum which passes through the hands of successive dealers, regardless of the amount of profit made by the dealer or dealers or of whether any profit was made at all.'

[33] Turning to the authorities on the 1988 Act, there are several which make it clear that a conspirator who acts as the collector or banker for the other conspirators will be regarded as having obtained a benefit in the total sum passing through his hands. In one of the earlier cases to this effect, *R v Currey* (1995) 16 Cr App R (S) 421, Lord Taylor CJ emphasised that benefit 'does not mean that he has retained property, simply that he has obtained it' (at 424). In *R v Patel* [2000] 2 Cr App R (S) 10, a sub-postmaster guilty of conspiracy was held to have benefited in the full amount obtained by using stolen benefit books, even though he had paid half the proceeds to an accomplice. Likewise in *R v*

Metcalfe [2001] EWCA Crim 1343 this court expressly applied the decision in the drug trafficking case of *R v Simpson* so as to hold that benefit was what passed into the defendant's possession, whether or not he then retained it: see paras [12] and [13].

[34] It is right that in *R v McKechnie* the court upheld an apportionment exercise carried out by the judge below in confiscation proceedings. But it is important to note what was the issue before the court in that case. The Crown had asked the judge to apportion the total loss caused by a credit card fraud between those responsible. The appellant sought to argue that, if the Crown could not show how much each defendant individually received or how the proceeds were divided up, then the benefit to a defendant was nil. This court, perhaps unsurprisingly, rejected that contention and said, in the words of Hallett J, that dividing the total was as good a starting point as any. But it is to be observed that the court was not being asked to decide whether a defendant in that conspiracy might be liable for the total amount of the fraud. That, as Mr Owen concedes, was never an issue in the case.

[35] Finally, there is the decision in *R v Olubitan* [2004] Cr App R (S) 70, where the defendant in question had joined a conspiracy to defraud at its very end and where the evidence showed that he had obtained nothing. In those circumstances it was held that he was not liable even for a proportion of the sum involved in the fraud.

[36] None of these decisions grapple with precisely the point raised in the present appeals. They do, however, provide some guidance. As *R v Olubitan* shows, the property which the defendant 'obtains ... as a result of or in connection with [the] commission [of the offence]' (s 71(4) of the 1988 Act) will involve questions of fact as well as ones of law. If he obtains property within the meaning of s 71(4), it matters not that he does so merely as a collector or distributor for others involved in the offence: it is the obtaining, not the retention, which matters. Thus a number of defendants may be liable to pay under a confiscation order the same or virtually the same sum in respect of the same property if it has passed through several hands. Mr Owen accepted that in this 'chain' type of case, there is always the potential for multiple recovery under the 1988 Act, just as there is in drug trafficking cases.

[37] It seems to this court to be important that there was a finding here that the companies retaining the VAT fraudulently were jointly controlled by various of the appellants. Once the corporate veil is pierced, as the appellants accepted it can be (a step indorsed by this court in *R v Dimsey, R v Allen* [2000] 2 All ER 142 at 146–147 [2000] 1 Cr App R (S) 497 at 502), the property held by the company in question is to be regarded as the joint property of those controlling that company. It is analogous to the situation where conspirators have put the proceeds of the fraud straight into their joint bank account. In such a situation each is entitled to the full amount in the account. If one concentrates on the words of the statute, as one must, it seems to us that each individual 'obtains' the property jointly held.

[38] The position is succinctly put in *Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime* (3rd edn, 2002) para 5.026(3), where a particular situation is described as follows:

> 'The evidence demonstrates that the proceeds obtained by and passed into the joint control of the defendants. On a strict interpretation of the Act

each defendant has received the whole amount. Where, for example, the proceeds are paid into a bank account held jointly by the defendants, they each benefit by the whole amount deposited. Each of the defendants would then be liable to have a confiscation order made against him in that amount. It follows that even in a joint pool case the whole of the benefit is attributable to each of the defendants. The liability to pay that amount will be determined by the defendant's ability to pay.'

[39] In our judgment, someone who has joint control of property has 'obtained' that property within the meaning of s 71(4) of the 1988 Act. None of the authorities cited in argument require such an approach to be rejected and it seems to us to be the natural meaning of the words in the statute. In the same way it matters not that an individual who holds a joint account has not drawn out a specific sum of money from that account: he has still obtained the whole of the money in the account. As the House of Lords' decision in *R v Smith (David)* [2001] UKHL 68, [2002] 1 All ER 366, [2002] 1 WLR 54 emphasises, s 71(4) bites the moment that the property is obtained or the pecuniary advantage derived.

[40] It is not necessarily any more unjust for the whole of that property jointly controlled to be treated as the individual defendant's benefit than for money which has passed through a defendant's hands to be treated as his benefit, even though that money is a much greater amount than his personal profit. Yet the applicants accepted that the latter situation is well established by the authorities. It was contended that there may be circumstances in which making an order in the full amount against several defendants would be disproportionate and contrary to art 1 of the First Protocol to the convention. Mr Owen accepted that the confiscation regime pursues a legitimate public interest as required by that article, namely to punish offenders and to remove criminal assets from circulation. But he argued that proportionality requires that the interference with property rights should be no greater than is necessary to achieve those aims.

[41] We see force in that point as a general proposition, and in some circumstances it may lead the court to adopt an apportionment approach. For example, there may be cases where the defendants have substantial assets, with the result that making orders for the full benefit in each case would lead to the Revenue recovering far more than the conspiracy or joint enterprise had obtained. In such a case the court may be prepared to apportion the benefit. But that situation does not apply here. In particular, the total of the confiscation orders made by the judge was well below the £12m of which the Revenue had been cheated by these conspirators.

[42] We conclude that he was entitled to hold that Stapleton, Bravard and May had benefited in the whole of the amounts by which the companies they had jointly controlled had benefited. Stapleton and Bravard had been joint principals throughout all four phases of the conspiracy and May had been a joint principal in the last two phases. Their levels of benefit were correctly determined by the judge.

HIDDEN ASSETS AND LEGITIMATE EXPECTATION

[43] When the judge came to the stage of determining the realisable assets of the appellants, he began by quantifying the identifiable assets of each of them.

In the case of May, the judge found his identifiable assets to exceed the benefit he had obtained from the fraud, though the judge commented that he was in no doubt that May did have very substantial undisclosed assets. Thus in May's case the confiscation order ultimately made reflected the benefit obtained rather than being reduced by the figure for realisable assets.

[44] But the assets which could be identified in the cases of Stapleton, Bravard and Fowles fell below the figure which in each case had been determined as the benefit obtained by that appellant. The judge considered whether those three had assets which they had not disclosed. After applying his mind to the amounts which he inferred had been drawn out by them during the different phases of the conspiracy, he found that both Stapleton and Bravard had some £750,000 of undisclosed realisable assets to be added to the sum of those assets which had been identified. The resulting figure in each of their cases determined the amount of the confiscation order under s 71(6) of the 1988 Act, since it was less than the benefit obtained. The position of Fowles requires separate treatment and we shall deal with his position later in this judgment.

[45] The exercise just described is contained in the judge's decision dated 2 August 2002. During the course of the hearing preceding that decision, it was submitted on behalf of the appellants that, because of guidance given by the judge before the pleas of guilty were entered, the appellants had a legitimate expectation that in the anticipated confiscation proceedings he would take account only of identifiable assets and that it would now be unfair for him to proceed on any other basis. The judge rejected that submission, but it now forms the central plank in the appellants' appeal on the topic of realisable assets.

[46] What had happened is perhaps a vivid reminder of the need for judges, if commenting at all on likely sentence, to express themselves clearly and unambiguously. After pleas of not guilty had initially been entered, there was a lengthy discussion in chambers on Thursday, 20 September 2001 between counsel and the judge. It began with leading counsel for Stapleton, Mr Arlidge QC, acting as spokesman for all the appellants and making it clear that they were hoping for some indication from the judge as to sentence which might enable counsel to advise their clients to change their pleas. Mr Arlidge indicated that one of the 'sticking points' in discussions which had taken place with prosecution counsel had been in respect of confiscation orders.

[47] The judge, while apparently willing to assist, reminded counsel that at that stage he had no idea what amount the Crown would be seeking by way of confiscation orders. However, he described what he had done in the past in a case involving money laundering where the benefit had been £50m but the prosecution had failed to apply for a confiscation order. So instead he had fined the defendant in addition to imposing a custodial sentence. The fine imposed was £1m which, said the judge, was in his view proportionate to the assets as well as to the criminality of the defendant. This, he thought, might be of assistance in the discussions between counsel for the defendants and the Crown, and he emphasised the huge saving in public resources were a trial to be avoided.

[48] These discussions in chambers continued into the afternoon. They ranged over discounts on custodial sentences for pleas of guilty as well as other matters but they returned to the topic of confiscation orders. There was mention of the issue of benefit and then Mr Arlidge indicated that they might not reach agreement about his client's assets. He went on to say to the judge: 'I take it that in general the message that your Lordship is giving me is that you are

prepared to take a sensible and realistic look at the situation.' The judge's response was as follows, with one correction to the transcript which we are persuaded on the evidence is appropriate: 'I would not dignify [it] in those terms, Mr Arlidge. What I am prepared to say is that I will look in terms of prospective confiscation at provable assets.' a

[49] Mr Arlidge expressed his appreciation. No objection had been taken so far by the Crown to the process which had been taking place in chambers. At a later point in the discussions, Mr Sells QC on behalf of the prosecution did raise an objection. The judge apologised for any discomfort he had caused but went on to say that confiscation was part of the package of sentence and that (in response to counsel for May) he could not do more 'than to say that what I said to Mr Arlidge, which was said without adverse comment from the Crown, is my likely approach.' The judge subsequently made some comments about sentence in open court without mentioning confiscation. May, Stapleton and Bravard changed their pleas to ones of guilty on re-arraignment on the following Monday, 24 September. b c

[50] When in the following July submissions were made about the approach to be adopted to realisable assets as part of the confiscation proceedings, it was put to the judge that defence counsel and their clients had understood him to mean identifiable as opposed to hidden assets when he had used the phrase 'provable assets'. A statement by Mr Arlidge, who was no longer acting as counsel, was put before the judge, in which reference was made to the phrase 'provable assets' and it was stated that Stapleton had subsequently been advised that the judge's likely approach to the confiscation order was favourable to him. The judge's response both in July and in the course of his judgment of 2 August 2002 was that 'provable' included what could be proved by inference and could include unidentifiable assets. d e

[51] In that judgment the judge acknowledged that he had in the 20 September discussion been seeking to give some guidance to those representing the defendants, and he was prepared to assume that his words had been conveyed to the lay clients. But he said that he had not intended by those words to restrict himself to identifiable assets, and he emphasised that the drawing of appropriate inferences is part of the process of proof. Consequently he went on to infer from the amounts of VAT retained by the various companies that Stapleton and Bravard, and indeed May, had substantial undisclosed assets. f g

[52] It was submitted before us that the interpretation of the words 'provable assets' as meaning identifiable assets was a reasonable one, given the context in which some form of assurance was being sought from the judge. Moreover, a legitimate expectation had been created both by that phrase and by the reference to the money-laundering case, with the result that it was unfair subsequently for the judge to rely on unidentified assets when making the confiscation orders. Mr Owen sought leave to call evidence from Mr Peter Rowlands, who had been junior counsel, led by Mr Arlidge, for Stapleton in September 2001. This was on the basis that Mr Rowlands could testify not only to his and Mr Arlidge's understanding of the judge's words but also and in particular to the advice then given to Stapleton and his reaction to it. h j

[53] We were not enthusiastic about trial counsel being called as a witness to give evidence about advice tendered in privileged circumstances to the lay client in criminal proceedings. None the less, we recognised that the unusual circumstances of this case meant that Mr Rowlands might be able to give

evidence helpful to this court. Having heard his evidence, we are satisfied that it met the criteria in s 23 of the Criminal Appeal Act 1968 and we have therefore received it and taken it into account.

[54] Mr Rowlands' evidence was that he and Mr Arlidge had seen their client in the cells after the judge's guidance and had said that the words meant 'identifiable assets'. He did not have any written note to that effect but he was firm in his recollection and unshaken in cross-examination. He said that because of the circumstances he had taken the phrase 'provable assets' as having only that one meaning. While Mr Rowlands recognised that proof can be by inference as well as by direct evidence, such a meaning would not have been giving the defence any helpful assistance. He told us that there was no doubt in his mind or in Mr Arlidge's about what the words had meant. Stapleton was influenced by what the judge had said and the interpretation counsel placed on it and he thereupon had indicated that he wished to change his plea to guilty.

[55] There was no challenge by the Crown to the honesty of Mr Rowlands but it was suggested that he may not be reliable in his recollection. We do not have any doubts as to his reliability. His evidence was clear, confident and consistent. We accept it as accurate. In respect of the appeal by Bravard, we also had before us a statement by Mr David Spens QC, who had appeared on behalf of Bravard at the time of the discussion in chambers on 20 September 2001 and the change of plea by his client. The Crown on Bravard's appeal did not seek to draw any factual distinction between the situation existing in his case and that in Stapleton's case. We therefore formally received Mr Spens' statement in evidence without requiring him to be called as a witness. His appeal is, on this aspect of the case, to be treated as being on all fours with that of Stapleton.

[56] What is the effect of all that? Mr Owen directed our attention to the decision of this court in *R v Smith (Terence)* [1990] 1 All ER 634, [1990] 1 WLR 1311. There a discussion had taken place, unrecorded, between counsel and the judge in the latter's room, as a result of which defence counsel told his client that the judge had indicated that a suspended sentence would be the outcome if there was a change of plea to guilty. The defendant then changed his plea, but was subsequently sentenced to immediate custody. There was a dispute between defence and the judge as to what the judge had in fact said, but this court did not seek to resolve that dispute. It accepted that the defendant had been misled by his own counsel into believing that the judge had given some sort of undertaking that he would pass a suspended sentence when, according to the judge, no such undertaking had been given. The court quashed the sentences and substituted suspended ones.

[57] Reliance is also placed on *R v Khan* [2004] EWCA Crim 1982, where once again there had been a discussion in the judge's room between counsel and the judge. A subsequent note agreed between both prosecution and defence counsel stated that the judge said that a guilty plea would attract a long-term sentence 'but only just'. Both counsel understood this to mean a sentence of four years' imprisonment. After the position had been explained to the defendant he changed his plea to one of guilty. In the event a sentence of five years' imprisonment was passed, the judge saying that he had no recollection of stating that the sentence would only just be long term.

[58] This court reduced the sentence to one of four years' imprisonment, saying that it had 'no hesitation' in doing so. It emphasised that there had to be a causative link between the judge's words and the plea of guilty but it was prepared to infer such a link in that case. It also commented that not every throwaway line will give rise to a judicial promise or a legitimate expectation on the defendant's part.

[59] In the present appeals Mr Sells for the Crown relied on that last point, stressing that the judge's words here were said ex tempore and not as part of any considered judgment. It was submitted that a judge must have given a clear indication for any legitimate expectation to be created, but Mr Sells accepted that the interpretation relied upon by the defence need not be the only reasonable interpretation of the words used before such an expectation can arise. He acknowledged that the judge's words were not happily chosen. None the less the Crown noted that Stapleton's s 73 statement, responding in February 2002 to the prosecutor's confiscation statement, made no mention of any such legitimate expectation and Mr Sells queried whether the causal link between the judge's words and the pleas of guilty had been shown.

[60] There is no doubt in our minds that the subjective intention of the judge when he gives some indication about his approach to sentencing if there is a plea of guilty is not relevant. The test must be one which focuses objectively upon the words used and the meaning to be attributed to them. In the present case this court can see that the meaning intended by the judge is a tenable one: it is trite law that a fact may be proved by inference as well as by direct evidence, and it may be that by using the expression 'provable assets' he was trying to indicate that he would not rely on any failure of the defence to discharge the burden of proof resting on it to show that realisable assets were less than the benefit: see *R v Barwick* [2001] 1 Crim App R (S) 129.

[61] But we have concluded that the meaning attached to his words by defence counsel was, in the context in which they were used, a reasonable one, especially given the earlier reference to the money-laundering case. This was not an unimportant topic. It was made clear by Mr Arlidge at the outset of the discussion that the issue of confiscation was very significant, a sticking point. The defence were clearly seeking some assistance from the judge which would enable them to indicate to their clients that he was intending to set some limit to the scale of confiscation. Given the absence of any express discretion in the statutory provisions, his approach to the topic of assets was clearly important, since the judge has to exercise a degree of judgment in applying the words in s 71(6)(b) of the 1988 Act, 'the amount appearing to the court to be the amount that might be realised at the time the order is made'. Moreover, it is evident that the judge was seeking to encourage a change of plea if possible, so as to avoid the expense of a lengthy trial.

[62] His words about 'provable assets' cannot be treated as a mere throwaway line. He returned later in the discussion to what he had said, describing it as his likely approach. It was clearly intended to be relied upon. As for the causal link between his words and the changes of plea, that was testified to by Mr Rowlands and was unchallenged in cross-examination before us. The fact that this understanding of the judge's words was not referred to in Stapleton's s 73 response cannot be seen as significant: that response was seeking to deal with the factual allegations made in the prosecutor's s 73 statement,

rather than setting out the whole of the legal case for Stapleton in the confiscation proceedings.

[63] We do not have to deal in this judgment with the situation where counsel conveys to his client a wholly unreasonable meaning of a statement by a judge. The present appeals are ones where it was reasonably open to defence counsel to understand the words used in the way which we accept they did, namely that the judge would confine himself to those assets which the Crown could identify. If such an understanding is then conveyed to the lay client, who pleads guilty in reliance thereon, then even if there is another possible interpretation of the judge's words, it will normally be unfair for the court to sentence on a more severe basis. Fairness is, as so often, the key. In the present case, we are satisfied that the conditions we have set out are met in respect of Stapleton and Bravard. It follows that the amount of the confiscation orders in their cases must be reduced to the total of their identifiable assets. As we have indicated earlier, the order in May's case was no more than his identifiable assets. Fowles has not sought to rely on legitimate expectation in this appeal.

[64] We cannot, however, leave this topic without stressing once again the extreme care which must be used by judges in seeking to give any indication in chambers about sentence. *Practice Direction (criminal: consolidation)* [2002] 3 All ER 904, [2002] 1 WLR 2870 points out the danger of any such indication, a matter which has been emphasised time and again since the classic case of *R v Turner* [1970] 2 All ER 281, [1970] 2 QB 321. But if, in exceptional circumstances, the judge does choose to give an indication, it is imperative that he does so unambiguously, leaving no room for misunderstanding. The conclusion which we have arrived at in the present appeals on this matter is one which we have reached with considerable regret.

ISSUES PECULIAR TO INDIVIDUAL APPELLANTS

Stapleton

[65] It was submitted that the judge was wrong to include amongst Stapleton's realisable assets his one-third share in the bank balances of Elysee Consulting Ltd, Flostap (a French overseas supplier) and JVJ Ltd, one of the buffer companies. Mr Owen pointed out that, when dealing with the determination of benefit, the judge had reduced the benefit figure on the basis that those balances, the subject of a restraint order obtained by the Customs and Excise, were available to make up part of the deficit in VAT owed. This, it was contended, was inconsistent with then including those balances in this appellant's realisable assets.

[66] We do not accept that the judge was wrong to include them in the realisable assets. In his response statement under s 73 of the 1988 Act, Stapleton had accepted that one-third of the assets of Elysee Consulting Ltd and of Flostap should be regarded as part of his realisable assets and the judge clearly accepted that the same position obtained in respect of JVJ Ltd. As for inconsistency, the judge was perhaps being generous in reducing the benefits figure in the way that he did, but it does not follow that this appellant's realisable assets had to be reduced in the same way.

Bravard

[67] Bravard and his wife own a property in Corsica in joint names. The judge treated that property as worth £20,000. He treated the whole of the value as a realisable asset of Bravard on the basis that—

> 'it was acquired entirely from his own resources and that, following the English law of resulting trust which applies to these proceedings, he is to be treated as the sole beneficial owner.'

But the judge also pointed out that 'French law does not recognise equitable principles of propriety ownership.' That is not in dispute.

[68] Given the position under French law we regard the judge as mistaken to have regarded the whole of the value of the Corsican property as realisable in the hands of Bravard. French law is clear. Under that law Bravard's wife is entitled to one-half of the value of the Corsican property and we do not regard the doctrine of resulting trust as applicable to this aspect of the case. Accordingly the realisable assets of Bravard should be reduced by his wife's half-share in the Corsican property, namely £10,000 on the basis of the value for the Corsican property adopted by the judge.

May

[69] Among the realisable assets of the appellant May taken into account by the judge was a house called 'The Robins', valued for the purposes of the hearing at £1·8m. The house was in the joint names of May and his wife and was unencumbered by any charge. The judge seems to have proceeded on the basis that the whole of the beneficial interest was vested in the appellant, because although he refers at para 10.6.3 of his decision of 2 August 2002 to Mrs May being 'a beneficial joint owner' he goes on to say immediately thereafter: 'there is no reason to suppose that she made any or any significant contribution to its acquisition.' The judge then went on to consider whether as a matter of discretion he should treat the matrimonial home as an available realisable asset, referring to such cases as *R v Lee* [1996] 1 Cr App R (S) 135 and *R v Taigel* [1998] 1 Cr App R (S) 328. For various reasons which he set out, he declined to exclude any part of the equity in The Robins from May's realisable assets.

[70] The reasoning for that exercise of discretion was criticised before us on behalf of May, it being said that those reasons were not supported by the evidence. In particular, it was emphasised that the property was purchased before the offences to which he pleaded guilty and so could not have been bought with the proceeds of those offences. Thus it was said that only half of the equity in the house should be included within his realisable assets.

[71] In the view of this court, it is important to distinguish between two questions. The first is whether there was evidence on which the judge could properly conclude that the whole of the beneficial interest was vested in May. This is fundamental, because s 74(4) of the 1988 Act defines the value of property for confiscation purposes, where some other person holds an interest in the property, as being the market value of the defendant's beneficial interest. The second question is whether the court has a discretion in respect of a matrimonial home in which a defendant holds the whole of the beneficial interest.

[72] On the first of those issues, this court is satisfied that the judge could properly conclude that Mrs May made no significant contribution towards the acquisition of The Robins. He had evidence before him that Mrs May's annual salary at the relevant times did not exceed four figures, and there was no evidence to show that she had made any contribution towards the purchase price. In those circumstances he could proceed on the footing that the whole of the beneficial interest was held by the appellant May.

[73] Once that position has been reached, the 1988 Act does not seem to us to give the court any discretion. *R v Lee*, on which reliance was placed, was concerned with the 1988 Act in its form before the amendments made by the Proceeds of Crime Act 1995. In its original form the 1988 Act gave the court a discretion both as to whether to make an order at all and as to the amount. Section 71(1) as it was simply gave the court the *power* to make an order and it also provided that the order would require the offender 'to pay such sum as the court thinks fit'. Section 71(6) as unamended provided that the confiscation order 'must not exceed' the lesser of the two amounts, the benefit and the amount that might be realised. The 1995 Act changed that. It put the court under a duty to make such an order when certain conditions were met (new s 71(1)) and it amended s 71(6) so as to remove the words 'must not exceed' and to replace them with the words 'shall be equal to'. The discretion as to the amount in s 71(1) was swept away.

[74] Likewise *R v Taigel* [1998] 1 Cr App R (S) 328 was dealing with the situation where the court retained its original discretion (at 330). We therefore agree with the decision of this court in *R v Ahmed* [2004] EWCA Crim 2599, [2005] 1 All ER 128, [2005] 1 WLR 122 that under the 1988 Act in its amended form the court had no statutory discretion in assessing the value of realisable property. We emphasise the word 'statutory', though *R v Ahmed* also made it clear (at [11], [12]) that any discretion based on the art 8 rights of innocent members of the family to occupy the matrimonial home applied only at the enforcement stage of the confiscation process and not at the stage of the making of the order.

[75] Consequently the judge in the present case was wrong to proceed on the basis that he had any discretion as to the matrimonial home, once he found that it had been paid for by the appellant May. The judge had no such discretion and the criticisms of the way in which he purported to exercise such a discretion are beyond the point. It follows that his conclusion that the matrimonial home should be included amongst May's realisable assets cannot be successfully challenged.

Fowles

[76] The appellant Fowles relies upon two original grounds which may be summarised thus. (1) That the net benefit figure in his case should be limited to £40,000 (his wages) rather than £3,129,929 as found by the judge. (2) That a sum of £16,000 given to Stapleton should not have been included in Fowles' realisable assets by the judge. We take these two issues in turn.

Benefit

[77] Fowles pleaded guilty to the conspiracy upon a detailed basis of plea agreed with the prosecution and reduced to writing. We shall summarise the

relevant parts to illustrate the agreed role of the appellant in relation to each missing trader company. a

[78] Lomond: Fowles was not responsible for setting the company up and played no executive role. He entered the conspiracy toward the latter stages and was educated in its mechanics.

[79] Lyndon Global: Stapleton suggested that items be taken to Fowles; keeping an eye for Stapleton on his son-in-law; encouraging others to 'set up again'; chaperoning Pullen between fraudulent companies; helping unload goods; and knowledge that Beachshand was to be set up. b

[80] Beachshand: Giving physical assistance to Pullen and on eight occasions accompanying Pullen in transferring goods between fraudulent companies. He had no organisational role. c

[81] He had no executive or organisational role in any company and was relied on as a box-carrier and minder by Stapleton. He had knowledge of and entered into the early stages, and encouraged and gave physical assistance in the later stages. It was the prosecution's case that he received a cash wage commensurate with his involvement. He played no part in Elysee. d

[82] The judge had his attention drawn to the basis of plea on an earlier date when he had indicated a provisional assessment of £3,129,929 as the appellant's benefit from the conspiracy. He later returned to the issue in his judgment on 2 August 2002.

[83] There he considered whether the prosecution had agreed each element of the basis of plea and then went on to say: e

> 'I have already drawn attention to the decision of the Court of Appeal in *R v Atkinson* ((1993) 14 Cr App R (S) 182) in para 3.2. It follows in my judgment that, whatever may have been agreed between Miss Moor and Mr Kirby, which would properly bind me when imposing sentence on Fowles, the court cannot avoid the performance of its statutory investigation under s 71(1A) and (1B). Accordingly my considered reasons for concluding the benefit figure in the case of Fowles is indeed £3,129,929 are as follows. That figure is the aggregate of the VAT of which Customs was cheated in respect of the Lyndon Global and Beachshand phases of the conspiracy. Fowles is a long-time criminal associate of Stapleton senior; so much is clear from the disclosed applications to maintain intrusive surveillance, as well as the unchallenged evidence as to his questionable involvement with Stapleton senior in the use of motor vehicles and the jewellery trade, I am in no doubt that Fowles introduced Hope, then hitherto of good character, and his stepson, to an opportunity to make easy and dishonest money. One of the links to those transactions was John Hurley, a man with previous convictions for dishonesty, who established both Lyndon Global and Beachshand ... In my considered judgment the role adopted in the two phases of the conspiracy with which I am concerned by Fowles was very similar to that adopted in phases 3 and 4 by Lawrence ... I am satisfied that de facto Fowles was as much in control of these companies, in his role as "minder" for Stapleton senior, as those who were in formal position as directors of the companies, namely Hope and Pullen.' f g h j

[84] It is clear that the judge, in deciding he was not bound by the terms of the basis of plea, relied on the decision of this court, differently constituted, in *R v Atkinson* (1993) 14 Cr App R (S) 182. That was a drugs case. The appellant had been convicted of possessing amphetamine with intent to supply and had had further similar cases taken into consideration. In confiscation proceedings the prosecution had invited the court to make a confiscation order in the sum of £17,000. The sentencing judge expressed doubt as to whether the prosecution had the power to limit the court to such a sum. He went on, having found certain facts, to order the appellant to pay confiscation in the sum of £27,267. The appellant appealed inter alia on the ground that—

> 'the sentencing judge was in error in declining to accept the prosecution's invitation to proceed under the statute only in respect of a contended for confiscation order totalling some £17,000.'

[85] That submission was rejected by this court. Simon Brown J said (at 185):

> 'The statute seems to us to be perfectly clear and imperative in its terms ... once the court has determined that a defendant has benefited from drug trafficking, and that here was not in issue, then the court is required to determine in accordance with section 4 the amount to be recovered under the provisions of the Act. Section 4(1) similarly is enacted in mandatory terms and provides that the amount to be recovered under the confiscation order shall be the amount the court assesses to be the value of the defendant's proceeds of drug trafficking. The court, accordingly, was not only entitled to reject prosecuting counsel's suggestion that the scope of the enquiry should be restricted, but indeed bound so to do.'

[86] Before us it was submitted by Mr Bodnar, on behalf of this appellant, that the judge was not entitled to attribute to the appellant a role different from that agreed with the Crown. He submitted that in *R v Atkinson* the prosecution were inviting the court to make a compromised order in the sum of £17,000, which invitation did not relate particularly to the specific facts of the case. It was to be distinguished from the present case where benefit fell to be determined by the degree of factual involvement of the appellant in the conspiracy. He submitted that that degree of involvement was delineated by the contents of the agreed basis of plea and that it was not for the sentencing judge to go behind it and determine the appellant's position based on factual findings inconsistent with that basis of plea. He submitted that confiscation is part of the sentencing process and that a judge is as bound by an agreed basis of plea in making a confiscation order as at any other part of the sentencing process.

[87] We have been referred to and have considered *R v Lunnon* [2004] EWCA Crim 1125, [2005] 1 Cr App R (S) 111 and *R v Lazarus* [2004] EWCA Crim 2297, [2005] 1 Cr App R (S) 552, but do not find them helpful.

[88] We consider that there is force in the appellant's submissions. We are satisfied that the making of a confiscation order is part of the sentencing procedure. Consequently a judge is bound at that stage by facts agreed between the parties in the same way as when he is passing a punitive sentence. It is upon that basis that the prosecution advance their case and the defendant submits to

conviction and sentence. It is to be remarked that prosecutors will from time to time agree a factual basis for plea with the defence in the knowledge of facts which have not been made available to the sentencing judge. The position is different where there is no agreed factual basis of plea. Then a judge will be required to hear the evidence placed before him and reach his own conclusion as to the part played by a defendant. *R v Atkinson* is to be distinguished since in that case there was no agreed basis of plea. The judge was merely invited to make a confiscation order based on a compromised figure for the defendant's liability which invitation this court concluded the judge was not obliged to accept.

[89] Accordingly we are satisfied that, whilst the learned judge was correct when he said that 'the court could not avoid the performance of its statutory investigation under s 71(1A) and (1B)', nevertheless we are of the opinion that he misdirected himself in determining that he was required to investigate the factual degree of involvement of the appellant further than that prescribed by the agreed basis of plea.

[90] We turn next to consider the appropriate amount of benefit to be attributed. It is only upon the basis that the appellant was a controller of the fraudulent companies that an order in the terms contended for by the prosecution could be made. We consider that the basis of plea falls far short of placing the appellant in that position.

[91] We have already summarised the appellant's involvement as set out in the basis of plea. It therefore appears to us that there was no factual basis for finding, as did the judge, that he was 'the lieutenant of Stapleton senior' or that—

> 'de facto Fowles was as much in control of these two companies [Lyndon Global and Beachshand], in his role as "minder" for Stapleton senior, as those who were in a formal position as directors of the companies, namely Hope and Pullen.'

[92] As a worker for wages it appears to us that his benefit is to be assessed in accordance with the wages he received. The only matter not agreed with the prosecution in the basis of plea was the level of those wages. They fell to be determined by the judge. The appellant did not give evidence in the confiscation proceedings and has thus provided no assistance to the court on this matter. The judge found that Fowles had benefited to an extent of not less than £20,000 in each of the Beachshand and Lyndon Global phases, a total of £40,000.

[93] Therefore this represents the wages received by the appellant from the conspiracy on the agreed facts. It follows for the purpose of s 71(1A) and (4) of the 1988 Act that must be the amount of his benefit.

[94] Before us Mr Bodnar has conceded that the appellant has realisable assets (excluding the £16,000 below) sufficient to satisfy an order that he be required to pay the full benefit amount. Although we have also heard argument about apportionment on behalf of this appellant, we consider that the alternative ground relating to apportionment does not now fall for determination in his case.

£16,000 paid to Stapleton

[95] This turns upon whether the judge included a particular sum of £16,000 paid to Stapleton by the appellant, and which fell to be considered as 'a gift' for the purposes of the 1988 Act, as a realisable asset both of this appellant and of Stapleton. If he did, it is argued that this appellant would be unable to recover that asset to satisfy his own order since it is already subject to the order concerning Stapleton. Therefore it should not be considered a realisable asset in the hands of the appellant.

[96] Determination of this issue will not effect the practical outcome of this appeal. We therefore deal with it briefly.

[97] This appellant accepted that the payment of £16,000 to Stapleton in or about January 2001 was prima facie 'a gift' caught by the 1988 Act. Mr Bodnar has argued that the judge specifically considered the entirety of Stapleton's apparent assets as being attributable to 'realisable assets'. It followed that in doing so he must have embraced the £16,000 'gift' as part of Stapleton's realisable assets. Since Stapleton's entire realisable assets were subject to the judge's confiscation order, it would not be possible for the appellant to recover the gift to satisfy the order made against him on the basis that the £16,000 formed part of his realisable assets.

[98] In considering those submissions we have been particularly impressed by the careful way in which the judge approached the identification of particular assets. He considered them against the background of the prosecutor's statements and on an itemised footing. We conclude that if he had in mind the £16,000 'gift' as realisable in the hands of Stapleton it is inevitable that he would have included it as a specified item in his judgment. We are confirmed in that view by his specific inclusion of the 'gift' as part of this appellant's realisable assets.

[99] We are satisfied that the judge took this item into account only when assessing this appellant's realisable assets and no element of double accounting is involved. Consequently the judge was correct to consider this sum as a realisable asset in the hands of this appellant and we dismiss the second ground of the appeal.

Conclusion as to Fowles

[100] It follows that Fowles' appeal succeeds upon the first ground to the extent that the confiscation order will be amended to require the appellant to pay £40,000 rather than £66,000 as ordered in the court below.

CONCLUSION ON THE INDIVIDUAL CONFISCATION ORDERS

[101] The result of our decisions on the various issues arising on the confiscation orders can now be set out, appellant by appellant. The appeal by May against the confiscation order made against him is dismissed. In the case of Stapleton, the amount of the order must be reduced to the total of his identifiable assets, namely £1,615,789, and we shall reduce the period of imprisonment in default of payment to four years. The order against Bravard must again be reduced to the total of his identifiable assets, £636,383, and then a further reduction of £10,000 is required to reflect our decision about the Corsican property. This gives a figure for the confiscation order against Bravard of £626,383, and the period of imprisonment in default is reduced to a term of

three years. The order against Fowles is reduced to £40,000, to reflect the decision set out in [92]–[94], above. We reduce the default term in his case to one of 12 months.

THE SENTENCE APPEAL

[102] We turn finally to the appeals against sentence by May and Lawrence. So far as May's appeal is concerned, the point is a short one. In his sentencing remarks the judge had proceeded on the basis that May had been actively involved after the disappearance of Lomond Services Ltd in July 1999—in other words, that he had been a principal in the last three phases of the conspiracy. However, when the judge came to analyse at the confiscation stage the involvement of the various defendants, which he did in some detail, he concluded that May had only participated in the last two phases of the fraud: see judgment dated 2 August 2002, para 9.2.

[103] Mr Campbell-Tiech submitted that, in the light of that subsequent finding, the judge passed the custodial sentence on an erroneous basis and that the five-year term of imprisonment should be reduced. We agree. We quash the sentence of five years' imprisonment and substitute for it one of four years' imprisonment.

[104] On behalf of Lawrence, Mr Mitchell argued that the judge was wrong to regard him as having been involved as May's 'lieutenant' during the last two phases of the conspiracy. It was submitted that Lawrence's role only began in July 2000 and that he was brought in to start up Elysee Consulting Ltd, the company used in the fourth and final phase. In short, he was only involved for about two months.

[105] The judge in his sentencing remarks commented that Lawrence had been actively involved since November 1999, and we note that there was evidence of this from the probe conversations. Moreover, the judge reached his conclusion about the length of Lawrence's involvement after conducting a 37-day trial. No one could have been in a better position than this judge to assess the role played by Lawrence in this conspiracy. We recognise that his sentence of four-and-a-half years' imprisonment is now somewhat longer than the sentence of four years which we have substituted in the case of May, whose lieutenant Lawrence was, but this difference simply reflects the fact that May pleaded guilty and thereby obtained a discount on his sentence, whereas Lawrence did not.

[106] The appeal against the sentence of imprisonment is allowed in May's case to the limited extent indicated. Lawrence's appeal is dismissed.

OVERALL RESULT OF THE APPEALS

[107] We summarise the result of the various appeals by each appellant.

[108] The appeal by May against the confiscation order made in his case is dismissed. His appeal against sentence is allowed, to the extent that we quash the original sentence and substitute one of four years' imprisonment.

[109] The appeal by Stapleton against his confiscation order is allowed. We quash the original order and in its place make one in the sum of £1,615,789, to be paid within two years, with four years' imprisonment in default.

[110] The appeal by Bravard against his confiscation order is allowed. We quash the original order and substitute one in the sum of £626,383, to be paid within 18 months, with three years' imprisonment in default.

[111] The appeal by Fowles against his confiscation order is allowed. We quash the original order and substitute one in the sum of £40,000, to be paid within 12 months, with 12 months' imprisonment in default.

[112] Any period of disqualification from acting as a company director, imposed by the court below, will remain. The appeal against sentence by Lawrence is dismissed.

May's appeal against confiscation order dismissed, appeal against sentence allowed. Lawrence, Fowles, Bravard and Stapleton appeals allowed.

Stephen Leake Barrister.

Re Uddin (a child) (serious injury: standard of proof)

[2005] EWCA Civ 52

COURT OF APPEAL, CIVIL DIVISION

DAME ELIZABETH BUTLER-SLOSS P, THORPE AND LAWS LJJ

7, 8 DECEMBER 2004, 24 FEBRUARY 2005

Appeal – Reopening of appeal – Application to reopen final appeal – Circumstances in which court will reopen an appeal.

Whenever the residual jurisdiction of the court to reopen a final appeal is sought to be invoked, the court must be satisfied that the case falls within the exceptional category described in *Taylor v Lawrence* [2002] 2 All ER 353 before it will accede to the application and reopen the case. The requirements for such exceptional circumstances are that the probability of a significant injustice must be clearly established and that there be no effective alternative remedy. The requirements as to evidence which apply where the court, on a first appeal brought in the ordinary way, will admit new evidence and decide the case in the light of it, or remit the matter for a fresh trial are of an altogether different and less demanding order from what must be shown to invoke the residual jurisdiction to reopen a concluded appeal. The residual jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal has been critically undermined. The jurisdiction is not solely concerned with the case where the earlier process has or may have produced a wrong result (which must be the whole scope of a fresh evidence case) but primarily with special circumstances where the process itself has been corrupted. The corruption of justice as a matter of policy is most likely to validate an exceptional recourse; a recourse which relegates the high importance of finality in litigation to second place. Fresh evidence, not previously available or at least not reasonably obtainable for use at the trial, is not the proper subject matter of *Taylor v Lawrence* applications. But, as the ultimate rationale of that case is the correction of injustice, it is wrong to say that there would be no case in which fresh evidence might justify such an application in the absence of some other factor which has corrupted the litigation process. The case where the process has been corrupted is the paradigm case, not necessarily the only case. However, if the discovery of fresh evidence is ever to justify reopening a concluded appeal the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claims of finality in litigation. It must at least be shown, not merely that that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings but that there exists a powerful possibility that such a result has in fact been perpetrated (see [16]–[22], below); *Taylor v Lawrence* [2002] 2 All ER 353 explained.

Per curiam. A party in a public law case is not entitled to attempt to dispense with the guardian appointed to represent a child or to sideline or marginalise the guardian on the ground that in an earlier part of the case the guardian's

recommendation had been adverse to that party. Other than in exceptional circumstances of specific bias or impropriety, the independence of the guardian may not be impugned as a result of the decision of the guardian to support the proposed care plan of the local authority (see [99], below).

Notes

For reopening of final appeals, see Supp to 37 *Halsbury's Laws* (4th edn reissue) para 1516A.

Cases referred to in judgment

Ampthill Peerage Case [1976] 2 All ER 411, [1977] AC 547, [1976] 2 WLR 777, HL.

Barrell Enterprises, Re [1972] 3 All ER 631, [1973] 1 WLR 19, CA.

Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp [1981] 1 All ER 289, [1981] AC 909, [1981] 2 WLR 141, HL.

C (a Hague Convention case), Re [1999] CA Transcript 1785.

Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.

Flower v Lloyd (1877) 6 Ch D 297, CA.

J (a minor), Re [2000] CA Transcript 230.

Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577, [2000] 1 AC 119, [1999] 2 WLR 272, HL.

R v Cannings [2004] EWCA Crim 1, [2004] 1 All ER 725, [2004] 1 WLR 2607.

R v Clark [2003] EWCA Crim 1020, [2003] 2 FCR 447.

R v Patel (Trupti) (11 June 2003, unreported), CA.

S (a minor) (care proceedings: reports), Re [1992] 2 FCR 554, [1993] 1 FLR 110, CA.

Taylor v Lawrence [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528, [2002] 3 WLR 640.

Wood v Gahlings (1996) Times, 29 November, CA.

Application for permission to reopen final appeal

The application of the mother of Layla Uddin, a child, for permission to appeal from certain findings of Bracewell J on 7 November 2002 in care proceedings relating to the child was refused by the Court of Appeal (Dame Elizabeth Butler-Sloss P, Thorpe and Mantell LJJ) on 4 March ([2004] EWCA Civ 567, [2004] 2 FCR 257). The mother applied to reopen her application for permission to appeal. The other parties to the application were the local authority, the father, and the guardian of the child. The facts are set out in the judgment of the court.

Peter Jackson QC and *Catherine Wood* (instructed by *Harman and Harman*, Canterbury) for the applicant.

Judith Rowe QC (instructed by *Nabila Zulfiqar* on behalf of *Birmingham City Council*) for the first respondent.

Andrew Scott (instructed by *Pye-Smiths*, Salisbury) for the second respondent.

Margaret Hodgson (instructed by *Carole Burgher*, Birmingham) for the third respondent.

14 December 2004. The court announced that the application would be dismissed for reasons to be given later. *a*

24 February 2005. The following judgment of the court was delivered.

DAME ELIZABETH BUTLER-SLOSS P.

b [1] This is the judgment of the court to which all members of the court have contributed. It concerns a little girl, Layla Uddin, born on 11 July 2001.

[2] The case returned to the Court of Appeal on 8 December for further consideration of the refusal of the Court of Appeal (Dame Elizabeth Butler-Sloss P, Thorpe LJ and Mantell LJ) to grant permission to appeal on 4 March 2004 (see the judgment of the court of 14 May 2004, reported [2004] EWCA Civ 567, [2004] 2 FCR 257, [2005] Fam 134). The further application is *c* made subject to the principles in *Taylor v Lawrence* [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528 and the provisions of CPR 52.17.

[3] We gave our decision to refuse the renewed application to the parties on 14 December 2004 and provided a short press release. We now give our reasons for our decision. *d*

THE APPLICATION OF THE PRINCIPLES OF *TAYLOR v LAWRENCE*

[4] CPR 52.17 is headed 'Reopening of final appeals'. Rule 52.17(1) provides:

> 'The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—(a) it is necessary to do so in order to *e* avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy.'

[5] By para (2) 'appeal' includes an application for permission to appeal. There is no doubt that this rule is specifically intended to reflect the reasoning *f* in the judgment of this court in *Taylor v Lawrence*. While this authority is very well known in the legal profession, it seems to us especially important to explain its effect in the context of our decision in this case. There is a pressing public interest, which has to be understood, in confining the circumstances in which the court will reopen an appeal that has already been finally determined *g* to cases of the most exceptional kind; and this is so across all areas of the law, including family law. Accordingly we make no apology for addressing the authority of *Taylor v Lawrence* in some detail.

[6] In that case judgment had been given against the defendants in a county court action. They appealed in part on the ground of an appearance of bias by *h* the judge. It emerged that the judge and his wife had engaged the claimants' solicitors to amend their wills the night before judgment was given in the action. The appeal was dismissed in January 2001. Later, the defendants learnt that the judge had not paid for the services provided by the solicitors during the trial. The defendants applied for permission to reopen their appeal. The application was heard and determined by a constitution of five judges of this *j* court (Lord Woolf CJ, Lord Phillips of Worth Matravers MR, Ward, Brooke and Chadwick LJJ). As is made clear in the judgment of the court delivered by Lord Woolf CJ, a court of five was exceptionally constituted in order to resolve the important issue of jurisdiction that arose in the case, namely whether there is any power at all to reopen an appeal which has been finally determined.

[7] It was submitted by Mr Corner acting as advocate to the court that the Court of Appeal enjoys no such power. He cited much learning, not least the decision in *Flower v Lloyd* (1877) 6 Ch D 297, in which Jessel MR concluded (at 300–301) that if the Court of Appeal 'has once determined an appeal, it has no further jurisdiction'. There were some dicta which went the other way. The court noted more than once that a judgment obtained by fraud could be set aside by order of the court in a fresh action brought for the purpose, and such recourse could no doubt be had as readily in a case where the judgment impugned was that of the Court of Appeal as where it had been given at first instance. But this, of course, does not in truth involve the *reopening* of concluded proceedings in the sense in which that is sought to be done here, and was attempted in *Taylor v Lawrence*. It is one thing to re-litigate an issue where the vehicle for doing so is the very same set of proceedings in which the issue had earlier been concluded. It is quite another to bring a *fresh* action to impugn an earlier judgment.

[8] As the court pointed out, the availability of a claim to set aside a judgment obtained by fraud does not mean there are no other situations where serious injustice may occur if there is no power to reopen an appeal. And so the court proceeded to consider, and ultimately to accept (though in guarded terms), the submission by counsel for the defendants to the effect that the Court of Appeal indeed possessed the jurisdiction to reopen previously concluded decisions of its own.

[9] The argument was put three ways. First it was said that the relevant jurisdiction was to be found in the County Court Rules 1981, as transposed to the Court of Appeal by force of s 15(3) of the Supreme Court Act 1981 (which we will not cite). Secondly, it was said that there existed a jurisdiction analogous to that discussed in *Wood v Gahlings* (1996) Times, 29 November. Lastly, another analogy was put forward, with that class of cases in which, in special and exceptional instances, the Court of Appeal has exercised a power to reopen its judgments in order to oversee and regulate the implementation and enforcement of its own orders.

[10] The first ground was rejected in short order and we need say no more about it. *Wood v Gahlings* was a case where there was a further appeal after a retrial. At the further appeal it was submitted that a fraud had been practised on this court hearing the appeal after the first trial. It was held that the accusation of fraud was not established, but observations were made obiter by Lord Woolf MR (as he then was) and Aldous LJ 'suggesting that there was power in this court in the appropriate circumstances to intervene if actual fraud could be established'. The court in *Taylor v Lawrence* [2002] 2 All ER 353 at [37], [2003] QB 528 observed:

> 'Fraud has always been treated as an exceptional case ... If, however, it is arguable that the Court of Appeal is able to reopen a decision where it has been obtained by fraud, this opens the door to the argument that there is jurisdiction to reopen an appeal in other exceptional cases.'

[11] What was in contemplation here was not the bringing of a fresh action to set aside a judgment based on fraud, but rather the actual reopening, and thus rehearing, of the appeal in which the fraud was said to have been practised.

[12] As regards the third argument raised to support a jurisdiction to reopen a concluded appeal, the court in *Taylor v Lawrence* drew attention to two family

cases, *Re C (a Hague Convention case)* [1999] CA Transcript 1785 and *Re J (a minor)* [2000] CA Transcript 230, both unreported. In the first of these Dame Elizabeth Butler-Sloss P drew attention to the fact that in Hague Convention cases the Court of Appeal 'inevitably has a continuing jurisdiction for the purpose of implementation; as it has in other forms of civil litigation, but particularly in family cases'. However, with respect it is to be noted that this form of 'continuing jurisdiction' is in principle no more controversial than the court's everyday grant of a liberty to apply when in handing down a final judgment it perceives that there may be difficulties, not then and there identifiable, in carrying the court's order into effect; and the court in *Re C* was not saying anything at variance with this.

[13] In the second case, however *(Re J)*, the court made observations which touch more closely the true question of jurisdiction raised in *Taylor v Lawrence*. Dame Elizabeth Butler-Sloss P referred to—

> 'the possibility of a residual power in the court with the final decision-making process [to set aside an earlier final order] ... if ... there is some factor outside the decision in the case itself ... It would have ... to be a factor that flawed the decision, and a factor which was outside the ambit of the decision itself'.

Robert Walker LJ (as he then was) referred to 'a very limited residual class of cases in which in quite extraordinary circumstances a decision might be revisited'. And he recalled the example given by Lord Donaldson of Lymington MR in which by mistake a Lord Justice determined an appeal by reference to the wrong set of case papers. May LJ envisaged, but did not affirm, the possibility that the Court of Appeal enjoyed a jurisdiction similar to that exercised by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 1 All ER 577, [2000] 1 AC 119.

[14] The court in *Taylor v Lawrence* then entered into some discussion of *Ex p Pinochet*, emphasising that the reasoning which allowed an earlier order of the House of Lords to be revisited depended on the status of the House as a final appellate court. That was a premise not automatically applicable to the Court of Appeal; but—

> 'in some cases no appeal will lie to the House of Lords and in others an appeal to the House of Lords will not be appropriate. Thus for practical purposes in many cases this court is the final court of appeal. The difference between this court and the House of Lords is therefore one of degree.' (See [2002] 2 All ER 353 at [45].)

Then a little later (at [49]):

> 'It is the reality of the situation which means that we cannot, as Jessel MR did in *Flower v Lloyd* (1877) 6 Ch D 297, take refuge in the fact that there is an alternative remedy. If there is no effective right of appeal to the House of Lords and this court is the only court which can provide a remedy then in our judgment there can arise the "exceptional circumstances" to which Russell LJ referred in *Re Barrell Enterprises* [1972] 3 All ER 631, [1973] 1 WLR 19.'

[15] Then it was stated that the Court of Appeal, albeit entirely a creature of statute, must possess implicit powers 'to control its own procedure so as to

prevent it being used to achieve injustice'. Passages from the speeches of Lord Diplock in *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] 1 All ER 289, [1981] AC 909 and of Lord Morris of Borth-y-Gest in *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254 are cited. These observations follow, appearing towards the end of the section of the judgment in *Taylor v Lawrence* [2002] 2 All ER 353 dealing with jurisdiction:

> '[54] ... The residual jurisdiction which we are satisfied is vested in a Court of Appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for that to happen.
>
> [55] One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations ...'

DISCUSSION

[16] It is clear that whenever the residual jurisdiction established by the judgment in *Taylor v Lawrence* is sought to be invoked, the court must be satisfied that the case falls within the exceptional category there described before it will accede to the application and reopen the case. One may without levity ask the question, how exceptional is exceptional? The language used by the court (and in CPR 52.17(1)) is necessarily general: apart from the descriptive phrase 'exceptional circumstances', the requirements are that the probability of a significant (CPR—'real') injustice must be clearly established, and that there be no effective alternative remedy.

[17] It seems to us to be of the first importance to distinguish the kind of case in which the residual jurisdiction might properly be invoked from one where all that is said is that there exists fresh evidence which could have a substantial effect on the outcome of the case. The principles upon which this court, on a first appeal brought in the ordinary way, will admit new evidence and decide the case in light of it (or remit the matter for a fresh trial) are well known. They are encapsulated in the decision in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489 (which is referred to in *Taylor v Lawrence*) with some little modification since the CPR came into force into which it is unnecessary to go. There are essentially three requirements: (a) the evidence could not have been

obtained with reasonable diligence for use at the trial; (b) the evidence would probably have had an important (though not necessarily decisive) influence on the result of the case; (c) the evidence must be credible (though it need not be incontrovertible). a

[18] These requirements are of an altogether different and less demanding order from what must be shown to invoke the residual jurisdiction to reopen a concluded appeal. The *Ladd v Marshall* rules may promote the admission of b fresh evidence where there is no more than a possibility that an injustice, in the shape of a factually erroneous result at the trial, has been perpetrated. The possibility, it is true, must be more than merely fanciful. But the *Taylor v Lawrence* jurisdiction can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. We think this language c appropriate because the jurisdiction is by no means solely concerned with the case where the earlier process has or may have produced a wrong result (which must be the whole scope of a fresh evidence case), but rather, at least primarily, with special circumstances where the process itself has been corrupted. The instances variously discussed in *Taylor v Lawrence* or in other learning there d cited are instructive. Fraud (where relied on to reopen a concluded appeal rather than found a fresh cause of action—*Wood v Gahlings*); bias; the eccentric case where the judge had read the wrong papers; the vice in all these cases is not, or not necessarily, that the decision was factually incorrect but that it was arrived at by a corrupted process. Such instances are so far from the norm that they will inevitably be exceptional. And it is the *corruption* of justice that as a e matter of policy is most likely to validate an exceptional recourse; a recourse which relegates the high importance of finality in litigation to second place.

[19] By contrast a fresh evidence case may disclose nothing to suggest that the process of justice has been corrupted. It may just be that fresh evidence, not previously available or at least not reasonably obtainable for use at the trial, f has come along which had it been admitted at trial might have had a significant impact on the result. Such instances are, broadly, the stuff of first-time-round appeals based on new evidence. They are, categorically, not the proper subject matter of *Taylor v Lawrence* applications. The principle of finality yields so as to allow a first appeal on *Ladd v Marshall* grounds. But it will prevail so as to disallow a second appeal—a *Taylor v Lawrence* application—on such grounds. g

[20] Even so, is there no case in which fresh evidence might justify a *Taylor v Lawrence* application in the absence of some other factor which has corrupted the litigation process? Since, as the court's judgment shows, the ultimate rationale of *Taylor v Lawrence* is the correction of injustice, it would surely be wrong to answer with an absolute negative. The examples we have mentioned—bias, and the h others—cannot be said to constitute the only proper instances for the jurisdiction's application. Nothing in the reasoning justifies so straitjacketed an approach. Indeed, it does not justify a brightline rule by which, for any application to reopen an appeal to succeed, it must be shown that the litigation process has been corrupted, as we have put it. In our view the case where the process has been j corrupted is the paradigm case: not necessarily the only case.

[21] However if the discovery of fresh evidence is ever to justify reopening a concluded appeal, the case must at least have this in common with the instances of corrupted process: the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claims of

finality in litigation—especially pressing where what is contemplated is a second appeal. Finality is itself a function of justice, and one of great importance. Here the observations of Lord Wilberforce in the *Ampthill Peerage Case* [1976] 2 All ER 411, [1977] AC 547, set out in *Taylor v Lawrence*, particularly repay attention. Now, it is to be noted that the strictures to be found in the *Ladd v Marshall* principles (see *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489), not least the requirement that the fresh evidence proffered could not have been obtained with reasonable diligence for use at the trial, are justified by the demands of finality; and *Ladd v Marshall* applies to a *first* appeal. To entertain a *second* appeal on fresh evidence grounds, greater strictures are required. It follows that, as we have already indicated, *Ladd v Marshall* grounds will in principle not suffice to justify a second appeal.

[22] What will? In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result *has in fact* been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR 52.17(1). It is to be remembered that apart from the requirement of no alternative remedy, '[t]he effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations' (*Taylor v Lawrence* [2002] 2 All ER 353 at [55]). Earlier we stated that the *Taylor v Lawrence* jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at.

THIS CASE

[23] This was never a case in which the integrity of the earlier litigation process, whether at trial before Bracewell J or at the first appeal, had been critically undermined. As must be plain from our treatment of the new evidence itself, it is very far from being a case in which it is demonstrated that a wrong result was earlier arrived at. The application to reopen the earlier appeal process pursuant to r 52.17(1) was misconceived in principle. That said, given the acute importance of the case to the parties and the interests of the child, we propose to look at the detail of the material now put forward. It is by no means to be supposed that such a narrative judgment will be appropriate in every *Taylor v Lawrence* application.

THE HISTORY

[24] The history of the case prior to the hearing of the permission to appeal in the Court of Appeal is set out in the previous judgment ([2004] 2 FCR 257, [2005] Fam 134). Since the refusal of the permission to appeal, the decision as to the future of the child Layla Uddin was made by Kirkwood J on 25 March 2004. In his judgment, he dealt with events between the judgment of Bracewell J dated 7 November 2002, and the hearing before him.

[25] Kirkwood J found that the mother had failed to co-operate with the agencies or with the court after the decision was given by Bracewell J. He said:

'It is a matter of regret and, I add, of sorrow that Layla's mother has not felt able to lend her co-operation to following through with any of this work. She has not seen the need to participate in any sort of therapeutic programme whether to address her own personal problems or her relationship with her child. That is very serious. No court could reasonably arrange the placement of this child with this mother without having a very full understanding of her and very clear professional guidance that whatever went wrong has been addressed; that Layla would be physically and emotionally safe in her mother's care. Indeed the mother surely recognises that. Her decision not to give any oral evidence to the court at this hearing (itself an unusual decision in such circumstances) was one taken deliberately and with the benefit of advice, and left the court without any opportunity of making an assessment of its own. Knowledge about the mother is not far advanced from the material that was before Bracewell J.'

[26] This was sad since there had been at least a chance that the child might have been reunited with her mother after further investigations and assessments.

[27] The maternal grandmother looked after Layla for a period but she did not accept that her daughter posed a risk to her granddaughter and she was considered unsuitable to be a carer. She agreed that long term she could not care for the child. She made no application to the court.

[28] It was then agreed, in consultation with the paternal family, that the paternal grandmother should take over the care of Layla with their support. This agreement was based upon the clear understanding that the father and the rest of his family who lived in the home of the paternal grandparents accepted the findings of Bracewell J and would co-operate in excluding the mother from playing any role in the child's life unless it was properly supervised.

[29] Kirkwood J's judgment recorded the way in which the family, particularly the mother and the father, deliberately misled the local authority as to their involvement in the care of the child and their breaches of clear provisions to ensure that the mother did not have unsupervised contact with Layla.

[30] The father, in a statement of evidence dated 16 June 2003, accepted the findings of Bracewell J that at that time the mother remained a risk to his daughter. The local authority with expert help engaged in a full and careful assessment of the paternal family. It was not completed until later than expected, that is to say in August 2003. The detailed assessment included a passage in which the writer formed the view that the father sounded genuine when he agreed with his family that he should terminate his relationship with his wife after she made it clear that she did not need and would not accept any therapy or help to deal with the issues nor co-operate with professionals. The wife throughout did not accept the end of their marriage. The father told the psychologist on three occasions in September 2003 that he had separated from his wife although he had subsequently seen her to try to stop her pestering him. His solicitor wrote to the mother's solicitors on 19 September 2003 warning that if the mother continued to contact and harass him, he would not hesitate to seek injunctive relief against her and that Layla's placement with the paternal family was at risk from her actions.

[31] The local authority's suspicions were, none the less, aroused and in accordance with its powers under the Regulation of Investigatory Powers Act 2000, as well as seeking guidance from the court, observation of the family was undertaken. The parents were indeed seeing each other in clear breach of the clear preconditions set out in the agreement between the social workers and the paternal family including the father. The mother on 8 October was shown the results of the observations and on the same day the father disappeared with Layla, returning on 10 October after intervention from his family. Layla was immediately removed and placed with a foster family.

[32] The father disclosed that he did not and never had accepted that his wife had harmed the child and he intended to clear her name. He further disclosed that he had remained in a relationship with his wife throughout the period. He had deceived and lied to his family, the professionals working on the case and the court. So had the mother. The deception was elaborate, including, as it did, the letter from his solicitor to the mother's solicitor alleging harassment by the mother.

[33] Kirkwood J made a care order on the basis of a care plan that Layla should be placed for adoption. She is now the subject of a freeing order and we were told by Miss Rowe QC for the local authority that active steps were being taken to place her with an adoptive family, subject of course to the outcome of the present application.

CASE MANAGEMENT OF THE RENEWED APPLICATION

[34] *Taylor v Lawrence* applications are comparatively rare and there is little established practice directing their preparation, particularly if ordered in for a hearing on notice with appeal to follow if permission granted. Manifestly the further application required careful judicial management and Thorpe LJ assumed control of it on behalf of the Court of Appeal. Permission was granted to the mother to disclose the documents in the case to Professor D, who had not previously been involved in the case, in July and August 2004. Thorpe LJ directed an oral hearing on notice on 28 September. His order contained further directions to ensure orderly and timely preparation. At that stage the application was supported by a statement from the solicitor for the mother, Mrs Harman, dated 8 September 2004, a report from Professor D dated 11 July 2004 and a second report from him dated 30 August 2004. The second report was stated to be a preliminary report prepared in haste and without the benefit of all relevant documents. Accordingly the first direction was that the applicant should file any further evidence by 8 October, the second required the evidence in response by 5 November (subsequently extended to 12 November by agreement between the parties), and the third the evidence in reply by 19 November. The order then provided for skeleton arguments to be filed by 26 November and that any application for further directions was to be made to Thorpe LJ, in writing in the first instance.

[35] The applicant elected not to file any further evidence in support of the application. That must seem surprising given the preliminary nature of Professor D's second report. Accordingly the evidence in response from the respondent's experts, Dr D, Dr R and Dr H, was directed to Professor D's first and second reports. Dr R's response was dated 2 November, Dr D's 9 November and, although Dr H's report was delivered on 11 November, it was unfortunately not served on the applicant until 17 November.

[36] Obviously at that stage an application by the applicant for an extension of say seven days to the deadline for filing evidence in reply would have been likely to succeed. No such application was received and no evidence in reply was filed.

[37] In the meantime the parties had agreed amongst themselves that there should be a meeting of experts. That was revealed to the court by a letter from the local authority dated 13 October (although dictated 7 October), a letter from the applicant's solicitors dated 18 October and a reply from the local authority dated 21 October. The letter of 13 October sought directions under four paragraphs. The first two paragraphs were agreed. The third paragraph was also agreed to the extent that it was accepted that in default of agreement as to the list of questions to be put to the experts at their meeting, then the parties were free to submit their own list of questions to be circulated to all the experts in advance.

[38] It was the last direction that both in negotiation and implementation created difficulties. The local authority proposed the conventional direction that the meeting of experts should be minuted by the solicitor for the child, the costs of the exercise to be shared between the parties. The applicant's solicitor strongly objected. She maintained that the guardian had 'formed a view about our client and the risk that she poses to the child'. Accordingly she asserted that the independence of the solicitor for the child was also compromised. Consequently she stated that she was seeking a retired High Court judge to moderate the meeting. In response to this unjustified attack on the guardian's impartiality the local authority, perhaps unwisely, adopted a neutral stance. This attack on the guardian's impartiality was renewed in a letter from the applicant's solicitor dated 29 October in which she wrote:

> 'As you will have seen, the Court has indicated that the guardian should attend the expert meeting.
>
> However, we would ask you to pass on to CAFCASS [Children and Family Court Advisory and Support Service], who will be funding the cost of the guardian's attendance, the fact that if our client succeeds in her appeal, she will be making application to the Court that a new guardian be appointed for any rehearing.
>
> We would also wish for you to consider your position as the child's solicitor.'

[39] When the correspondence was submitted to the court Thorpe LJ directed: (a) That the hearing on 8 December be extended to determine any appeal in respect of which permission might be given. (b) Should the solicitor for the child not have received a public funding certificate in due time, the meeting of experts was to be minuted by the appointee of the chief legal officer of the local authority.

[40] That direction seems not to have been much regarded by the parties for in the following week they agreed elaborate arrangements for the meeting of experts to be moderated by Sir Phillip Otton and transcribed by a stenographer. These developments were referred to the court and on 2 November Dame Elizabeth Butler-Sloss P resolved the few issues in contention by directing that the guardian should attend the meeting of experts and that the issue of costs should be dealt with at the hearing. It was also recorded that the

court had no objection to the appointment of Sir Philip Otton, agreed by all parties, to chair the meeting.

[41] In the same week the solicitors for the father sought by letter of 25 October directions that a further expert, Dr J, be authorised to read the papers and thereafter submit his report by 20 November. By letter of 29 October the solicitor for the child supported that application. Before ruling Dame Elizabeth Butler-Sloss P wished to know whether Professor D supported the involvement of Dr J. Leading counsel then acting for the applicant reported to the court: 'Professor D does not consider that Dr J needs to be instructed ... our position on behalf of the mother, is that we do not support the application for leave for the father to instruct Dr J prior to the hearing fixed for 8 December.' However the issue thus joined was resolved by a letter of 1 November from the father's solicitors withdrawing the application to instruct Dr J. These exchanges assumed considerable significance when, at the hearing, Mr Scott, who appeared for the father, sought an adjournment to enable an expert opinion to be obtained from Dr J.

[42] We were told that on 11 November the BBC suggested to the mother or her advisors that Professor G, a consultant paediatric epidemiologist, might give expert evidence in support of the application. The mother's solicitors made no application to the court but instructed Professor G and obtained from her a report, dated 23 November that was in circulation prior to the experts meeting on 25 November. Her report was particularly contentious in that it attacked the validity of research published in articles in the medical press in 1996 and 1998, both co-authored by Dr D.

[43] By much the same route the mother's solicitor obtained a report from a Professor H (suggested by a journalist on 1 December). This report is less contentious since Professor H is a mathematician specialising in statistics. His report was dated 2 December 2004.

[44] The drafting of questions for the experts' meeting did not proceed happily and what emerged may well have contributed to the moderator's approach. For he seems to have proceeded on an assumption that, since there was a profound disagreement between experts of obvious eminence, the application on 8 December would at least be enlarged to permit further scientific investigations and reports in preparation for a further hearing in the spring. At the conclusion of the professional exchanges the moderator required each of the four participants to submit a final position statement on a single sheet of A4 by noon on 3 December. He also required responses to the reports of Professor G and Professor H to be filed by the experts for the first respondent by 3 December. Finally he indicated that a further report from Professor D to record his subsequent investigations and research was to be filed by 4 February 2005. This last direction demonstrates the unwarranted assumption of a further hearing after 8 December. The court had fixed 8 December for the determination of the *Taylor v Lawrence* application and any appeal that might result. That fixture recognised the child's need for finality, particularly in the light of the order of Kirkwood J setting Layla on the road to adoption.

[45] The moderator's requirement was met by the first respondent's experts in that Dr D filed his position statement and responses to Professors G and H on 2 December, Dr R filed his position statement on 30 November and Dr H filed his position statement on 2 December. Professor D's compliance was less

orthodox in that on 5 December, only one clear day before the hearing, he filed a 12-page report which effectively became his final report in the application.

[46] This detailed chronology of events demonstrates how vain was the court's endeavour to control the timetable and to ensure that the papers were complete for the court's preparation in the week preceding the hearing. Mr Jackson QC, first instructed on 24 November on behalf of the mother, filed his principal skeleton on 3 December, Miss Rowe on 1 December and Miss Hodgson, on behalf of the guardian, on 1 December.

[47] The court's preparations were complicated by an application by the BBC for a raft of orders, necessitating arrangements for a preliminary sitting on 7 December. The parties filed their skeletons in response to that application, work which was then rendered superfluous by the BBC's withdrawal on the afternoon of 6 December as a result of objection to their application by the mother. An additional skeleton from Mr Jackson was filed on 7 December, entirely excusable given that the documents upon which it was based, contemporaneous transcripts of conversations recorded by the ambulance teams who had taken Layla to hospital, had only been unearthed by his junior, Miss Wood, on 5 December. What is less excusable is that the application for the admission of the evidence of Professors G and H was only issued on 26 November and listed for hearing on 7 December.

[48] We do not need to detail all the avoidable problems caused by the disregard of the court's plain intention to control and manage the case, particularly on the part of the applicant's solicitor and Professor D. It is perfectly plain from the correspondence that the first respondent continued to await a final report from Professor D after 8 October and indeed well into November. Whilst we appreciate that the issues were fully ventilated at the experts' meeting on 25 November, Professor D effectively delayed his final report until 5 December. He was entitled to the last word by way of reply but not by the submission of his first fully considered report. Some prejudice, albeit less, was no doubt caused to the local authority's experts, and particularly Dr D, by the filing of such a contentious report from Professor G at such a late stage in the timetable.

RULING ON LATE ADDITIONAL EVIDENCE

[49] On the day before the hearing of this application we were asked to accept the additional evidence of Professor G and Professor H. Despite considerable reservations about the late presentation, the failure to seek the permission of the court and manner in which this additional evidence had been provided to the other parties and to the court, we took the view that the court should not refuse to consider the additional evidence on this renewed application. Neither the local authority nor the guardian objected to this course. We therefore took account of the evidence of Professor G and Professor H. We also accepted as additional evidence the transcripts of the conversations of the ambulance teams. As we set out above we refused the father's application for an adjournment for the purpose of enabling an expert opinion to be obtained from Dr J.

SUBMISSIONS ON BEHALF OF APPLICATION TO REOPEN APPEAL

[50] Mr Peter Jackson, who now represents the mother, in his submissions to this court set out a number of grounds upon which he attacked the basis of the judgment of Bracewell J (the first judgment) and consequently the decision

of this court in the first application for permission to appeal (the first application). The exceptional circumstances which, he submitted, entitled this court to reopen the case were based partly on matters arising between the first judgment and the first appeal and partly the additional evidence obtained after the first application. Since the first judgment Mr Jackson submitted that there has been an evolving recognition of the need for caution in accepting allegations of child abuse. He pointed to the line of cases in the Court of Appeal (Criminal Division) in *R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447, *R v Patel* (11 June 2003, unreported) and *R v Cannings* [2004] EWCA Crim 1, [2004] 1 FCR 193, [2004] 1 All ER 725. Given the light thrown on these cases by the Court of Appeal (Criminal Division) he asked us to look again at the first judgment which he divided into the three aspects of medical evidence, stress on the mother and her credibility. He (i) criticised the absence of positive evidence of harm caused by the mother; (ii) challenged the judge's findings on credibility; (iii) challenged the foundations upon which the previous medical evidence had been based and relied upon the additional medical evidence provided by Professor D to demonstrate its fallibility; (iv) relied upon alternative medical explanations for Layla's condition.

[51] We ruled that Mr Jackson was not entitled, on an application to reopen the first application, to challenge matters which could properly have formed part of the submissions in the first application and were not informed by subsequent events or additional evidence. He was not therefore able to pursue points (i) or (ii) above.

[52] In addition to the reports and evidence of Professor D with which we deal below, Mr Jackson relied upon further information obtained in Bangladesh in support of the suggested genetic origin of Layla's condition and the transcripts of the discussions between the ambulance teams who came for Layla and the mother to demonstrate that Bracewell J's assessment that the mother was lying was flawed.

[53] Mr Scott, for the father, supported the submissions of Mr Jackson and gave us a helpful insight into the meaning of gastro-oesophageal reflux (GOR) to elucidate his submission that this was the correct diagnosis of Layla's condition.

SUBMISSION OF THE LOCAL AUTHORITY

[54] The local authority opposed the application. Miss Rowe submitted that the late diagnosis of reflux was based solely upon the recent history given by the parents to Professor D which was inconsistent with the earlier accounts given by the mother to the medical professionals. She relied upon the findings of Bracewell J and Kirkwood J as to the lack of credibility of the mother and father. Apart from one recording of a 999 call the findings remained unchallenged and unchallengeable. The evidence of a genetic basis disclosed a muddled picture and the relevance of a genetic element remained as incomplete and problematical as it had been before the original Court of Appeal.

SUBMISSION OF THE GUARDIAN

[55] The guardian took a neutral position in the written submissions on the issue whether to reopen the permission to appeal. Miss Hodgson in helpful written and oral submissions, reminded us of the evidence of Professor P on the

genetic issue and that the child remained in limbo during these prolonged proceedings.

THE MEDICAL EVIDENCE AND THE CONCLUSIONS OF PROFESSOR D

[56] Any appraisal of Professor D's contribution must include all three of his reports. His first states in the introduction:

> 'On 30th June 2004 I was approached by (the applicant's solicitor) to ask if I would be willing to read the Court of Appeal judgment and prepare a short commentary in which I would analyse the judgment in medical (rather than legal) terms insofar as it relates to the case of *Layla Uddin*. My sole source of information about the care proceedings is the judgment of the Court of Appeal.'

[57] The following are the themes developed by Professor D. (a) The danger of assessing the four admissions in the context of a pattern. (b) The shortcomings of research studies published by Professor Sir Roy Meadow and Dr Southall. (c) The relevance of genetic factors. (d) The need to distinguish between the differing specialities and sub-specialities in paediatrics leading to the question: were the experts at trial suitably qualified? (e) The huge importance of history taking. Within this last theme Professor D says of his own work:

> 'Using the simplest of clinical tools, namely taking a history from a Mother and examining a child, tools which have been refined over many years of clinical practice, it is uncommon for one to be unable to make some new contribution to any problem.'

[58] There can be no doubting that Professor D's stance on 11 July was to question the qualification of the experts and the validity of their contributions both clinically and forensically. At this stage the theory of GOR was raised in paras 40 and 66 but assumed no prominence.

[59] Professor D's second report dated 30 August throughout stressed its preliminary character. In para 7 he wrote: 'I am concerned about the exceptional brevity and incomplete nature of this report, an inevitable consequence of the extreme urgency of the situation, namely the impending adoption of the child.'

[60] Again the final section headed preliminary conclusions opens thus:

> 'Still required (from me) is a detailed analysis of the four episodes that have been hitherto attributed to intentional suffocation, to look in greater depth at the history obtained at the time, the examination findings, and the results of the investigations that were performed.'

[61] Anyone giving due weight to those qualifications would surely have expected the completion of the forensic task, upon which the application solely depended, both within the court's timescale and to enable his professional colleagues, whose work he was indicting, to know with clarity what criticisms they had to meet.

[62] That said it is relevant to identify the main themes of the second report. (a) The extent and the quality of the history that the Professor had obtained from the parents during a lengthy (five-hour) meeting. (b) The significance of GOR. (c) Deliberate suffocation and fabrication of illness. (d) Genetics.

[63] In his conclusions Professor D explained why 'important preliminary points' contra-indicated intentional suffocation. He then criticised his colleagues either for having failed to take a history or for having taken an inadequate history. In his final paragraph he offered his preliminary conclusion that there were three possible explanations for the four episodes of which GOR was 'in terms of the available medical information, the most probable'.

[64] We have already explained the circumstances in which Professor D's final report came to be submitted. In para 4 he wrote:

> 'Between submitting my report on 30th August 2004 and the experts meeting on 25th November 2004, I have undertaken additional work on the case and on the issues that arise. This work partly comprised reading additional papers and reports, but mainly consisted of studying various aspects of the medical literature.'

[65] However he continued to stress that even this report did not merit description as final. In para 8 he said: 'I have not yet had an opportunity to cross check my findings and my analysis with the new Court bundles and with the transcript of the entries in the medical records.'

[66] In the next paragraph he wrote: 'In the light of this additional data it has been put to me that my analysis of the records needs to be revisited and completed, and I accept this.'

[67] Furthermore the penultimate section of his report was headed 'Further Work Needed' and over the course of the two following pages he identified the need for an agreed set of records, study of the relationship between GOR and ALTE, together with further examination of genetics.

[68] Viewing these three reports together there emerges a distinct impression of a busy specialist who never quite finds the time to complete the task. Given that the mother's application had been previously refused, with the consequence that she was reduced to such prospects as the decision in *Taylor v Lawrence* afforded her, crucial to her success was a thorough, complete and convincing expert opinion. It might be said that Professor D's contribution lacks any of those characteristics. However we must not overlook the fact that in writing his third report Professor D had been given the clearest indication from the moderator that the hearing on 8 December was likely to be but the preliminary to a final hearing in the Court of Appeal in 2005.

[69] Whilst we appreciate that Professor D was entitled to restrict his contribution to matters purely medical, his elevation of the history which he had obtained from the parents as a proper foundation for his preliminary conclusion that GOR was the most probable explanation has to be questioned. Was it realistic given that the mother's evidence had been rejected as untruthful at the trial, not just on details concerning the child's admission, but across a wide front? However in fairness to Professor D we must note that in his final report he wrote:

> 'I appreciate that aspects of the family's behaviour have been a cause for concern, and I imagine that further information about this may be found in the papers relating to the disposal hearing, which have not been disclosed to me. However these are not medical matters and the significance of these aspects when it comes to considering the cause of the A.L.T.E can only be a matter for the court.'

GOR

[70] What then of Professor D's opinion that the most probable cause of the ALTE episodes was GOR? Since that was not an argument raised during the course of the previous application for permission to appeal, it is necessary to return to the medical evidence before the trial judge.

[71] Professor H in his report of 22 May 2002 dealt with GOR at para 7. He stated:

> 'As stated above, gastroesophageal reflux, from the stomach into the oesophagus and pharynx, has been suggested as a possible factor leading to airway obstruction in young infants. Gastroesophageal reflux is a commonly observed phenomenon in infants with many cases remaining asymptomatic and most improving spontaneously. It is clear that the presence of acid in the larynx can lead to airway obstruction and to so-called mixed apnoeas (a combination of obstruction and depression of the respiratory drive). However, most recent evidence refutes gastroesophageal reflux as a cause of apnoeas in infants presenting with apparent life threatening episodes and it appears likely that it is a chance association. I note that L was not investigated for gastroesophageal reflux. In my opinion, this is appropriate given the evidence, but even were this to be contemplated at this stage, its presence or absence would not be helpful in determining the cause of earlier events.'

[72] Subsequently there was a meeting of the experts chaired by the guardian ad litem who dealt with a series of agreed questions. This was question 5:

> 'Is G.O.R. a possible explanation of the reported/presenting symptoms in relation to these episodes? Would such symptoms be likely to be episodic and/or potentially self-resolving had they been caused by such means?'

[73] There followed an exchange of views between the three experts on the relevance of GOR, its mechanism, and the debate in the scientific literature on the relationship between GOR and apnoea. It is quite clear that none of the three answered the first question in the affirmative. This consensus led to Bracewell J recording amongst the conclusions of the experts: 'The possible medical conditions considered, being GOR, Laryngeal Malacia and Trachea Malacia, are all much less likely than abuse to explain L's pattern of illness.'

[74] In reaching this opinion the experts naturally concentrated on the contemporaneous records, containing the statements of the parents about Layla's health, together with the observations of the healthcare professionals. There is no doubt that the contemporaneous records do not support a diagnosis of GOR. The transcript of the meeting on 25 November 2004 contains this statement from Professor D:

> 'I would not have diagnosed reflux on the basis of the records that Dr D has very carefully gone through—all the occasions when vomiting was or was not mentioned. On the basis of that information alone, I would not have made a diagnosis of reflux.'

[75] A few pages earlier in the transcript Professor D stated that his diagnosis was 'based totally on the history of the parents'.

[76] Those concessions led to the obvious challenge which appears from this passage in the transcript which merits full citation:

> 'THE CHAIRMAN: Do you want to come to it now and deal with it? Because I think we had been looking at the contemporaneous records, and Dr D seems to have applied himself to that. You may feel that as you have not had the opportunity to look at the records, you do not want to come into the discussion on that. I am in your hands really.
>
> PROFESSOR D: I think I have already responded, in that Dr R put me on the spot and pointed out that his understanding of the contemporaneous ... pointed out that there were contemporaneous records. I cannot remember how he worded it, but I said that I would not have diagnosed reflux on the basis of those written records. It does not include the health visitor ones necessarily, but I was really referring to the hospital ones. So I have answered your question?
>
> DR R: Yes, I think you said it was a normal child, on the basis—
>
> PROFESSOR D: I would not have diagnosed reflux on the basis of those records.
>
> THE CHAIRMAN: Do you want to come back?
>
> DR D: T, do you feel that the absence of reference to abnormal vomiting in the contemporaneous records in any way undermines what the parents told you in July?
>
> PROFESSOR D: That is a very good question, but I think it really gets to the issue that, as you rightly pointed out in your excellent report, it is really going to be a matter for the court to decide on the reliability of the parents' history. And I do not want to stray into that territory, because I think that is a matter for the judge rather than for me, as I understand it.
>
> THE CHAIRMAN: Well, if I may say so, I think that is a perfectly proper stance to take, that you are not here to evaluate the account that was given to you. And that is a job for outside. I think that may be so.'

[77] In her skeleton argument Miss Rowe included a table contrasting the stark difference between the parent's account to Professor D in August 2004, covering Layla's state of health from birth to age four-and-a-half months, with the contemporaneous records. The records clearly show that, apart from a brief attack of gastro-enteritis in mid-August and another in mid-November, there is not only no record of Layla vomiting but specific entries of an absence of vomiting in mid-September and mid-October 2001. On the final occasion that Layla was admitted to hospital on 13 October 2001, she remained on the paediatric ward for about 21 days and during that period there were only two occasions of vomiting recorded.

[78] Finally it must not be overlooked that a causative link between GOR and ALTE is still not scientifically established. It is enough to quote a concession made by Professor D at the meeting of 25 November recorded at p 79 of the transcript. He said:

> 'It does seem to me an important issue that has been raised, quite rightly, by Dr H as to whether there is a causal relationship between reflux and ALTEs. And he and others have questioned that. That is a scientific question that is at the heart of, if you like, my argument. Because if the science is there is no causal link, then it becomes irrelevant.

Now, I have already done some work on this, and it is a very complex area. And I believe more work needs to be done, because I think Dr H has quite rightly put his finger on a very important question, and it seems to me that the court needs to have an attempt of an answer to that question.'

[79] The needs of this child cannot be postponed nor subordinated to future scientific research and debate.

CREDIBILITY OF THE PARENTS

[80] An essential element of the new information provided to us is based upon the accounts of both parents to Professor D. This required their accounts of the state of health of Layla to be believable and acceptable. It is clear that their accounts to Professor D were not consistent with the contemporaneous medical evidence.

AMBULANCE RECORDS

[81] These are transcripts of conversations between the ambulance teams and the mother at the times of the four admissions of Layla to hospital. The records are said to cast doubt on two adverse findings of Bracewell J in her judgment. In relation to finding 1, on 5 August the report of the ambulance crew, timed 20.41, stated: 'Severe respiratory distress ... breathing problems ... unconscious ... no breathing.'

[82] The mother in her oral evidence said that she had told the ambulance crew that the baby was not breathing. Without that recently acquired information the judge found, on the basis of the ambulance record, timed 20.48, which referred to 'colic' and other symptoms but not to 'no breathing', that the mother had given a different picture to the ambulance crew from that given to the hospital. With the new evidence, the adverse conclusion drawn by the judge as to the evidence of the mother on that point was not justified. The second finding is unclear and does not, in our view, support the challenge to the finding of the judge.

[83] We accept, reading the ambulance team's transcript, that Bracewell J was not justified in making her first adverse finding. But her assessment of the behaviour, demeanour and credibility of the mother gathered from hearing the entire first part of the case were so obvious and so extensive that a single incorrect finding on the basis of one incident cannot by itself undermine the findings of lack of credibility of the mother. Kirkwood J's assessment of the lack of credibility of the father and continuing lack of credibility of the mother is a vital part of the reconsideration by this court of all the relevant factors.

[84] Given that the parents were rejected as truthful witnesses and then found to have perpetrated a deception on the local authority, it would be particularly dangerous to prefer a belated account given in the circumstances that it was. It is thus apparent that the edifice of Professor D's opinion is built on sand rather than rock.

GENETICS

[85] The possibility of a genetic origin to Layla's condition was considered prior to the hearing before this court. Professor P wrote a report, dated 21 February 2004 in which he considered that he would not be able to state that on the balance of probabilities there was a genetic cause and added that 'the family history is unsubstantiated and needs to be treated with great caution'.

[86] In our first judgment we accepted that advice. Journalists from the BBC became involved in this case and made further inquiries in Bangladesh. A journalist, believing that Layla had suffered from fits which necessitated admission to hospital, video-recorded a three-year-old cousin of the mother, called Tariq, suffering a fit in front of him. An explanation of the fit was given by Tariq's mother to the effect that he suffered fits when he had a fever. These fits were diagnosed as febrile convulsions. His grandmother and other relatives described how other infants in the family suffered from unexplained fits. According to the journalist the family claimed more than 30 infant deaths in the family going back four generations.

[87] This further information remained imprecise and incomplete and was, in our judgment, insufficient to cast doubt on the conclusion of the Court of Appeal [2004] 2 FCR 257 at [83] of the first judgment of the court.

THE EVIDENCE OF PROFESSOR G

[88] She is an experienced paediatric epidemiologist. She commented in her evidence on two papers referred to and relied upon by Dr D in his original report dated 27 February 2002 and at the experts' first meeting on 6 September 2002, both in the evidence considered by Bracewell J. Paper A was a report on a study by three paediatricians in association with the British Paediatric Association on the epidemiology of Munchausen Syndrome by Proxy, non-accidental poisoning and non-accidental suffocation. Paper B was a follow-up of the children referred to in Paper A. Professor G was critical of the methodology of the study and the lack of detail and of verification. She reminded us that, while it was important to recognise that parents did harm their children, it was also important to recognise that there were many children with disorders for whom no cause could be found. She suggested that there was a temptation for some health professionals to make assumptions adverse to the family. In summary, in her view, the two papers were no better than anecdotal reports and were not a scientifically valid approach to get at the truth of what might or might not have been happening.

[89] In response Dr D explained that the two papers had passed through the peer review process of the editorial committee of *Archives of Disease in Childhood* before publication. He agreed that, in common with most scientific papers, they had deficiencies and the comments of Professor G were in some respect valid. But they had to be seen in the wider context of the available and practical methodologies in the study of child abuse. This was the only research they had. In his opinion the papers had limitations which related in the main to the difficulties of prosecuting research in the area of child abuse. He did not consider that they misled but believed that they made a considerable contribution to the knowledge in this field.

[90] We do not consider that this additional evidence from Professor G is of sufficient importance to justify by itself a review of the case nor does it add sufficient weight to the other evidence to which we have referred above.

THE EVIDENCE OF PROFESSOR H

[91] Professor H wrote a paper in *Paediatric and Perinatal Epidemiology 2004* on 'Multiple sudden infant deaths—coincidence or beyond coincidence?' He cast doubt on the use of statistics in the *R v Clark* trial. Although the article does not relate directly to the child Layla Uddin, the subject of Professor H's paper does bear at least some relevance to the issues in this case. He was instructed

by the solicitor for the mother to prepare a report on statistical aspects relating to multiple events and the evidence of Dr D and Dr R. Professor H's report questioned the statistical evidence given by Dr D and Dr R and cited in the judgment of the court of 14 May 2004 and contended that, although inadvertent, the evidence relating to statistics was misleading. The basis of this contention is formed from Professor H's statistical work on sudden infant deaths transferred onto the occurrences at issue in this case.

[92] Professor H refers to evidence of Dr D ([2004] 2 FCR 257 at [69]) that 'if you have two cot deaths, the relevant probability between that being natural causes or abuse is roughly 50:50' and contends that it is at odds with the statistics he has comprised from his work of multiple sudden infant deaths. Although perhaps compelling at first glance, Professor H does concede the obvious question when his report notes:

> 'How do cot death statistics relate to the present case? In the absence of relevant data it is impossible to say whether the relative probabilities for natural: abuse in cases of sudden infant deaths would transfer to similar ratios for episodes of the sort experienced by child Layla Uddin. But there is no reason to suspect that they would be vastly different.'

[93] Professor H similarly questions an exchange with Dr R concerning statistics ([2004] 2 FCR 257 at [53]). Dr R states that the number of cases of first presentation to hospital which lead to a second presentation is 'much less than 1 in 20'. Although Professor H's eventual contention is that the line of questioning regarding a third or fourth time is worrying in that it suggests that low re-admission rates are a measure of likelihood of abuse and might be misinterpreted, he does concede that as to the '1 in 20' figure, he has 'no reason to take issue with this figure'.

[94] We do not consider that in this case the issue of statistics was central to the decision nor that the evidence of Professor H is of sufficient weight to justify a reopening of the permission to appeal.

CONCLUSION

[95] In conclusion we do not consider that sufficient doubt has been cast on the evidence of the three medical witnesses at the hearing before Bracewell J to justify a reopening of the medical issues. The serious lack of credibility of both parents casts such doubt on the account given by the parents to Professor D at a late stage, inconsistent as it is with contemporaneous medical records, that it does not begin to surmount the high hurdle required by CPR 52.17. For the reasons set out above, we were satisfied that the issues raised on the further application came nowhere close to the principles laid down in *Taylor v Lawrence* [2002] 2 All ER 353, [2003] QB 528 and that no significant injustice had occurred. There were therefore no grounds upon which permission to reopen the appeal should be granted.

COMMENTS ON THE ROLE OF GUARDIAN

[96] We have set out above the steps taken by the solicitor for the mother to exclude the guardian from playing any part in the further experts' meeting, even to the extent of indicating that she should not even attend the meeting. We should like to express our concern that the local authority should have remained relatively neutral on this point and that the guardian does not appear to have made a strong objection to this attack on her impartiality. We should

like to make it clear that in the view of the court there were no grounds revealed in the papers which justified the removal of the guardian from her traditional role nor from playing any further part in the case had it gone further. Equally there would appear to be no grounds advanced for the suggestion in the letter of 29 October from Mrs Harman (see above) that the solicitor for the child should consider her position.

[97] We are also concerned that the approach adopted by Mrs Harman might reflect that taken by other solicitors acting for parents in these difficult and fraught cases. We feel therefore that some comments should be made about the functions and role of the guardian of a child in a care application in order to remind the legal advisers as to the unsuitability of the course adopted in this case and with the hope that it may in future avoid a repetition of misunderstandings as to the guardian's role.

[98] In the Children Act 1989 the role of the guardian of the child is crucial. A guardian is appointed to represent the child unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests (see s 41(1)). The Family Proceedings Rules 1991, SI 1991/1247 (FPR) and the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, SI 1991/1991 set out in detail the statutory requirements of a guardian, usually appointed from CAFCASS. A guardian is appointed unless the court is satisfied that it is not necessary to do so to safeguard the child's interests. Rules 11 and 11A (FPR), for example, provide for the powers and duties of a guardian which continue for such time as is specified in the appointment or until terminated by the court (see r 10(9)). The independence of the guardian is underlined by the exclusion of anyone who comes within the provisions of r 10(7), such as a person employed by the applicant local authority. This independence on behalf of the child is an essential element in the hearing of a care application. The court is entitled to rely upon and does rely upon the investigations of and pays close attention to the recommendations of the guardian who looks at the case from an impartial and objective standpoint. The guardian has a duty to form a view of the application and, where appropriate, to recommend a course honestly believed by the guardian to be in the best interests of the child he/she represents, whether it be to advise the return of the child to the family or to advise the removal of the child permanently from the natural family.

[99] A party is not entitled in a private law dispute to have the court welfare officer removed from the case (now the CAFCASS reporter) on the ground that the report is favourable to the other party. In the same way a party in a public law case is not entitled to attempt to dispense with the guardian or to sideline or marginalise the guardian on the ground that in an earlier part of the case, the guardian's recommendation had been adverse to that party (see generally independence of court welfare officer and guardian in *Re S (a minor) (care proceedings: reports)* [1992] 2 FCR 554). Other than in exceptional circumstances of specific bias or impropriety, the independence of the guardian may not be impugned as a result of the decision of the guardian to support the proposed care plan of the local authority.

[100] In the present case, the guardian at an earlier stage had chaired the experts' meeting which was a normal procedure in a difficult case. There was no good reason to exclude her or her solicitor from the neutral role of chairing the later experts' meeting in which Professor D participated. To do so was to misunderstand and to diminish the role of the guardian. We are surprised that

the guardian and the local authority did not demur more strongly at an expensive and unnecessary alternative to the use of the guardian or her solicitor as chairman. The cost of inviting Sir Philip Otton to chair the meeting and to make himself familiar with all the papers added extra cost to the public purse, one which neither the local authority nor the Legal Services Commission should have been asked to bear.

Application dismissed.

Celia Fox Barrister.

Leeds City Council v Price and others

[2005] EWCA Civ 289

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, BROOKE AND SEDLEY LJJ

2, 16 MARCH 2005

Local authority – Land – Right to respect for private and family life – Gipsies occupying local authority land without licence or consent – Local authority seeking possession order – Whether breach of right to respect for private and family life – Human Rights Act 1998, s 2, Sch 1, Pt I, art 8.

The claimant local authority brought possession proceedings against the defendants who were gipsies, in as much as that definition covered those who lived in caravans or trailers and who, regularly or occasionally, travelled from place to place with their homes. A preliminary issue arose as to whether, where a public authority demonstrated that it had an absolute right to possession of land, a defendant could raise by way of defence to an action for an order for possession of that land a plea that the obtaining of possession would infringe his rights under art 8[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Article 8(1) guaranteed the right to respect for, inter alia, a person's home, and art 8(2) provided that interference by a public authority with the exercise of the right might only be such as was in accordance with the law and necessary in a democratic society for, inter alia, the protection of the rights and freedoms of others. The judge answered the question in the negative, holding that he was bound to do so by a decision of the House of Lords, and rejecting the defendants' submission that that decision was incompatible with a subsequent decision of the European Court of Human Rights. The defendants appealed. The claimant argued that the decision of the Court of Human Rights demonstrated only that English law dealing with a local authority's right to recover possession of land forming part of a site provided by the local authority to meet the needs of gipsies was not compatible with the convention. The defendants contended that, if the Court of Appeal were to conclude that the two decisions were incompatible, that it should follow the decision of the Court of Human Rights in order to satisfy the obligation under s 2[b] of the 1998 Act to take into account the decisions of that court.

Held – (1) The decision of the Court of Human Rights was incompatible with the proposition that the exercise by a public authority of an unqualified proprietary right under domestic law to repossess its land would never constitute an interference with the occupier's right to respect for his home, or would always be justified under art 8(2) of the convention. The reasoning of that decision could not be confined to the treatment of gipsies. The decision of the Court of Human Rights did not exclude the possibility that a particular statutory regime could of

a Article 8 is set out at [4], below

b Section 2, so far as material, provides: '(1) A court ... determining a question which has arisen in connection with a Convention right must take into account any—(a) judgment [or] decision of the European Court of Human Rights ...'

itself achieve the balance required by art 8(2), so that, if the judge complied with it, the requirements of art 8(2) would be satisfied, and equally, it did not exclude the possibility that, if a statutory regime was to comply with the convention, it had to require a public authority to weigh in the balance the import of its actions on the individual affected and permit the individual affected to challenge in the courts the conclusion reached by the public authority. Accordingly, the decision of the Court of Human Rights could not be treated as simply identifying a discrete exception to the general rule propounded by the majority in the House of Lords; the decision of the Court of Human Rights was incompatible with the House of Lords decision (see [26]–[30], below); *Connors v UK* (2004) 16 BHRC 639 considered.

(2) In the absence of any change in circumstances the principle of legal certainty required, where a decision of the Court of Human Rights conflicted with a previous decision of the House of Lords, that the court follow the decision of the House of Lords, and by giving permission to appeal, if sought and not successfully opposed, taking the decision of the Court of Human Rights into account to that extent (see [31]–[33], below); *Harrow London BC v Qazi* [2003] 4 All ER 461 followed.

Notes

For the convention rights and their interpretation, see Supp to 8(2) *Halsbury's Laws* (4th edn reissue) para 104A.1, and for the right to respect for private and family life, home and correspondence generally, for respect for home in particular, and for what constitutes respect and interference, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149, 152, 154, 155.

For the Human Rights Act 1998, s 2, Sch 1 Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 678, 707.

Cases referred to in judgment

Buckley v UK (1996) 23 EHRR 101, [1996] ECHR 20348/92, ECt HR and E Com HR.

Chapman v UK (2001) 10 BHRC 48, ECt HR.

Connors v UK (2004) 16 BHRC 639, ECt HR.

D v East Berkshire Community Health NHS Trust, K v Dewsbury Healthcare NHS Trust, K v Oldham NHS Trust [2003] EWCA Civ 1151, [2003] 4 All ER 796, sub nom *D v East Berkshire Community NHS Trust, MAK v Dewsbury Healthcare NHS Trust, RK v Oldham NHS Trust* [2004] QB 558, [2004] 2 WLR 58; *affd* [2005] UKHL 23, [2005] 2 All ER 443, [2005] 2 WLR 993.

Harrow London BC v Qazi [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983, [2003] 3 WLR 792; *rvsd* [2001] EWCA Civ 1834, [2002] HLR 276.

Kay v Lambeth London BC [2004] EWCA Civ 926, [2005] QB 352, [2004] 3 WLR 1396.

R v Central Criminal Court, ex p Bright, R v Central Criminal Court, ex p Alton, R v Central Criminal Court, ex p Rusbridger [2001] 2 All ER 244, [2001] 1 WLR 662, DC.

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.

Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson [2002] EWCA Civ 4, [2002] LGR 467.

X (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Cases referred to in skeleton arguments

Birmingham City Council v Bradney, Birmingham City Council v McGann [2003] EWCA Civ 1783, [2003] All ER (D) 163 (Dec).

R (on the application of McLellan) v Bracknell Forest BC, Reigate and Banstead BC v Benfield [2001] EWCA Civ 1510, [2002] 1 All ER 899, [2002] QB 1129, [2002] 2 WLR 1448.

Appeal

The defendants, Kim Maloney, Ellen Maloney, Patrick Maloney, Kathleen Maloney and Patrick Maloney, appealed with permission of Judge Bush sitting as a deputy judge of the High Court from his decision 25 October on a preliminary issue, set out at [1], below, in proceedings brought by Leeds City Council against Sean Price, F Smith and persons unknown for possession of land at Spinkwell Lane, Wakefield. The appellants had defended those proceedings and subsequently been joined formally. The proceedings were transferred from the Leeds County Court to the High Court. The facts are set out in the judgment of the court.

Alex Offer (instructed by *Davies Gore Lomax*, Leeds) for the appellants.

Ashley Underwood QC and *Tom Tyson* (instructed by *Nicole Jackson*, Leeds) for the council.

Cur adv vult

16 March 2005. The following judgment of the court was delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR.

INTRODUCTION

[1] Where a public authority demonstrates that it has an absolute right to possession of land, whether under relevant statutory provisions or, if there is none, at common law, can a defendant raise by way of defence to an action for an order for possession of that land a plea that the obtaining of possession will infringe his rights under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)? That is the important preliminary issue raised before Judge Bush, sitting as a deputy judge of the High Court in proceedings transferred from the Leeds County Court. In a judgment delivered on 25 October 2004, Judge Bush answered that question in the negative, holding that he was bound so to do by the decision of the House of Lords in *Harrow London BC v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983. He granted leave to appeal.

[2] The appellants had submitted that *Qazi*'s case was incompatible with a subsequent decision of the European Court of Human Rights (the Strasbourg Court), *Connors v UK* (2004) 16 BHRC 639 and that the court was bound to follow *Connors v UK* rather than *Qazi*'s case. Those submissions have been repeated by Mr Alex Offer in this court. Judge Bush rejected them, holding that *Qazi*'s case was not incompatible with *Connors v UK* and that he was bound

to follow *Qazi*'s case. We have to consider two questions. Is *Qazi*'s case incompatible with *Connors v UK*? If so, which decision should we follow?

THE FACTS

[3] The appellants (the Maloneys) are members of the Maloney family. They are gipsies in as much as that definition covers those who live in caravans or trailers and who, regularly or occasionally, travel from place to place with their homes. The respondent, Leeds City Council (the council), is the freehold owner of land at Spinkwell Lane, Wakefield. The council contends that this is recreational land used as a football pitch by a local football team and others, although this is not admitted. On or about 24 May 2004 that land was occupied by a group of gipsies. By 2 June some had moved on and others had arrived. On 13 June the Maloneys moved onto the land. On 15 June the council commenced proceedings in Leeds County Court for possession of the land. On 24 June the matter came before the court where the Maloneys identified themselves as being in possession of the land. On 22 September 2004 the action was transferred to the High Court.

THE ISSUES RAISED IN THE ACTION

[4] The council's title to the land is not in dispute. Nor is it disputed that the Maloneys entered onto and remained in occupation of the land without any licence from or consent of the council. Mr Offer accepted that their only defence to the claim for possession lay in their assertion that this would infringe their rights under art 8 of the convention. Article 8 provides:

> '(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right, except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[5] The following questions can arise in respect of the application of art 8 in a case such as this. (i) Can art 8 ever be infringed by a claim to possession of land by a public authority that has, art 8 apart, an absolute right to possession? If so: (ii) does English domestic law provide protection of the art 8 rights of a defendant facing a claim for possession of the land on which he has his home? If so: (iii) under what procedure is that protection available and is the protection adequate? These questions are framed with reference to a landowner which is a public authority. Such a landowner is directly affected by the obligation contained in s 6(1) of the 1998 Act to act in conformity with the convention. The extent, if any, to which the matter with which we are dealing affect private landowners is outside the ambit of this appeal. The council took two points in response to the Maloneys' defence. First they challenged the jurisdiction of the court, which was, at that stage, the county court. They contended that the function of the county court was restricted to determining whether the council was, in private law, entitled to possession. The Maloneys were seeking to challenge, on public law grounds, the council's decision to seek possession. The county court had no jurisdiction to rule on such an issue. It should properly have been raised by an application for judicial review in the High Court.

[6] So far as the substance of the defence was concerned, the council contended that *Qazi*'s case established that art 8 could not be raised to defeat contractual or proprietary rights to possession. *Connors v UK* was a decision on special facts which did not put in doubt the authority of *Qazi*'s case.

WHAT DID *QAZI*'S CASE DECIDE?

[7] In *Qazi*'s case the local authority, as freehold owners of a house, brought proceedings for possession in the Watford County Court. In 1992 they had leased the house to Mr Qazi and his wife as joint tenants under a secure tenancy, subject to the provisions of the Housing Act 1985. In 1999 the wife, having left Mr Qazi, gave the local authority notice bringing the tenancy to an end in accordance with its terms. The local authority asked Mr Qazi to leave the premises, but he refused to do so. He continued to live in the house, latterly with a new wife whom he married in July 2000 and her five-year-old son. Before the proceedings were brought the 1998 Act came into force. Mr Qazi pleaded by way of defence that the local authority, in seeking possession, were infringing his rights under art 8 and that the court would also do so if it made the order sought. Mr Recorder Williamson, before whom the action came, dismissed this defence and made a possession order. He held that, once the wife's notice had terminated the tenancy, Mr Qazi had no legal or equitable interest in the house, which consequently ceased to be his home within the meaning of art 8(1). Accordingly that article was not engaged. Mr Qazi appealed successfully to the Court of Appeal, which ordered that the matter should be remitted to the county court for consideration of whether the local authority could justify under art 8(2) their interference with Mr Qazi's right to respect for his home (see [2001] EWCA Civ 1834, [2002] HLR 276).

[8] The local authority appealed to the House of Lords. It is relevant to consider both the minority and the majority opinions, for it is Mr Offer's submission that the minority were vindicated by *Connors v UK*. All five members of the Committee agreed that the house remained Mr Qazi's home, for the purpose of art 8, while he continued to live there as a trespasser. To that extent they endorsed the judgment of the Court of Appeal. The remaining issues were (i) whether the act of the local authority in seeking possession of their house in accordance with their proprietary right infringed Mr Qazi's *right to respect* for his home and, if so, (ii) whether the fact that they were asserting a clear proprietary right meant, inevitably, that they could justify their action under art 8(2), so that there was no arguable defence to be tried.

[9] Lord Bingham of Cornhill and Lord Steyn would have dismissed the appeal. They were not prepared to accept that, if domestic law accorded to a local authority an absolute proprietary right to possession of land, the assertion of that right could never constitute an interference with the right to respect for the home of an individual living on that land. Each cited with approval the following passage of the judgment of Laws LJ in *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4, [2002] LGR 467:

> '[27] Before proceeding to the issues arising under article 8(2), I should make it clear that I entertain what is perhaps a deeper reason for my view that the case cannot be concluded by a judgment that there is no violation of article 8(1). It concerns the relationship between the two paragraphs of article 8. I have held that eviction of these tenants would constitute a prima facie violation of their right to respect for their homes. But this conclusion is not simply an instance of that everyday judicial process, the

application of a statute's correct construction (here, article 8(1)) to a particular set of facts. Rather it has a purposive quality. The court has to arrive at a judicial choice between two possibilities, a choice which transcends the business of finding out what the legislation's words mean. The first choice ... would entail a judgment that the Convention requirement was met at the article 8(1) stage ... The second choice (accepting a prima facie violation of article 8(1)), which I prefer, entails a judgment that the more rigorous and specific standards set out in article 8(2) have to be met if the court is to hold that the evictions are compatible with the tenants' Convention rights. The Convention is, as it were, much more remotely engaged in the fabric of our domestic law if the first, rather than the second, choice is taken. Part of the court's task is to decide how close that engagement should be in the context in hand. Thus I do not eschew the first choice merely because I take the view that the second more naturally reflects the ordinary sense of the words used in article 8(1). I consider as a matter of substance that the vindication and fulfilment of the Convention rights, for which purpose of the Human Rights Act 1998 was enacted, require that the domestic law procedures involved in these appeals should be subjected to scrutiny for conformity with the article 8(2) standards. Such a process is demanded by the fullness of our municipal law of human rights.'

Lord Bingham and Lord Steyn would have remitted the case to the county court judge. It seems to us implicit in this that they considered that, despite the relevant statutory provisions, it would have been open to the judge to decline to make an order for possession having regard to the impact that this would have had on Mr Qazi and his family.

[10] Lord Hope of Craighead's conclusions appear from the following sentences extracted from a speech which analysed at length the Strasbourg jurisprudence:

'[78] ... My understanding of the European jurisprudence leads me to the conclusion that art 8(2) *is* met where the law affords an unqualified right to possession on proof that the tenancy has been terminated.

[84] ... the Strasbourg jurisprudence has shown that contractual and proprietary rights to possession cannot be defeated by a defence based on art 8. It follows that the question whether any interference is permitted by art 8(2) does not require, in this case, to be considered by the county court.' (See *Harrow London BC v Qazi* [2003] 4 All ER 461.)

[11] The reasoning of Lord Millett was similar, and appears in the following passages of his speech:

'[101] ... In most cases art 8(2) calls for a balance to be struck between the applicant's right to "respect" for his home and some competing public interest ... But art 8(2) also permits interference with the right where it is necessary "for the protection of the rights and freedoms of others. Those others include but are not limited to private citizens. They include landowners whether they are private citizens or public authorities ...

[103] ... The premises were Mr Qazi's home, and evicting him would obviously amount to an interference with his enjoyment of the premises as his home. But his right to occupy them as such was circumscribed by the terms of his tenancy and had come to an end. Eviction was plainly necessary to protect the rights of the local authority as landowner. Its obligation to

"respect" Mr Qazi's home was not infringed by its requirement that he vacate the premises at the expiry of the period during which it had agreed that he might occupy them. There was simply no balance to be struck ...

[107] ... there is no lack of respect, and no infringement of art 8, where the order is made in favour of the person entitled to possession by national law.'

[12] Lord Scott of Foscote was more categoric in holding that the exercise of absolute proprietary rights could never amount to interference with the right to respect for the home of a person infringing those rights. The following passages illustrate his reasoning:

'[125] ... If ... the tenant has no right to remain in possession as against the landlord he cannot claim such right under art 8. To hold otherwise, to hold that art 8 can vest property rights in the tenant and diminish the landlord's contractual and property rights, would be to attribute to art 8 an effect that it was never intended to have. Article 8 was intended to deal with the arbitrary intrusion by state or public authorities into a citizen's home life. It was not intended to operate as an amendment or improvement of whatever social housing legislation the signatory state had chosen to enact. There is nothing in Strasbourg case law to suggest the contrary.

[145] ... How could the termination of that tenancy in a manner consistent with its contractual and proprietary incidents be held to constitute a lack of respect for the home that had been thus established? The home was always subject to those contractual and proprietary incidents. The contrary view seems to me to treat a "home" as something ethereal, floating in the air, unconnected to bricks and mortar and land.

[146] ... It is true that in a number of cases the Strasbourg tribunal (whether court or Commission) has held art 8 to be prima facie applicable but has held the "interference" constituted by the claim or the order for possession to be justified under art 8(2). But there is no case in which this conclusion has been reached by considering the degree of impact on the tenant's home life of the eviction. There is no case in which a balance has been struck between the tenant's interests and the landlord's rights. In every case the landlord's success has been automatic. And so it must be unless art 8 is to be allowed to diminish or detract from the landlord's contractual and proprietary rights. In my opinion, the Strasbourg jurisprudence has shown, in effect, that art 8 has no relevance to these landlord/tenant possession cases.'

[13] Thus all three of the majority held that, under the Strasbourg jurisprudence, the exercise of an absolute proprietary right to possession could not infringe art 8. Implicit in this conclusion was the premise that the English domestic law which conferred the absolute right to possession was, itself, compatible with convention rights. Indeed Lord Hope expressly observed at [74] that no suggestion had been made to the contrary and that, had it been, it would not have been sustainable 'in view of the fundamentally subsidiary role of the convention, which gives special weight to the role of the domestic policy maker'. It may also be observed that, while there was a majority for the dismissal of the appeal, there was no majority ratio. Unlike Lord Hope and Lord Millett, Lord Scott considered that art 8 was not engaged at all.

[14] Each of the majority made observations to the effect that any objection on grounds of public law to the exercise by a public authority of its private law

right to recover possession of its property had to be advanced in judicial review proceedings, rather than by a defence to the possession action itself. None however stated in terms that, if an objection to the authority's action lay under the 1998 Act, it had to be advanced in judicial review proceedings rather than by a defence to the possession action in the county court.

[15] Lord Steyn began his vigorous dissent with the following observation:

> '[27] It would be surprising if the views of the majority on the interpretation and application of art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as incorporated into our legal system by the Human Rights Act 1998, withstood European scrutiny.'

Mr Qazi in fact made an application to the Strasbourg Court and it was ruled inadmissible. Mr Underwood QC for the council suggested that this implicitly endorsed the reasoning of the majority of the House of Lords. Without sight of the reasons given for rejecting Mr Qazi's application we do not think it would be safe to draw this inference. Petitions processed by the registry and recommended by a lawyer for dismissal in limine go in batches of 50 or more before a single judge of the court. The recommendation is generally adopted and communicated in a short-form letter either setting out one of the grounds specified in art 35 or simply stating that the matters complained of do not disclose any appearance of a violation of the convention. Having regard to the summary nature of this procedure, the rejection of admissibility cannot carry the same weight as a reasoned decision of the Strasbourg Court in a case that has been ruled admissible. Such a case was *Connors v UK* (2004) 16 BHRC 639.

WHAT DID *CONNORS v UK* DECIDE?

[16] Mr Connors was a gipsy, whose daughter had married into the Maloney family. His application arose out of the eviction by Leeds City Council of himself and his family from two plots that they occupied on a gipsy site run by the council at Cottingley Springs. The county court had made a possession order, which had been enforced. An application for permission to challenge the council's decision to evict the family had been made to the High Court and refused. All these events took place before the 1998 Act came into force. Before the Strasbourg court Mr Connors had the advantage of being represented by Mr Offer. He alleged that Mr Connors' treatment involved infringement of arts 6, 8, 13 and 14 of the convention. The Strasbourg Court dealt first with art 8.

[17] The Strasbourg Court (at 658) recorded a degree of common ground between the parties:

> '68. The parties were agreed that art 8 was applicable in the circumstances of this case and that the eviction of the applicant from the site on which he had lived with his family in his caravans disclosed an interference with his right to respect for his private life, family life and home.
>
> 69. The parties were also agreed, in the context of art 8(2), that the interference was "in accordance with the law" and pursued a legitimate aim, namely, the protection of the rights of other occupiers of the site and the council as owner and manager of the site.
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> 70. The question remaining for examination by the court is whether the interference was "necessary in a democratic society" in pursuit of that aim.'

[18] The English statutory regime affords a degree of security of tenure to those who make their home on a caravan site and that regime distinguishes between sites that are privately owned and those that are provided by local authorities to meet the needs of gipsies. Under the Mobile Homes Act 1983, a person who lives on a privately owned caravan site in a caravan or mobile home as his only or main residence may only be evicted by court order and on one of a number of stated grounds. These include a failure to remedy a breach of a licence agreement within a reasonable time, provided that this renders it reasonable to terminate the licence. So far as gipsy sites are concerned, under the Caravan Sites Act 1968 a local authority is given an unconditional right to terminate a licence on 28 days notice, albeit that possession may only be obtained pursuant to a court order.

[19] The council had alleged that Mr Connors' family misbehaved in such a way as to constitute a nuisance in breach of the council's licence conditions. Originally this allegation was advanced in the county court proceedings by way of justification for the possession order sought. Mr Connors disputed the allegation. In these circumstances the council decided not to pursue the allegation of breach of licence and to seek possession on the simple ground that, having terminated the licence on 28 days' notice, Mr Connors and his family had become trespassers and the council had an absolute proprietary right to possession. The county court ordered possession on this basis.

[20] Much of the debate reflected in the judgment of the Strasbourg Court related to an attempt by the United Kingdom government to justify a statutory regime which, so Mr Connors alleged, discriminated against gipsies. The government argued that the different regime was justified because its object was to cater for the desire of gipsies to lead a nomadic life by enabling local authorities to ensure that there were always places available for those who were travelling. Mr Connors argued that art 8 required the government to show that his eviction was necessary and proportionate. The council had averred that it had good reason to evict him and his family. He had challenged this assertion, but there was no procedure which entitled him to require the council to substantiate its allegations.

[21] In making its assessment the Strasbourg Court started by recognising that national authorities had a margin of appreciation in deciding when interference with art 8 rights was 'necessary in a democratic society'. It commented (at 663):

> '83. The procedural safeguards available to the individual will be especially material in determining whether the respondent state has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by art 8 ...
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> 84. The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases ... To this extent, there is a positive obligation imposed on the contracting states by virtue of art 8 to facilitate the gypsy way of life ...'

[22] The Strasbourg Court went on to apply these considerations to the case before it. It identified the issues as follows (at 663–664):

'85. The seriousness of what was at stake for the applicant is not in doubt. The applicant and his family were evicted from the site where they had lived, with a short absence, for some fourteen to fifteen years, with consequent difficulties in finding a lawful alternative location for their caravans, in coping with health problems and young children and in ensuring continuation in the children's education. The family was, in effect, rendered homeless, with the adverse consequences on security and well-being which that entails. The council, and the government in these proceedings, took the view that the eviction was justified by a breach of the licence conditions, the applicant being responsible for causing nuisance on the site. The applicant contested that he was at fault. It is not for the court however to assess in retrospect whose version of events was correct as the council in evicting the applicant relied instead on the power to give 28-days' notice to obtain summary possession without proving any breach of licence. While it was variously alleged by council officers that the applicant's licence conditions had been breached due to the unruly conduct of persons on his pitch and contended by the applicant that any problems arose from adult visitors from off the site over whom he had no control, the respective merits of the arguments were not examined in the county court proceedings, which were only concerned with the fulfilment of the formal conditions for the eviction. The central issue in this case is therefore whether, in the circumstances, the legal framework applicable to the occupation of pitches on local authority gypsy sites provided the applicant with sufficient procedural protection of his rights.

86. The serious interference with the applicant's rights under art 8 requires, in the court's opinion, particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed. The court would also observe that this case is not concerned with matters of general planning or economic policy but with the much narrower issue of the policy of procedural protection for a particular category of persons. The present case may also be distinguished from *Chapman v UK* (2001) 10 BHRC 48, in which there was a wide margin of appreciation, as in that case, it was undisputed that the applicant had breached planning law in taking up occupation of land within the Green Belt in her caravans and claimed, in effect, special exemption from the rules applying to everyone else. In the present case, the applicant was lawfully on the site and claims that the procedural guarantees procedural available to other mobile home sites, including privately run gypsy sites, and to local authority housing, should equally apply to the occupation of that site by himself and his family.'

[23] The Strasbourg Court reached the conclusion that the legal framework did not provide Mr Connors with sufficient procedural protection of his rights. It rejected the government's argument that the need to cater for gipsies' nomadic lifestyle justified a failure to give them the security of tenure enjoyed by those who lived on private caravan sites. The court did not consider *Harrow London BC v Qazi* [2003] 4 All ER 461. It did, however, consider domestic cases involving gipsies, decided after the 1998 Act had come into force, in which the courts had found that there was no infringement of arts 8 or 14. The Strasbourg Court ((2004) 16 BHRC 639 at 665 (para 91)) commented that these showed a judicial reluctance to trespass on the legislative function and that the domestic courts' position could not

therefore be analysed as providing strong support for the justification of continuing the current regime.

[24] The Strasbourg Court's conclusions appear in the following final passages (at 666–667):

> '94. However, even allowing for the margin of appreciation which is to be afforded to the state in such circumstances, the court is not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family had been sufficiently demonstrated by the government. The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community ...
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> 95. In conclusion, the court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of art 8 of the convention.'

[25] Mr Underwood's first submission in respect of the significance of the decision in *Connors v UK* was that it had none, because the case had been decided on the basis of the government's concession that art 8 was fully engaged and that the issue was whether the council's interference with Mr Connors' art 8 rights was justified under art 8(2). This was a concession that the government had previously made in domestic cases where it had intervened in support of local authorities. Mr Underwood submitted that the concession was wrongly made and that the court's decision was founded upon it. We do not accept Mr Underwood's submission on this point. The reasoning of the Strasbourg Court in *Connors v UK* was not founded on the government's concession. It is quite clear that the Strasbourg Court considered that the concession was properly made.

[26] The decision in *Connors v UK* is unquestionably incompatible with the proposition that the exercise by a public authority of an unqualified proprietary right under domestic law to repossess its land will *never* constitute an interference with the occupier's right to respect for his home, or will *always* be justified under art 8(2). To that extent *Connors v UK* is incompatible with *Qazi*'s case. Mr Underwood submitted that this was the extent of any incompatibility. All that *Connors v UK* demonstrated was that, contrary to Lord Hope's observation to which we have referred in [13], above, there was one area of English law which was not compatible with the convention, namely that area which dealt with a local authority's right to recover possession of land forming part of a gipsy site.

[27] Mr Underwood's submission receives some support from the decision of this court in *Kay v Lambeth London BC* [2004] EWCA Civ 926, [2005] QB 352, [2004] 3 WLR 1396. The primary issues in that case were whether the appellants, who were defendants to possession actions, had enjoyed the rights of secure tenants under Pt IV of the Housing Act 1985 and, if so, whether their tenancies had been lawfully terminated. One of the appellants had, however, pleaded by way of defence to the possession action reliance on arts 8, 14 and art 1 of the First Protocol of the convention. The judge struck out this defence on the grounds, inter alia, that the decision in *Qazi*'s case precluded reliance by way of

defence on art 8. This court decided that the judge had correctly ruled on the art 8 point. As Auld LJ put it:

> '[100] ... The fact is that Lambeth has an unqualified right to possession. And on the basis of the majority opinions in *Qazi*'s case by which we are bound, that is a sufficient answer to the claims under article 8.'

[28] After the hearing the court was provided with a report of the decision that had just been given in *Connors v UK* and Auld LJ commented on this. After citation of some of the passages that we have set out above, he held:

> '[106] Whilst there is, in those general statements of principle, some support for the argument of [counsel for the defendants], they cannot, it seems to us, affect this court's assessment of the decision in *Qazi*'s case ... The general statement of principle in para 83 of the Court's judgment is based upon the court's decisions in [*Buckley v UK* (1996) 23 EHRR 101], and [*Chapman v UK* (2001) 10 BHRC 48], to which it refers, both of which were cited to and considered by the House of Lords in *Qazi*'s case. *Connors* is therefore only of assistance to the courts of this country in relation to cases involving gypsies.'

It is questionable whether this finding, apparently made without oral argument as a postscript to the judgment, would bind us were we minded to make an order that conflicted with it.

[29] With respect to Auld LJ, we do not consider that the reasoning of the Strasbourg Court in *Connors v UK* (2004) 16 BHRC 639 can be confined to the treatment of gipsies. It is true that the Strasbourg Court (at 663 (para 86)) remarked that the case was not concerned 'with matters of general planning or economic policy but with the much narrower issue of procedural protection for a particular class of persons', but some of the court's observations appear to be of more general application. Thus (at para 83) under the heading 'General principles', the court remarked that the procedural safeguards available to the individual would be especially material in determining whether the respondent state had, when fixing the regulatory framework, remained within its margin of appreciation. Statutory regimes that govern obtaining possession of land must be open to scrutiny. The decision in *Connors v UK* does not exclude the possibility that a particular statutory regime may itself achieve the balance required by art 8(2), so that, if the judge complies with it, the requirements of art 8(2) will be satisfied. Equally, however, the decision in *Connors v UK* does not exclude the possibility that, if a statutory regime is to comply with the convention, it must require a public authority to weigh in the balance the impact of its actions on the individual affected and permit the individual affected to challenge in the courts the conclusion reached by the public authority.

[30] For these reasons we do not accept that *Connors v UK* can be treated as simply identifying a discrete exception to the general rule propounded by the majority in *Qazi*'s case [2003] 4 All ER 461. We accept Mr Offer's submission that *Connors v UK* is incompatible with *Qazi*'s case.

SHOULD THIS COURT FOLLOW *QAZI*'S CASE OR *CONNORS v UK*?

[31] Mr Offer submitted that, should we conclude that *Qazi*'s case could not stand with *Connors v UK*, we should follow the latter decision. Only in this way could we satisfy our obligation under s 2 of the 1998 Act to 'take into account' the decisions of the Strasbourg Court. His primary submission was that this would

not offend the principle of stare decisis. Strasbourg law is capable of development and, so he submitted, the decision in *Connors v UK* could properly be considered as a development in the law which had occurred since the decision in *Qazi*'s case. It seems to us that to accept this submission would be to subvert the principle of legal certainty. Less than a year elapsed between the decision in *Qazi*'s case and the decision in *Connors v UK*. In the latter case the Strasbourg Court did not purport to be making new law. The jurisprudence on which it based its decision pre-dated *Qazi*'s case. The issue is a stark one. If a decision of the House of Lords in relation to the convention is followed by a decision of the Strasbourg Court that is incompatible with it, which decision should an inferior court follow?

[32] Mr Underwood submitted that we were bound to follow the House of Lords. He drew our attention to the statement of Lord Hoffmann in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [76], [2001] 2 All ER 929 at [76], [2003] 2 AC 295 to the effect that s 2(1) of the 1998 Act did not make it mandatory to follow the Strasbourg jurisprudence. He also drew our attention to the following statement of Judge LJ, sitting in the Divisional Court in *R v Central Criminal Court, ex p Bright, R v Central Criminal Court, ex p Alton, R v Central Criminal Court, ex p Rusbridger* [2001] 2 All ER 244 at 264, [2001] 1 WLR 662 at 682 (para 105) in a judgment which pre-dated the entry into force of the convention:

> 'We are not permitted to re-examine decisions of the European Court in order to ascertain whether the conclusion of the House of Lords or Court of Appeal may be inconsistent with those decisions, or susceptible to a continuing gloss. The principle of stare decisis cannot be circumvented or disapplied in this way, and if it were, the result would be chaos.'

These observations were made in a very different context, but the warning of the risk that chaos will follow if inferior courts are to be permitted to rely on decisions of the Strasbourg Court to justify departing from decisions of the House of Lords is timely. None the less, we have to decide upon the appropriate course without the benefit of any precedent that is directly applicable.

[33] In *D v East Berkshire Community Health NHS Trust, K v Dewsbury Healthcare NHS Trust, K v Oldham NHS Trust* [2003] EWCA Civ 1151, [2003] 4 All ER 796, [2004] QB 558 this court held that the decision of the House of Lords in *X (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633 could not survive the introduction of the 1998 Act. This was, however, because the effect of the 1998 Act had undermined the policy consideration that had largely dictated the House of Lords' decision. Departing from the House of Lords decision in those circumstances has attracted some academic criticism. It remains to see whether this will be echoed by the House itself. What Mr Offer invites us to do in this case, however, is iconoclasm of a different dimension. There has been no change of circumstances, but simply a decision of the Strasbourg Court that conflicts with a previous decision of the House of Lords. It seems to us that in these circumstances, the only permissible course is to follow the decision of the House of Lords but, to give permission, if sought and not successfully opposed, to appeal to the House of Lords, thereby and to that extent taking the decision in *Connors v UK* into account. If in due course the House considers that we have not followed the appropriate course, it will no doubt make this plain.

[34] Had we accepted Mr Offer's invitation to depart from *Qazi*'s case we would have had to consider some difficult questions. Where gipsies trespass on

the land of a local authority without leave or licence, can seeking their removal ever constitute an interference with their art 8 rights that is not justified under art 8(2)? If so, can their art 8 rights be raised as a defence to the proprietary claim for possession rather than by proceedings for judicial review? If so, on the facts of this case is there an arguable defence that requires the case to be remitted to the judge? As it is these questions are not for us. For the reasons that we have given, we must dismiss this appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Aon Trust Corp Ltd v KPMG (a firm) and others

[2004] EWHC 1844 (Ch)

CHANCERY DIVISION
SIR ANDREW MORRITT V-C
14–16, 29 JULY 2004

Pension – Pension scheme – Company pension scheme – Minimum funding requirement – Minimum funding requirement applicable to schemes other than money purchase schemes – Whether scheme money purchase scheme – Pension Schemes Act 1993, s 181 – Pensions Act 1995, s 67.

The claimant was the sole trustee of a pension fund (the scheme) and the defendants were the principal employer under the scheme, a member of the scheme who was receiving the pension due to her, and a member of the scheme who had not retired. The scheme provided for employees and employer to pay into the fund a sum equal to a specified percentage of the employee's salary. Under r 7.2 of the deed governing the scheme, the benefit to which a member became entitled on retirement was a pension equal to the sum of the amounts arrived at by multiplying the payments into the fund made by the employee and the employer by the factor set out in a table applicable at the time of payment and designed to give rise to a product equal to the prospective pension at normal retirement age to be expected from those payments on the basis of the actuarial assumptions made at that time. The deed provided for periodic valuation of the fund and under cl 8.5 if a valuation revealed a deficiency the trustee could, with the consent of the principal employer, make such adjustments and amendments to the benefits secured or thereafter accruing for and in respect of the members as were necessary to secure the continued solvency of the fund. A large deficit in the fund was disclosed and the claimant sought the determination of the court in respect of the various questions including: (i) whether the power under cl 8.5 included a power for the trustee to make reductions to pensions in payment at the date of the exercise of the power; (ii) whether the power under cl 8.5 was a power to modify the scheme for the purposes of s 67(1)[a] of the Pensions Act 1995 which applied to any power conferred on any person by an occupational pension scheme and imposed certain requirements on the exercise of such a power; and (iii) whether the scheme was a 'money purchase scheme' within the meaning of the Pension Schemes Act 1993 and the 1995 Act. The relevance of that question was that the 1995 Act contained minimum funding requirement provisions designed to ensure that the value of the assets of a scheme was not less than the amount of its liabilities, so that, in the case of a serious underprovision, the employer had to pay into the scheme whatever was necessary to make up the value of the assets to a specified percentage and in certain cases the amount of any shortfall at an applicable time was to be treated as a debt due by the employer to the trustees. None of those provisions applied to an occupational pension scheme which was a money purchase scheme. Section 181[b] of the 1995 Act

a Section 67, so far as material, is set out at [27], below
b Section 181, so far as material, is set out at [35], below

defined 'money purchase scheme' as a pension scheme 'under which all the benefits that may be provided are money purchase benefits'. Money purchase benefits were defined as 'benefits the rate or amount of which was calculated by reference to a payment or payments made by the member or by any other person in respect of the member and which were not average salary benefits'. The relevant definition of 'average salary benefit' was benefit the rate or amount of which was calculated by reference to the average salary of a member over the period of service on which the benefit was based. The first defendant contended, inter alia, that the benefits provided by the scheme were calculated 'by reference to' payments rather than 'by reference to' the average salary of the member.

Held – (1) On the true construction of the scheme the power under cl 8.5 included a power to make reductions to pensions in payment at the date of the exercise of the power and a power to make different reductions to the benefits of different members (see [25], [26], below).

(2) Clause 8.5 was a power to modify the scheme for the purposes of s 67(1) of the 1995 Act. A pension in payment was an entitlement under the scheme and the purpose of s 67 was to protect, amongst other things, entitlements. To reduce the entitlement was, to that extent, to modify the scheme, and it was not material that the reduction was effected by the use of another part of the scheme, namely cl 8.5 (see [32], [33], below).

(3) The characteristics of money purchase benefits or schemes were that a money purchase benefit could not be a defined benefit because the investment yield from the underlying fund, whether actual or notional, could not be predicted precisely, and that a money purchase scheme was fully funded in the sense that liability for the benefits was in all normal circumstances exactly matched by available assets. By contrast, salary-related schemes provided a benefit defined by reference to the salary of the member whether average or final and the liability for such benefit was unlikely to be exactly matched by available assets. The phrase 'calculated by reference to' in s 181 pointed to the yardstick or measure by which the benefit was to be ascertained or defined in the context of an occupational pension scheme. In a conventional money purchase scheme that would be the payments, actual or notional, into the fund for the ultimate benefit was defined only by what the fund would purchase at retirement. By contrast, in a final salary scheme the benefit was ascertained or defined by reference to the final salary whether or not the liability for it had been matched by the contributions. An average earnings-related scheme was likely to have resort to both earnings and contributions/payments in the ascertainment or definition of the benefit in order to take account of both the level of earnings going to make up the average and the time when they arose. For that reason average salary benefits were excluded at the conclusion of the definition of 'money purchase benefit'. It was recognised that in the calculation of such benefits account had to be taken of contributions paid in order to weight them according to the period in which they were paid. But as the resulting benefit was ultimately defined by reference to average earnings, not contributions, it was not to be regarded as a money purchase benefit. In the instant scheme the pension computed in accordance with r 7.2 was calculated by reference to the average salary of a member over the period of service on which the benefit was based. The requirement for an annual calculation and a percentage contribution based on earnings in that year gave rise to a measure or yardstick based on average salary.

The application each year of a different factor to the contribution provided for weighting that average. As such it could not be a money purchase benefit and it followed that the scheme was not a money purchase scheme (see [46], [52], [54]–[56], [58], [60], below).

Notes

For the minimum funding requirement, see 44(2) *Halsbury's Laws* (4th edn reissue) para 81.

For the Pension Schemes Act 1993, s 181, see 33 *Halsbury's Statutes* (4th edn) (2003 reissue) 810.

For the Pensions Act 1995, s 67, see 33 *Halsbury's Statutes* (4th edn) (2003 reissue) 926.

Cases referred to in judgment

Barclays Bank plc v Holmes [2001] OPLR 37.
Stevens v Bell [2002] EWCA Civ 672, [2002] OPLR 207.

Claim

Aon Trust Corporation Ltd, the sole trustee of the KPMG Staff Pension Scheme, sought the determination of the court in respect of certain questions (set out at [18], [28], and [37] below) as to the provisions contained in the Consolidated Text of the Third Deed of Revision dated 24 April 1996 as amended by five deeds of variation which governed one of the two funds in the pension scheme. The defendants were KPMG, the principal employer under the scheme, Ruth Muir James (the pensioner member), a representative former employee of KPMG receiving pension under the scheme, and Julian Walker (the active member), a representative member of the scheme who had not retired. The facts are set out in the judgment.

Christopher Nugee QC and *Jonathan Evans* (instructed by *DLA*) for the trustee.
Christopher Tidmarsh QC (instructed by *Herbert Smith*) for KPMG.
Nicholas Warren QC (instructed by *Pinsents*) for the pensioner member.
Brian Green QC and *Emily Campbell* (instructed by *Macfarlanes*) for the active member.

Cur adv vult

29 July 2004. The following judgment was delivered.

SIR ANDREW MORRITT V-C.

INTRODUCTION

[1] What is now the KPMG Staff Pension Fund (the scheme) was constituted with effect from 1 July 1949 by a deed dated 20 June 1949. In essence it provided for both employees and the employer to pay into a fund constituted by the employer for the purpose of providing pensions for its permanent staff a sum equal to a specified percentage of that employee's salary for the time being. The deed provided both for amendments to the scheme and for the adjustment of benefits by reference to either surpluses or deficits revealed by a quinquennial actuarial valuation. The benefit to which the member became entitled on

retirement was a pension equal to the sum of the amounts arrived at by multiplying the payments into the fund made by the employee and employer by the factor set out in the table applicable at the time of payment. The factors shown in the tables in force from time to time varied in accordance with age and sex and were designed to give rise to a product equal to the prospective pension at normal retirement date to be expected from those payments on the basis of the actuarial assumptions made at that time.

[2] Between 1954 and 1998 the periodic actuarial valuations indicated a surplus and bonuses were declared in relation to accruing benefits. But the actuarial valuation as at 31 March 1999 disclosed a deficit of £600,000. With effect from 31 March 2000 the scheme was varied so as to constitute two funds, a pre-2000 fund and a post-2000 fund. The post-2000 fund is a conventional money purchase scheme with which I am not concerned. The pre-2000 fund became a closed fund.

[3] The actuarial valuation carried out as at 31 March 2002 indicated that the deficit on the pre-2000 fund had increased to £71m, though it was capable of being reduced to £65m if half the fund was reinvested in equity investments, as, I understand, has now been done.

[4] The CPR Pt 8 application now before me was issued on 27 January 2004 by Aon Trust Corporation Ltd (the trustee) which was appointed as sole trustee of the scheme on 23 December 2002. The trustee seeks the determination of the court in respect of five questions. Two of them, questions 3 and 4, are designed to resolve the issue whether the first defendant, KPMG, the well-known firm of chartered accountants, is liable to make good the deficit in the pre-2000 fund either as the employer under the provisions of ss 56–61 or s 75 of the Pensions Act 1995 or by virtue of an obligation in the scheme itself. Questions 1 and 2 concern the ability (if any) of the trustee to reduce pensions in payment to members so as, if thought fit, to reduce or eliminate the deficiency. Question 5 seeks, in effect, the directions of the court as to what the trustee should do in the light of the answers to the prior questions. It is agreed that question 5 should be adjourned until after I have given judgment on the others or such of them as now arise.

[5] The defendants are (1) KPMG, (2) Ruth Muir James and (3) Julian Walker. KPMG is joined because it is the principal employer under the scheme and, depending on the answers to questions 3 and 4, may be liable to make good the deficit. The second defendant (the pensioner member) is a former employee of KPMG and a member of the scheme. She is now receiving the pension due to her under the scheme and has been joined to represent principally all other pensioners and also some members not yet in receipt of benefit. The third defendant (the active member) is a member of the scheme but has not retired. He is joined to represent all other members not in receipt of benefit. Appropriate representation orders are sought in respect of both the pensioner member and the active member.

THE SCHEME

[6] The provisions of the scheme have been revoked and replaced and amended on numerous occasions since its inception in 1949. The document currently governing the pre-2000 fund is the consolidated text of the third deed of revision dated 24 April 1996 as amended by five deeds of variation the last of which was dated 2 January 2001. Schedule 1 contains what are described as new clauses, Sch 2 the general rules applying to either or both the pre- and post-2000

funds and Sch 3 the revenue limits rules for approval of both pre- and post-2000 funds.

[7] There are 22 new clauses in Sch 1. They cover such matters as interpretation, trusts and name of the scheme, the trustees, investment and safe custody of the fund and accounts. Clause 8 deals with the actuary and actuarial valuations. After providing for the appointment of an actuary and for his valuations cll 8.4 and 8.5 provide:

> '8.4 If an actuarial valuation or interim review of the Pre-2000 Fund shows a surplus the Trustees may with the consent of the Principal Employer and after taking the Actuary's advice and after making any such amendments to the Trust Deed and/or Rules as may be necessary, decrease the contributions of any Member and/or increase (by declaration of bonuses or interim bonuses or otherwise) the benefits or future benefits of any Member or other person entitled to receive any benefit from the Pre-2000 Fund.
>
> 8.5 If an actuarial valuation of the Pre-2000 Fund reveals a deficiency in the Pre-2000 Fund's resources the Trustees may with the consent of the Principal Employer make such adjustments and amendments to the benefits secured or thereafter accruing for and in respect of the Members as are necessary in the opinion of the Trustees after taking the Actuary's advice to secure the continued solvency of the Pre-2000 Fund.'

[8] Clause 9 confers certain powers on the trustees. Clause 10 provides for the augmentation of benefits at the request of the employer. It enables the employer to ask the trustees to grant additional or new benefits. Before doing so the trustees are required to obtain an estimate of the cost of compliance and advice as to how to fund it. By cl 10.3 the trustees are required to grant the benefits so requested subject to the revenue limits and subject to the employer making such additional contributions to the general fund as are necessary to fund the increase. Clause 10.4 points out that other provisions for augmentation are to be found in cl 8.4 (see [7], above) and r 21 (see [16], below).

[9] The schedule continues with clauses concerning lump sum benefits, transfer payments, powers to buy or transfer out benefits, and employers. In the event of an employer ceasing to be a participating employer his obligation (cl 17.11.3) to pay any contributions ceases 'except ... any sum payable by it pursuant to Section 144 of the Pension Schemes Act 1993'. Clause 18 provides that with the consent of the principal employer the trustees have power—

> 'at any time or times to alter, amend, add to and/or cancel all or any of the provisions of the Trust Deed or Rules provided that nothing shall be done which would—
>
> (a) cause the main purpose of the Scheme to cease to be that stated in Clause 2.3 or
>
> (b) cause the payment or transfer of the Fund or any part of it to the Principal Employer or any Participating Employer.'

[10] Clause 19 provides that the principal employer and the trustees may terminate the scheme in circumstances specified for each of them. One of the consequences prescribed by cl 19.4.3 is that—

> 'The Employers shall cease to have any obligation to pay any contributions to the Scheme except contributions due but unpaid at the date of termination

and any sum payable by them pursuant to Section 144 of the Pension Schemes Act.' a

[11] Clause 20 deals with the winding up of the scheme in the event of its termination. Clause 20.12 empowers the trustees in the event of delay in realising the assets of the scheme 'including the discharge of any debt due to them from any of the Employers under Section 144 of the Pension Schemes Act' to apply assets of the scheme in securing its liabilities. The remaining clauses deal with a number of miscellaneous matters it is not necessary to describe. b

[12] The general rules contained in Sch 2 are divided into nine sections and an Appendix. Sections I, II and VIII are of general application, ss III to VII apply to benefits payable out of the pre-2000 fund. Section I comprises rr 1–4. They deal with questions of interpretation, eligibility, membership and temporary absence. c Section II comprising rr 5 and 6 deals with the contributions to be paid by members and employers respectively. The rules are now much more complicated than they were in 1949 but, in essence both the member and the employer are required to pay contributions equal to a specified percentage of the member's salary varying in accordance with age and bands of income (rr 5.1–5.5 and 6.1–6.5). In addition a member may pay voluntary contributions, called d additional voluntary contributions (r 5.6). The destination and use of such additional voluntary contributions depends on whether the member has agreed with the trustee that they should be taken into account into the computation of benefits payable from the general fund. In that event the contributions are paid into the general fund (r 5.8); but in the absence of such an agreement such e contributions are to be applied by the trustee in providing additional benefits which must be money purchase benefits within the meaning of s 75 of the 1995 Act (r 5.9).

[13] Section III comprising rr 7–9 deals with members' pensions. Rules 7.1 and 7.2 provide: f

'7.1 A Member whose Pensionable Service terminates as a result of his retirement from Service on his Normal Pension Date shall be entitled to a pension from the Scheme which shall commence to be payable with effect from the day following his Normal Pension Date for the remainder of his lifetime and calculated in accordance with this Rule.

7.2 The annual amount of a Member's pension under sub-rule 7.1 shall g be calculated as follows:

(1) by taking the total amount of the contributions paid by him and his Employer into the General Fund during or in respect of each Contribution Period up to and including the Contribution Period ending 31st March 2000 and multiplying it by the appropriate factor determined from the Tables in h Appendix A in accordance with sub-rule 7.3 in order to give the amount of pension derived from each Contribution Period;

(2) by increasing the amounts determined in accordance with paragraph (1) of this sub-rule by bonuses declared pursuant to sub-Clause 8.4 or the corresponding provisions of the Trust Deed which it has superseded and/or j by reducing them by any adjustments made pursuant to sub-Clause 8.5; and

(3) by aggregating the amounts of pension determined in accordance with paragraphs (1) and (2) of this sub-rule.'

Sub-rule 7.3 identifies the relevant tables in App A, which like those attached to the original deed governing the scheme, specify the factor to be applied to the

contribution to ascertain the amount of pension derived from particular contribution periods.

[14] As a simplified illustration of how the rule works take a male aged 25 at his next birthday in the calendar year 1999. The factor is 0·960 for a pension payable unreduced at age 65. If in that year he earned £20,000 and the contribution rate for both him and the employer was 4% then the computation of benefit on retirement at age 65 would be £20,000 × 8% (ie £1,600) × 0·960 = £1,536 per annum. If in the same year there had been a bonus declaration of 5% under cl 8.4 then the pension in respect of that year of service would have increased to £1,612·80 (£1,536 + (5% × £1,536)). On the other hand a deduction of the like percentage under cl 8.5 would give rise to a pension aged 65 of only £1,459·20. The formula is applied for each year of service to the contributions made in that year and the pension at retirement is the sum of the product of such computations for each year of service.

[15] Rule 8 deals with the pensions of early leavers. The general rule is to adjust the pension due on normal retirement date by discounting it to the date of actual retirement. But in the case of early retirement through ill-health r 8.4 entitles the trustee to determine the annual amount of the pension after consultation with the principal employer and having taken advice from the actuary but otherwise in its discretion so long as it complies with certain preservation regulations.

[16] Section IV deals with alternatives to member's pensions. Section V deals with benefits on the member's death both before and after retirement or normal retirement age. Section VI provides for early leavers. Section VII sets out arrangements for payments and for increases. Rule 20.4 recognises that no increase in pension is guaranteed but that increases may be payable as a consequence of the declaration of a bonus in accordance with cl 8.4. Section VIII deals with what is called a special account. The trustee is bound to maintain such an account with sub-accounts for each member. The trustees are required to credit to such sub-accounts amounts coming within one or more of the six descriptions set out in r 21.2. It is unnecessary to set them all out but they include (1) amounts representing the value of benefits purchased with additional voluntary contributions which, if paid, would exceed the revenue limits (r 5.11(2)), (2) amounts equivalent to the lump sum attributable to the employer's contributions in respect of a member who died in service with no dependants to whom the trustee might in its discretion pay the same (r 12.2). By r 21.4 the trustee is required at the direction of the principal employer to apply the credit balance on the special account in payment of a member's future contributions or in payment of additional benefits or for any other purpose of the trust deed and rules.

[17] The Appendix contains nine tables setting out the factors to be applied for any given period of service according to age and sex from the inception of the scheme down to 31 March 2000. These are required to compute the benefits accrued in the pre-2000 fund. They have no application to the post-2000 fund. Schedule 3 contains details of the revenue limits which, by cl 2.4 of the new clauses contained in Sch 1, restrict both the benefits and contributions which may be provided and made. No party has referred me to any provision of Sch 3 or suggested that any of its contents is relevant to any of the questions I have to decide.

QUESTION 1

[18] The issues raised by this question are— a

> 'whether the power under clause 8.5 ... includes power ...
>
> (i) to make reductions to pensions in payment at the date of exercise of the power;
>
> (ii) to make different reductions to the benefits of different members ...' b

There is no dispute about (ii). Accordingly if the answer to (i) is in the affirmative I am invited to give an affirmative to answer to (ii) as well.

[19] The pensioner member invites me to answer question 1(i) in the negative. She submits that a pension in payment cannot be reduced. She relies on the terms of the rules and what she submits is the practice of the Inland Revenue in relation to approved schemes. The active member, by contrast, c submits that there is no evidence of any relevant practice of the Inland Revenue and the terms of the scheme show that the power may be exercised in relation to pensions in payment as well as to any other benefit.

[20] It is convenient to deal at the outset with the question of the Inland Revenue practice. Such practice may provide a background against which to d construe the scheme documents (see *Stevens v Bell* [2002] EWCA Civ 672, [2002] OPLR 207). The evidence in this regard falls into two categories, published practice notes and recent correspondence and telephone conversations between representatives of the parties' solicitors and officials of the Inland Revenue. The published practice notes relied on are IR12 entitled Practice Notes on the Approval of Occupational Pension Schemes (1979), paras 6.31–6.33 and 22.8 and e the same document as published in 1991, para 7.22.

[21] Paragraphs 6.31–6.33 of the 1979 version point out that the pension is not assignable, may not commence before normal pension date and must be payable for the pensioner's life as a minimum period, subject to provision for forfeiture but only in exceptional circumstances. Paragraph 6.33 points out that the annual f rate may be varied where it is drawn before state pensionable age so that the pensioner's total income from occupational and state pensions is roughly constant throughout retirement. This would involve a higher pension from the occupational pension scheme before state pensionable age. Paragraph 22.8 merely points out that if a scheme is amended previous approvals do not continue so that approval of the Inland Revenue to the amendment is required. g Paragraph 7.22 of the 1991 version deals with the same point as para 6.33 of the 1979 version. Nothing is said in either version about reductions in pension after state pension age for the purpose of securing the continued solvency of the fund.

[22] The evidence of the correspondence and telephone conversations with officials of the Inland Revenue is at best contradictory but inconclusive. The h evidence does not, in my judgment, provide any support for the proposition that the Inland Revenue would not have approved the scheme had they thought that cl 8.5 could be applied to reduce pensions in payment.

[23] Accordingly, the resolution of this issue depends on the proper construction of the scheme without any predisposition to one answer rather than j the other in the light of any practice of the Inland Revenue. Counsel for the pensioner member points out that increases or decreases pursuant to cll 8.4 and 8.5 have to be taken into account as required by r 7.2(2) in calculating the amount of a member's pension for the purposes of r 7.1. He relies on the fact that the pensioner is entitled to such a pension from his normal pension date 'for the remainder of his lifetime'. He points out that whereas cl 10.4 and r 20.4

contemplate increases to a pension in payment by, amongst other methods, a bonus declared under cl 8.4 there is no corresponding provision recognising or requiring its reduction in consequence of the operation of cl 8.5.

[24] This is disputed by counsel for the active member. He points out that in cl 1 of the scheme a member is defined as 'an individual who has been admitted to membership of the scheme ... and who remains entitled (whether prospectively or actually) to any benefit from the Scheme'. He relies also on the fact that cl 8.5 operates on both benefits 'secured' as well as 'thereafter accruing'. He points out that both cl 10.4 and r 20.4 are in rules dealing expressly with increases so that it is hardly surprising that no provision is made in those rules for reductions.

[25] I prefer the submissions of counsel for the active member. Clause 8 deals with actuarial valuations and their consequences. Such a valuation is bound to take account of liabilities in respect of pensions in payment as well as in prospect. The terms of cl 8.5, when read with the definition of member, reflect this requirement. The definition of member and the reference to benefits secured each embrace pensions in payment. Rule 7.2(2) expressly contemplates a reduction in accordance with cl 8.5 before retirement but does not exclude the consequence of a reduction thereafter. Whether or not the further provisions in relation to increases to be found in cl 10.4 and r 20.4 are necessary, I do not consider that the absence of a corresponding provision in respect of cl 8.5 leads to any conclusion different from that which the clear language of both cl 8.5 and r 7.2(2) require.

[26] Accordingly I answer question 1(i) in the affirmative. As I have already indicated no party was concerned to argue for a negative answer to question 1(ii). Having considered the matter for myself I think that they were right not to do so. If the power exists at all, there are no words to indicate that it must be exercised in the same way for all members. Nor, given the fiduciary duty of the trustee, is there any reason to imply any such limitation. Accordingly I will answer question 1(ii) in the affirmative also.

QUESTION 2

[27] Section 67 of the 1995 Act, so far as relevant, provides:

> '(1) This section applies to any power conferred on any person by an occupational pension scheme ... to modify the scheme.
>
> (2) The power cannot be exercised on any occasion in a manner which would or might affect any entitlement, accrued right or pension credit right of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied.
>
> (3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion—(a) the trustees have satisfied themselves that—(i) the certification requirements, or (ii) the requirements for consent, are met in respect of that member, and (b) where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion.'

Subsection (4) defines the expressions used in sub-paras (i) and (ii) of sub-s (3)(a) by reference to regulations. They are the Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517.

[28] Given that I have concluded that cl 8.5 confers on the trustee the power to reduce pensions in payment, the question arises whether that power may be

exercised free from the restrictions imposed by s 67. Accordingly question 2 asks: 'Whether and if so to what extent cl 8.5 is a power to modify the scheme for the purposes of s 67(1) of the 1995 Act.' a

[29] Counsel for the pensioner member invites me to give an affirmative answer to that question. He points out that the section applies to any power to modify however it may be exercised and that the purpose of the section is to protect an existing entitlement. He submits that the exercise of the power b conferred by cl 8.5 will reduce the pensions in payment and so affect the member concerned. He suggests that the reference to 'adjustments and amendments' indicates that either is a modification and that, in any event, the exercise of the power conferred by cl 8.5 will necessitate some amendment to the scheme under cl 18.

[30] Counsel for the active member contends for a negative answer to this c question. He submits that the scheme which may not be modified save in accordance with s 67 includes cl 8.5 so that its exercise by an adjustment does not constitute a modification. His submission is limited to exercise by adjustment because he accepts that its exercise by amendment must engage s 67 because of the decision of the Court of Appeal in *Stevens v Bell* [2002] OPLR 207. d

[31] Section 124(5) of the 1995 Act incorporates the definition of 'modifications' to be found in s 181 of the Pension Schemes Act 1993. The latter section provides that 'unless the context otherwise requires ... "modifications" includes additions, omissions and amendments, and related expressions shall be construed accordingly'. Thus an 'addition' or 'omission', not amounting to or requiring an amendment will be a modification. It follows that an adjustment e requiring such an addition or omission comes within the section. This demonstrates that a modification does not require any change to the relevant documents.

[32] Then does the exercise of the power conferred by cl 8.5 necessitate such an addition or omission? In my view it does. The argument of counsel for the f active member appears to me to attribute to the word 'scheme' a sense corresponding to the document in which it is recorded but excluding the rights conferred by it. It may be that an exercise of the power contained in cl 8.5 can be implemented without any alteration to the constituting documents of the scheme. In this sense an adjustment not involving an amendment can be made by deducting from the pension otherwise due the amount of the reduction. But g to conclude from that consideration that the section does not apply appears to me to ignore the clear intention behind it.

[33] The purpose of the section is to protect, amongst other things, entitlements. A pension in payment is an entitlement under the scheme (see *Barclays Bank plc v Holmes* [2001] OPLR 37 at 60 (para 129)) albeit subject to h reduction in the event of the exercise of the power conferred by cl 8.5. The entitlement is a part of the scheme. In my view to reduce the entitlement is, to that extent, to modify the scheme by the equivalent of an omission. The fact that the reduction or omission from that part of the scheme is effected by the use of another part of the scheme, that is cl 8.5, does not seem to me to be material. For j these reasons I will answer question 2 in the affirmative.

QUESTION 3

[34] Sections 56–61 of the 1995 Act introduced the minimum funding requirement designed to ensure that the value of the assets of a scheme is not less than the amount of its liabilities. Those sections make detailed provision for

periodic valuations and other related matters. Section 60 ensures that in the case of a serious underprovision, defined as a deficiency of more than 10%, the employer must pay into the scheme whatever is necessary to make up the value of the assets to at least 90% of the amount of the liabilities. Section 75 takes the matter further and provides that the amount of any shortfall at an applicable time shall be treated as a debt due by the employer to the trustees.

[35] None of those provisions applies to an occupational pension scheme which is a money purchase scheme (see ss 56(2)(a) and 75(1)). Section 124(5) of the 1995 Act incorporates definitions contained in the 1993 Act. In s 181 of the 1993 Act the expression 'money purchase scheme' is defined to mean 'a pension scheme under which all the benefits that may be provided are money purchase benefits'. The same section provides that—

> '"money purchase benefits", in relation to a member of a personal or occupational pension scheme or the widow or widower of a member of such a scheme, means benefits the rate or amount of which is calculated by reference to a payment or payments made by the member or by any other person in respect of the member and which are not average salary benefits ...'

[36] There is no general definition of average salary benefits in either the 1993 Act or the 1995 Act. But a definition for the purposes of s 84 of the 1993 Act is conceded to be of general application. That definition is in the following terms:

> '"average salary benefit" means benefit the rate or amount of which is calculated by reference to the average salary of a member over the period of service on which the benefit is based.'

[37] Plainly it is of the greatest importance to all the parties to this claim to know whether the scheme is a money purchase scheme. Accordingly question 3 asks: 'Whether the scheme is or is not a "money purchase scheme" (within the meaning of the 1993 Act and the 1995 Act).' KPMG submits that it is. Both the pensioner member and the active member submit that it is not.

[38] The arguments on this question have been particularly wide-ranging. Counsel for KPMG has fastened on the definition of money purchase benefits and the other contexts in which it has been used for the purpose of supporting a submission as to the purpose and policy behind the definition. So regarded, he submits that all the benefits provided by the scheme as it stands are calculated by reference to payments rather than by reference to the average salary of the member and that the various powers to amend, augment or introduce other benefits, such as cll 8.4, 10 and 18 and r 21 do not affect the conclusion.

[39] This is disputed by counsel for both the pensioner member and the active member. They point out that most of the contexts on which counsel for KPMG relied relate to the use of the expression 'money purchase benefit' rather than the expression 'money purchase scheme'. They emphasise that the definition of the latter expression excludes any scheme under which any non-money purchase benefit is provided. They contend that under this scheme none of the pension bonuses declared under cl 8.4, ill-health early retirement benefits under r 8.4, ex gratia payments funded out of the special account under r 21.4 and benefits arising from additional voluntary contributions paid into the general account under r 5.8 is a money purchase benefit. In addition they rely on the powers conferred by cll 8.4, 10 and 18 as well as r 21 for the proposition that other non-money purchase benefits 'may' be provided.

[40] I shall start by considering the derivation of the expression 'money purchase benefits' and the contexts in which it has been used. The earliest use to which my attention was drawn is in Sch 1A to the Social Security Act 1975 which was inserted by Sch 1 to the Social Security Act 1985 with effect from 1 January 1986. Such a benefit was defined as 'any benefit the rate or amount of which is calculated by reference to a payment or payments made by the member, or by any other person in respect of him' (see para 5(1) of Sch 1A). The schedule deals with the revaluation of pensions of early leavers, that is persons whose pensionable service terminates before normal pension age. Different methods of revaluation were to be applied to differently calculated pensions. Paragraph 3 dealt with pensions calculated by reference to the member's average salary, para 4 to pensions calculated by reference to the member's length of service and para 5 to pensions calculated by reference to a payment or payments made by the member or by any other person in respect of him. In the case of para 5 'the investment yield and any bonuses arising from' such payments were to be applied in providing such benefit as would have been provided under the scheme.

[41] These provisions with amendments were re-enacted in s 84 of and Sch 3 to the 1993 Act. Schedule 3 provides for four methods of revaluation, final salary method, average salary method, flat rate method and money purchase method. The last mentioned method is applicable to money purchase benefits arising under an occupational pension scheme (see s 84(3)). The method is to apply the investment yield and any bonuses arising from payments made by or on behalf of a member towards providing any pension or other retirement benefit which would have been payable under the scheme.

[42] I accept the submission of counsel for KPMG that the evident object of these provisions is to try to ensure that an early leaver should ultimately obtain a benefit equating as nearly as possible with what he would have got had he remained an active member of the scheme. Equally it demonstrates quite clearly that it is envisaged that a money purchase benefit arises from and is correlative to a fund, actual or notional, and its investment yield constituted by the contributions paid by the member and his employer.

[43] The second context in which the expression 'money purchase benefit' had been used is that of 'contracting out'. The Social Security Act 1986 made provision by s 6 and Sch 2 for schemes providing money purchase benefits to contract out of the state earnings-related pension scheme (SERPS). The definition of such benefits was—

> 'benefits the rate or amount of which is calculated by reference to a payment or payments made by a member of the scheme or by any other person in respect of a member, other than average salary benefits.' (See para 11(b) of Sch 2.)

These provisions were re-enacted in ss 7–39 of the 1993 Act.

[44] The purpose of singling out money purchase benefits was to ensure that if the scheme was to be allowed to contract out, a member with only money purchase benefits must have special money purchase contracted-out rights rather than a salary-related guaranteed minimum pension. Thus the distinction recognised that a money purchase benefit had no guaranteed or defined benefit for it depended on the investment yield obtained or attributable to the fund derived actually or notionally from the contributions made by the member and his employer.

[45] The third context on which counsel for KPMG relied is s 144 of the 1993 Act. This was concerned with cases of a deficiency of assets on the winding up of the scheme or of the employer. It has been re-enacted with amendments in s 75 of the 1995 Act. The effect was to deem the deficiency to be a debt due from the employer to the trustees. The relevance for present purposes is that the schemes to which the provision applied excluded money purchase schemes as defined in s 181 of the 1993 Act.

[46] Counsel for KPMG submits that s 144 does not indicate a parliamentary assumption that a money purchase scheme cannot be in deficit because the benefits are correlative with the assets in the fund, actual or notional. He submits that such a scheme may have a deficit if it is a flat rate scheme. He suggests that a deficit may also arise if the trustees instead of buying an annuity for the pensioner grant a pension of a specified amount which, in the event, cannot be fully met from the fund attributable to it. I will accept for the purposes of the argument, but without deciding, that these are real possibilities. Nevertheless it appears to me to be obvious that Parliament recognised that in a money purchase scheme in all normal circumstances the benefits are matched by equivalent assets. This is to be contrasted with a defined benefit scheme, such as a final salary scheme, when assets and liabilities will not match each other unless the actuarial and other assumptions on which the level of contribution was fixed actually occur.

[47] Counsel for the active member also relied on ss 102ff of the 1993 Act, now repealed. This section provided for the automatic increase in certain pension benefits by reference to a limited retail price index and the most recent actuarial valuation. Its relevance is that it did not apply to a money purchase scheme as defined in s 181 nor to a pension from some other type of scheme which was a money purchase benefit. Counsel for KPMG submitted that no clear policy could be discerned. I do not agree. In my view it shows once again that Parliament envisaged that the money purchase benefit or scheme already provided to the member the benefit of the investment yield on the underlying fund, actual or notional so that there was no justification for providing a further increase by reference to the index.

[48] I was also referred to passages in the *Report of the Pension Law Review Committee* (Cm 2342) published in September 1993, better known as the Goode Report. In para 2.2.2 (p 78) the committee disclaimed any intention to provide detailed and comprehensive explanations but the general descriptions they did give are instructive. In para 2.2.11 (pp 80–81) they state that the most important division is between schemes where the benefits to be provided are related to members' earnings and schemes where the benefits provided are a product of the contributions made and the investment return on them.

[49] In paras 2.2.12–2.2.17 (pp 81–82) they describe schemes in the former category including, in para 2.2.17, schemes called 'average salary scheme[s]'. These, though now rare, are described as schemes where the eventual pension is based on the member's salary over the whole period of employment, rather than just the final year or years.

[50] In paras 2.2.18–2.2.20 (pp 83–84) the committee describe money purchase schemes. They point out that the contributions payable by member and employer are fixed but the benefits payable on retirement variable 'according to the investment performance of the resulting fund and the rate at which the fund can be converted into a pension at the time of retirement'. They note that

such schemes are often called defined contribution schemes. In para 2.2.19 they said: *a*

> 'Though the final pension achieved will be linked indirectly to the individual's earnings during working life, there is no direct link between the pension and the member's salary at any particular time.'

In para 4.4.58 (p 248) the committee reiterated their view that 'money purchase schemes are by their nature fully funded'. *b*

[51] Finally I must refer to the various contexts in which the expressions are used in the 1995 Act. I have already referred to the context provided by ss 56–61 and 75. Section 73 deals with preferential liabilities in the winding up of a salary-related occupational pension scheme. As a money purchase scheme is not a salary-related scheme (see s 125(1)(a)), this section cannot apply to such a scheme. It is suggested that such non-application is another instance of Parliamentary recognition that in a money purchase scheme deficiencies do not normally arise. But this is to be contrasted with s 89 of the 1995 Act which authorises regulations providing for ss 56–60 and 75 to apply to money purchase schemes with or without modification. *c* *d*

[52] This excursus into the various contexts in which the definitions or concepts of money purchase benefits or schemes appear does show the characteristics such benefits or schemes are expected to have. First, a money purchase benefit cannot be a defined benefit because the investment yield from the underlying fund whether actual or notional cannot be precisely predicted. Second, a money purchase scheme is fully funded in the sense that liability for the benefits is in all normal circumstances exactly matched by available assets. Such schemes or benefits are to be contrasted with salary-related schemes. They provide a benefit defined by reference to the salary of the member whether average or final. The liability for such benefit is unlikely to be exactly matched by available assets. *e* *f*

[53] I turn then to consider the various benefits for which this scheme provides. The first and most important is the pension computed in accordance with r 7.2. It comprises two elements, namely that prescribed by r 7.2(1) and the bonuses declared in accordance with cl 8.4 included by r 7.2(2). The first element requires the application of the factor to be ascertained from the table to the proportion of the member's earnings in that year, that is in the example given (at [14], above) £20,000 × 8% (ie £1,600) × 0·960 = £1,536 per annum. That process is repeated for each year of service and the aggregate represents the basic pension before the addition of bonuses. Counsel for KPMG submits that this computation complies with the definition of a money purchase benefit because the benefit (£1,536 pa) is calculated (× 0·960) by reference to the payment (£1,600). Counsel for the pensioner member and the active member dispute this. They contend that the benefit (£1,536 pa) is computed (× 8% (ie £1,600) × 0·960 =) by reference to the salary of the member (£20,000). In a sense they are all right! *g* *h*

[54] I accept the submission of counsel for KPMG that the definition must be applied with regard to the substance of the calculation. In addition I consider that it must be interpreted and applied having due regard to the contexts in which it appears and the purposes for which it is applied. In my judgment the phrase 'calculated by reference to' points to the yardstick or measure by which the benefit is to be ascertained or defined in the context of an occupational pension scheme. In a conventional money purchase scheme that will be the payments, actual or notional, into the fund for the ultimate benefit is defined only by what *j*

the fund will purchase at retirement. By contrast in a final salary scheme the benefit is ascertained or defined by reference to the final salary whether or not the liability for it has been matched by the contributions.

[55] An average earnings related scheme is likely to have resort to both earnings and contributions/payments in the ascertainment or definition of the benefit. It is necessary to do so in order to take account of both the level of earnings going to make up the average and the time when they arose. This, in my view, is the explanation for the exclusion of average salary benefits at the conclusion of the definition of 'money purchase benefit'. It was recognised that in the calculation of such benefits account must be taken of contributions paid in order to weight them according to the period in which they were paid. But as the resulting benefit was ultimately defined by reference to average earnings, not contributions, it was not to be regarded as a money purchase benefit.

[56] I conclude that this element of the pension benefit is calculated by reference to the average salary of a member over the period of service on which the benefit is based. The requirement for an annual calculation and a percentage contribution based on the earnings in that year gives rise to a measure or yardstick based on average salary. The application each year of a different factor to the contribution provides for weighting that average. The resulting benefit is ultimately calculated by reference to average earnings not payments. As such it cannot be a money purchase benefit. It follows that for this reason alone the scheme is not a money purchase scheme.

[57] The other element of the pension benefit which enters into the calculation required by r 7(2) is any bonus declared in accordance with cl 8.4. This benefit is both contingent and discretionary. It is contingent on there being a surplus revealed by the actuarial valuation, the consent of the principal employer and favourable advice to the trustees from the actuary. Even then the right of the member depends on the exercise by the trustees of the discretion given to them by cl 8.4. Such a benefit need not be calculated by reference to payments made by or in respect of the member at all. For example an increase in benefit of 5% in the year to which my example (see [14], above) relates is an increase to the amount of the prospective benefit. No doubt in deciding how large an increase to award the trustees would consider the size of the surplus but that would not give rise to the calculation of the benefit by reference to the surplus. Further, the proportion of the surplus attributable to the bonus credited to a member would not necessarily have arisen from that member's contributions. An example given by counsel for the pensioner member illustrates this. Take two members of the same age who each retired at 65 with a pension of £4,000 per annum. Their contribution record may be very different, one may have served at a relatively modest level but for longer than the other, yet both will receive the same bonus.

[58] For these reasons I do not consider that the bonus element in the pension benefit is a money purchase benefit either. It follows that the pension as a whole is not a money purchase benefit and the scheme is not a money purchase scheme. In these circumstances it is unnecessary for me to deal with the similar submissions made in relation to the other benefits, referred to at [39], above, on which counsel for the pensioner member or the active member relied. I will answer question 3 in the negative.

QUESTION 4

[59] In the light of my conclusion in respect of question 3 this question does not arise and I need say no more about it.

CONCLUSION

[60] For all these reasons I will make declarations: (1) in answer to questions 1(i) and (ii) in the affirmative, (2) in answer to question 2 in the affirmative, and (3) in answer to question 3 in the negative. I will make the representation orders and other orders sought by paras 6, 7 and 8 of the claim form. I will adjourn question 5 with liberty to the trustee to restore on a date to be fixed through the usual channels. I understand that it is agreed that KPMG will pay the costs of the trustee, the pensioner member and the active member as agreed or assessed. I will make an order to that effect if asked.

Order accordingly.

Celia Fox Barrister.

Baker & Davies plc v Leslie Wilks Associates (a firm)

[2005] EWHC 1179 (TCC)

QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)

JUDGE RICHARD HAVERY QC

7, 8, 30 JUNE 2005

Contribution – Third party proceedings – Building contract – Claimant building contractor subcontracting to defendant consulting engineer – Claimant agreeing with employer to remedy faults at no expense to employer – Claimant instructing contractors to carry out remedial works – Deed of settlement signed with employer on completion of works – Claimant seeking contribution from defendant – Whether for purposes of statute 'payment' having to be money payment – Whether time running for limitation purposes from date of agreement or date of settlement deed – Civil Liability (Contribution) Act 1978, s 1 – Limitation Act 1980, s 10.

The claimant building contractor was engaged to carry out certain works and retained the defendant as its consulting engineer in relation to that project. The works were completed, but cracks subsequently appeared. As a result of a settlement agreement between it and its employer, the claimant instructed contractors and paid for remedial works to be carried out at no expense to the employer. On 8 April 2004, the claimant commenced proceedings claiming a contribution from the defendant under s 1[a] of the Civil Liability (Contribution) Act 1978. Section 1(4) provided that a person who had agreed to make any payment in settlement of any claim against him was entitled to recover contribution without regard to whether he was ever liable in respect of the damage provided he would have been liable assuming the factual basis of the claim against him could be established. The defendant raised a limitation issue. It disputed the date of the settlement agreement contending that it was made no later than in February 2001 when the employer confirmed it was content for the claimant to proceed with the remedial works, which would take it outside the two-year limitation period in s 10[b] of the Limitation Act 1980. The claimant argued that it was made when the deed agreeing full and final settlement was signed on 11 March 2005. Preliminary issues were ordered to be tried on the assumption that both the claimant and defendant were liable to the employer in respect of the cracking and the loss consequent upon that cracking. They included whether the settlement agreement gave rise to a claim for contribution under the 1978 Act and if so when did the limitation period start to run. By s 10(4) the relevant date was the earliest date on which 'the amount to paid by him is agreed between him ... and the person ... to whom the payment is to be made'. The defendant submitted, inter alia, that the claimant had no entitlement to a contribution because, having regard to the use of the word 'payment' in s 1(4) of the 1978 Act and in s 10(4) of the 1980 Act, and the use of 'the amount to be paid

a Section 1 of the 1978 Act, so far as material, is set out at [7], below

b Section 10 of the 1980 Act, so far as material, is set out at [7], below

by him' in the latter, the right to recover contribution arose only where the person seeking the contribution had made a payment of a monetary sum to the person who had suffered the damage. It argued that the settlement agreement was not an agreement to make payment by way of compensation to the employer; it was an agreement to carry out, or cause to be carried out, work at no cost to the employer.

Held – The word 'payment' in s 1(4) of the 1978 Act and s 10(4) of the 1980 Act included a payment in kind, at any rate where the payment in kind was capable of valuation in monetary terms. In such a case, the 'amount to be paid' by him in s 10(4) referred not to the amount of work, but its value. That construction best gave effect to the intention of Parliament. There was no suggestion in s 1(1) of the 1978 Act, which was the primary provision giving rise to the right to claim contribution, of a limit or restriction on the right of a person to claim contribution from another person liable in respect of the same damage. Section 1(2)–(4) was designed not to restrict that right, but to remove restrictions or defences that might otherwise be raised. Finally, s 10, albeit that it arose out of an enactment of the 1978 Act, was directed to time limitation and not to narrowing the nature of the right to contribution. The answer to the preliminary issues were therefore that the settlement agreement did give rise to a claim for contribution under the 1978 Act and that time started to run for the purposes of s 10 from 11 March 2005 (see [15], [16], below).

George Stow & Co Ltd v Walter Lawrence Construction Ltd (1992) 40 Con LR 127 not followed.

Notes

For statutory right to contribution, see 12(1) *Halsbury's Laws* (4th edn reissue) paras 837–847.

For the Civil Liability (Contribution) Act 1978, s 1, see 13 *Halsbury's Statutes* (4th edn) (2004 reissue) 733.

For the Limitation Act 1980, s 10, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 944.

Case referred to in judgment

Stow (George) & Co Ltd v Walter Lawrence Construction Ltd (1992) 40 Con LR 57.

Claim

By claim form issued on 8 April 2004, the claimant, Baker & Davies plc, brought proceedings against the defendant, Leslie Wilks Associates (a firm), for a contribution or indemnity under the provisions of s 1 of the Civil Liability (Contribution) Act 1978 in respect of moneys expended by the claimant in having underpinning works carried out at no expense to the employer and in respect of the moneys paid to the employer in respect of the employer's losses pursuant to a settlement agreement made between the employer and the claimant. Preliminary issues were ordered to be tried, which were reduced by consent of counsel to those set out at [6], below. The facts are set out in the judgment.

Martin Bowdery QC and *Serena Cheng* (instructed by *Jones Day*) for the claimant.
Graham Chapman (instructed by *Squire & Co*) for the defendant.

Cur adv vult

30 June 2005. The following judgment was delivered.

JUDGE RICHARD HAVERY QC.

[1] This is a claim for contribution or indemnity in which I have to decide some preliminary issues.

[2] The claimant is a building contractor. The defendant is a firm of consulting structural engineers. The claimant entered into a building contract with the South London Family Housing Association Ltd, now known as the Horizon Housing Group Ltd (which I shall call the employer), for the design and construction of a block of nine residential flats with associated landscaping and car parks at Orchid Court, Whitefoot Lane, Lewisham. By a contract made on or shortly after 21 October 1994, the claimant retained the defendant as its consulting engineer in relation to that project. By a warranty for consultants executed as a deed the defendant covenanted with the employer that it would exercise all the reasonable skill and care expected of a consulting structural engineer in relation to the works and in particular the design of the foundations and any inspections of their construction. The works began on 7 November 1994. Practical completion took place on 24 August 1995.

[3] In January 1997 cracking began to appear at Orchid Court. In February 1997 the claimant arranged for the defendant to monitor the cracking and to advise on necessary remedial work. On 20 October 1998 the defendant advised that the cracking was slight. It recommended making good the cracks and carrying out a process described as stitching. The employer was not satisfied with that recommendation. After much correspondence, the claimant in April 2000 appointed an independent consulting engineer, Elrond Consulting (Elrond), to report on the cracking, its cause and necessary remediation. In June 2000 Elrond produced a report which contained a recommendation to underpin a communal staircase area and an adjoining flat. The claimant agreed with the employer that that work should be done. It was done by contractors instructed and paid by the claimant. The claimant also paid the employer some money in respect of losses suffered by the employer, including claims made by tenants, arising out of the works.

[4] The claimant claims from the defendant a contribution or indemnity under the provisions of s 1 of the Civil Liability (Contribution) Act 1978 in respect of the moneys expended by the claimant in having the underpinning works carried out at no expense to the employer and in respect of the moneys it paid to the employer in respect of the employer's losses.

[5] It is common ground that the works of repair and the payment made to the employer by the claimant were the subject of a settlement agreement between the employer and the claimant. The date and terms of the settlement are in issue. The defendant says that the settlement agreement was made in or about August 2000 and no later than February 2001. The claimant says that it was made by deed dated 4 March 2005 and signed on 11 March 2005. These proceedings were issued on 8 April 2004. The question of limitation arises.

[6] The numerous preliminary issues originally ordered have been reduced by consent of counsel to three. They are these: 1. When was the settlement agreement reached? 2. Does or did the settlement agreement give rise to a claim for contribution under the 1978 Act? 3. If the answer to 2 is Yes, when did time start to run for the purposes of s 10 of the Limitation Act 1980? For the purpose of those preliminary issues it is assumed that both the claimant and the defendant were liable to the employer in respect of the same damage, namely the cracking of the building and the loss consequent upon that cracking.

[7] The relevant statutory provisions are these. The 1978 Act provides, so far as material, as follows:

> '**1.**—(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought ...
>
> (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.'

The 1980 Act provides, so far as material, as follows:

> '**10.**—(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.
>
> (2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.
>
> (3) If the person in question is held liable in respect of that damage—(a) by a judgment given in any civil proceedings; or (b) by an award made on any arbitration; the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be) ...
>
> (4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and

a the person (or each of the persons, as the case may be) to whom the payment is to be made.'

[8] Those provisions of the 1980 Act are substantially in the form of amendments to the Limitation Act 1963 enacted by Sch 1 to the 1978 Act.

[9] As to the second preliminary issue, Mr Chapman submitted that the right b to recover contribution arises only where the person seeking contribution has made, or been ordered or agreed to make, payment of a monetary sum to the person who has suffered the damage. Where, or in so far as, the person seeking compensation has made reparation in some other way, specifically by carrying out works at his own expense, he has no entitlement under the 1978 Act to c recover contribution from any other person liable in respect of the same damage. Mr Chapman relied on the use of the word 'payment' in sub-ss (2) and (4) of s 1 of that Act.

[10] In further support of the above proposition, Mr Chapman submitted that the right to recover contribution arises only in the circumstances mentioned in sub-ss (3) and (4) of s 10 of the 1980 Act. Otherwise, there could be a right to d contribution which would not be the subject of accrual under s 10(1) and there would be no limitation period. It could not have been the intention of the legislature, he submitted, that there should be circumstances in which there was no limitation period.

[11] There is no question of sub-s (3) of s 10 of the 1980 Act applying. I am e concerned here only with sub-s (4). Mr Chapman submitted that apart from the comparatively small monetary sum, the settlement agreement was not an agreement to make payment by way of compensation to the employer. It was an agreement to carry out, or cause to be carried out, work at no cost to the employer. Moreover, though it was true that payment was agreed to be made between the claimants and the contractors who carried out the remedial works, f no amount to be paid by the claimants was agreed between the claimants and any person to whom payment was to be made in compensation for the damage. Mr Chapman submitted, and I accept, that the expression at the end of sub-s (4) 'the person ... to whom the payment is to be made' must refer to a person receiving the payment by way of compensation for the damage.

g [12] Mr Chapman relied on the decision of Judge John Hicks QC in *George Stow & Co Ltd v Walter Lawrence Construction Ltd* (1992) 40 Con LR 57. Judge Hicks appears to have regarded it as beyond argument that payment means a monetary payment. He said (at 133 (para 253)):

h 'Since such a payment is required where s 1(2) applies it follows that an individual, uninsured claimant who satisfies his liability to the victim by doing remedial work with his own hands cannot claim contribution to its value under the 1978 Act. That ... seems to me to be inescapable.'

j See also (1992) 40 Con LR 127–128 (para 229), 132 (para 247).

[13] Mr Chapman also relied on the opinion of AM Dugdale in an article in (1979) MLR 42, p 185 to the effect that where a wrongdoer settled on a basis other than payment, such as the repair of any damage, he might not be able to claim a contribution.

[14] I asked Mr Chapman whether his researches into the Law Commission report that gave rise to the 1978 Act (*Law of Contract: Report on Contribution* (Law

Com no 79) (March 1977)) threw any light on the meaning of the word 'payment'. The answer was no; there was merely a comment that the word 'payment' reflected language used in other jurisdictions. It was used in a similar Irish statute. a

[15] Mr Chapman's submissions were cogent, but I reject them. They lead to a conclusion as to the intention of Parliament which in my judgment is not borne out by the legislation as a whole. That intention could readily have been stated b expressly if it had existed, and I can see no reason for it. The primary provision giving rise to the right to claim contribution is s 1(1) of the 1978 Act. There is no suggestion there of any limit or restriction on the right of a person to claim contribution from another person liable in respect of the same damage. Subsections (2)–(4) of s 1 are designed not to restrict the right, but to remove c restrictions or defences that might otherwise be raised. Section 10 of the 1980 Act, albeit that it arises out of an enactment of the 1978 Act, is directed to time limitation and not to narrowing the nature of the right to contribution.

[16] The word 'payment' in ordinary parlance is capable of including a payment in kind, as that well-known expression exemplifies. One talks, for example, of paying a debt to society by the performance of community service. d In my judgment, the word 'payment' in these statutory provisions includes a payment in kind, at any rate where the payment in kind is capable of valuation in monetary terms. In such a case the 'amount to be paid by him' in s 10(4) of the 1980 Act refers not to the amount of the work, but to its value. That construction, in my judgment, best gives effect to what appears to me to be the e intention of Parliament.

[17] I turn now to consider when the settlement agreement was reached. The defendant contends that the claimant agreed to indemnify the employer in respect of the loss and damage by way of an agreement reached in the period from August 2000 to February 2001 and, in any case, by February 2001 at the latest. f

[18] The principal relevant transactions are these. Following delays, the employer's agents wrote to the claimant on 8 May 2000 threatening legal proceedings unless within five working days of the date of the letter the claimant provided a clear statement giving a date on which the contemplated remedial works would start and a date by which they would finish. The claimant wrote a g holding letter on 16 May stating that the engineers for the scheme were now indicating that their original proposal might not be satisfactory in the current circumstances, stating that Elrond had been commissioned by the claimant's insurers to produce an independent report, and expressing the hope that the claimant could give a definitive answer by 1 June. h

[19] The minutes of a meeting between the employer's and the claimant's representatives held on 28 June 2000 record a requirement on the part of the employer that the claimant should give written confirmation that the remedial works would be undertaken on behalf of the employer by the claimant's insurers, who would indemnify the employer for all claims, disbursements, costs and fees j associated with remedying the building. The minutes of a further meeting between representatives of the same parties held on 12 July 2000 record that the claimant's insurers would not give written confirmation of liability or confirm that remedial works and associated costs would be borne by them. The claimant invited the employer to submit details of its costs to them on a monthly basis. The minutes noted that if there were no satisfactory movement from the

claimant and its insurers by 28 July then the employer would be forced to resolve the matter through other legal means.

[20] On 8 August 2000 the employer's solicitors wrote to the claimant's solicitors expressing the hope that the matter could be resolved promptly and without the need to formalise matters further. There were set out a number of matters which it was said the employers were looking for. Those matters included: that the subsidence be rectified to the satisfaction of the employer and the residents and that the rectification work be subject to a suitable guarantee; that the claimant or its agent should act as project manager for the remedial works; that the employer be reimbursed for all of its costs in relation to the problem such costs to include: compensation for the employer and the residents; the costs of decanting the residents whilst any remedial work was undertaken; and reimbursement of the costs incurred by the employer in dealing with the matter since 1997, including legal costs and the costs of any structural engineer that the employer believed it necessary to instruct.

[21] On 10 August 2000 the claimant's solicitors replied to the employer's solicitors' letter of 8 August. They stated that the Elrond report was in draft form and that the final version was expected within a few days, when copies would be sent to the employer and the defendants. They stated that it was the claimant's intention to rectify the subsidence in accordance with the method set out in the Elrond report, which was understood to recommend the inclusion of a provision of an insurance-backed guarantee by the contractor who would be engaged to carry out the works; and that it was also understood that the report would include a recommendation that the project should be managed by an independent structural engineer who would be instructed on behalf of the claimant. They further stated that the claimant would meet only those reasonable costs for which it was properly liable.

[22] The minutes of a meeting held on 22 August 2000 between representatives of the employer and of the claimant record that the claimant confirmed that it was progressing with the remedial action in accordance with Elrond's report; that it was not waiting for approval or agreement from the defendant's insurers, and that it would resolve liability for the work as a separate issue with the defendant's insurers. The claimant also confirmed that an independent structural engineer would work up the scheme in detail and project manage the works. Mr Darryl Godwin, the development director of the employer, told the claimant that the employer would be commencing the compilation of the potential claims from leaseholders, compensation generally and the employer's costs etc to date to be presented to the claimant's insurers.

[23] The claimant's insurers appointed Cameron Taylor Bedford Consulting Engineers (Cameron Taylor) to oversee the works. In September 2000 the claimant sought the employer's approval of that appointment. On 24 October the employer's agents wrote to the claimant's solicitors confirming that the employer had appointed William J Marshall and Partners (Consulting Engineers) to give an opinion on Elrond's remedial proposals. They sought information relating to the design of the foundations and the soil conditions at the site. On 26 October the claimant's solicitors replied asking for confirmation that the costs of the employer associated with the retention of its own consulting engineers would be borne entirely by the employer. On 2 November the claimant's solicitors sent responses to the employer's request for information.

[24] On 8 December the employer's solicitors wrote stating that the employer had expressed concern at the apparent slow progress of the matter. On 21 December, the claimant's solicitors wrote to the employer's solicitors stating that on the assumption (given their message of 8 December) that the employer was content with the proposed remedial works, they, the claimant's solicitors, had sent the agreed terms of appointment of Cameron Taylor to the claimant for execution. The employer's solicitors wrote back on 21 December that the claimant's solicitors' assumption was not correct, but that they looked forward to receiving Cameron Taylor's proposals following their preliminary investigative work.

[25] The claimant's solicitors wrote to the employer's solicitors on 22 December 2000 and again on 29 January 2001 asking for confirmation whether or not the employer was content for them to proceed with the remedial works as communicated to the employer. On 12 February 2001 the employer's solicitors wrote to the claimant's solicitors stating:

> 'We write further to our correspondence in this matter. We have now received instructions from our client. Our client confirms that it is content for your client to carry out the proposed remedial works at no cost to [the employer] or the leaseholders.'

They invited the claimant's solicitors, for the future, to communicate direct with the employer. Mr Chapman submitted that the matter of the agreement culminated in that letter. He submitted that it was significant that, the agreement having been confirmed, the employer's solicitors ceased to represent the employer.

[26] Mr Chapman also relied on statements in the claimant's statements of case and letters as admissions or assertions of a relevant agreement. It is not suggested that the claimant is bound by any such admission or assertion.

[27] Mr Chapman accepted, rightly in my judgment, that for an agreement to start time running under s 10(4) of the 1980 Act, it has to be an agreement in bona fide settlement of the claim made by the employer against the claimant. He submitted that the correspondence between the employer and the claimant and their respective representatives culminated in a settlement agreement by February 2001 at the latest. The claimant's solicitors were writing to the employer's solicitors asking whether they agreed that Elrond's proposed remedial scheme constituted the works that should be carried out. After chasing, the response from the employer's solicitors was yes, we are now content for that scheme to be carried out. Thus assuming that the scheme was properly carried out, any risk that it would not be successful was to be borne by the employer. The matter could be tested in this way. If after the remedial works had been completed the employer had told the claimant that it wanted the claimant to try another scheme, the employer would have got pretty short shrift. The claimant would have said no, you approved that scheme and that is the settlement. The settlement agreement was that the claimant agreed to undertake the agreed remedial work and pay the reasonable costs occasioned by those remedial works that were incurred by the employer and by the leaseholders. The fact that thereafter there was a quantification process did not change the fact that there was an agreement in 2000 or 2001 which was sufficiently certain to be legally binding. The agreement arose from an exchange of promises, the consideration

going the other way being an undertaking on the part of the employer to forbear to sue the claimant. It was an implied agreement, arising from the fact that the employer did not sue.

[28] I reject Mr Chapman's submission. It nowhere appears from the correspondence that the employer was giving up its claim against the claimant. It is true that it approved the works. It may be, as Mr Chapman submitted, that it impliedly agreed to forbear to sue the claimant while the works were in progress. Clearly that is what the claimant wished and expected. So there may have been a contract. But in my judgment it did not constitute a settlement of the claim. Whilst the employer wished to satisfy itself that the works were likely to be successful, there is no ground for inferring that it was willing, or undertook, to run the risk that the works would not be successful. The existence of the contractor's guarantee in my judgment does not negate that conclusion, and in any case may not cover any inadequacy in the design of the remedial works.

[29] I have reached the above conclusion by considering the correspondence and minutes to which I have been referred. But I also heard the oral evidence of one witness, Mr Godwin, whom I have mentioned above. Mr Godwin was development director of South London Family Housing Association Ltd (the Association). He is now a director of Shared Horizons, a division of Horizon Housing Group Ltd. The Association is a separate company within that group. He was questioned at some length about the dealings between the claimant and the employer, of which he was to a considerable extent aware. It is clear that his understanding was that the employer had not settled its claim against the claimant by agreeing to allow the claimant to carry out the works at no cost to the employer or the leaseholders. In re-examination he was asked what the employer would have done if the remedial work had not resolved the problem. He answered that it would have required the claimant to come up with an alternative way of resolving the structural defects; and failing that, the employer would have taken legal action. His understanding is in accordance with my conclusion from the documents.

[30] Practical completion of the remedial works took place on 16 November 2002. There were remaining issues between the employer and the claimant. On 14 February 2003 the Horizon Housing Group Ltd wrote to the claimant to the effect that the Association would be submitting a financial claim to the claimant for a number of issues that had arisen as a direct result of the cracking; both that which had been remedied and that which had not as yet. It was not until 19 January 2004, by a decision of an adjudicator, that the total sum due from the claimant to the contractor for the Elrond works, Abbey Pynford, was quantified. Thereafter further negotiations and exchanges of information took place between the claimant and the employer. On 2 March 2005 the claimant's solicitors wrote to the employer making an offer in full and final settlement of all issues relating to Orchid Court. That offer was expressed to be subject to contract. It was accepted by letter dated 3 March 2005. A settlement deed, the first draft of which had been sent to the employer in January 2005, was prepared.

[31] The settlement deed is dated 4 March 2005. It is agreed that it was signed on 11 March 2005. It is peculiarly worded, though no point is taken on the peculiarity. Clause 1.1 of the deed reads:

> 'The parties agree that in full and final settlement the [claimant] shall be responsible for £249,179·25 ("the Settlement Amount") of the costs of the

Employer and the Leaseholders in relation to the Dispute. The [claimant] is hereby given credit for those costs that it has already paid and, to the extent that the sums comprising the Settlement Amount have not already been paid by the [claimant] (whether to the Employer, the Leaseholders and/or third parties), the balance (set out in clause 1.4 below) shall be paid by the [claimant] to the Employer and the Leaseholders within 28 days of the date of this Settlement Deed.' *a* *b*

The total sum of £249,179·25 included £168,845·84 and £42,788·19, totalling £211,634·03, which had been paid by the claimant's insurers to the works contractor and to the project manager respectively.

[32] I thus decide the issues, which for convenience I repeat here, as follows: 1. When was the settlement agreement reached? Answer: 11 March 2005. 2. Does or did the settlement agreement give rise to a claim for contribution under the 1978 Act? Answer: Yes, it did and it does. 3. If the answer to 2 is Yes, when did time start to run for the purposes of s 10 of the 1980 Act? Answer: 11 March 2005. *c*

[33] I should add that it is common ground that proceedings for contribution can be brought before accrual of the right as defined in s 10 of the 1980 Act. *d*

Order accordingly.

Martyn Gurr Barrister.

Arkin v Borchard Lines Ltd and others

[2005] EWCA Civ 655

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, BROOKE AND DYSON LJJ

7–9 MARCH, 16 MAY 2005

Costs – Order for costs – Payment of costs by non-party – Circumstances in which non-party may be ordered to pay costs of proceedings – Professional funder part-financing claimant's litigation under contingent fee agreement – Claimant's litigation unsuccessful – Whether professional funder liable for costs.

The claimant, a man without means, was granted legal aid and brought proceedings against the four defendant companies. His legal aid was withdrawn and his solicitors and counsel then acted for him on a conditional fee basis. MPC, a company in the business of the management and processing of compensation claims and providing assistance in claims assessment and litigation, agreed to fund expert evidence and the cost of organising documents on a contingent fee basis, so that it would only be paid if the claim succeeded, and in that event would receive a share of the damages recovered. Various Pt 20 defendants were joined to the action. Judgment was subsequently given in favour of the defendants. However, the judge declined to order that MPC (which had been joined as a Pt 20 defendant for costs purposes) should pay the costs of the defendants and the other Pt 20 defendants. He concluded that support of litigation furthered the important public policy objective of facilitating access to justice and, provided that such support was not attended by adverse features which would offend against the prohibition of champerty, it was to be encouraged, not discouraged. The defendants and the other Pt 20 defendants appealed, inter alia, against that aspect of the costs order, contending that it was fair that a funder who, for profit, had supported a claim which had turned out to be without foundation, should be required to indemnify the successful defendant against legal costs reasonably incurred in resisting the claim.

Held – A professional funder, who was financing part of a claimant's costs of litigation in a manner which facilitated access to justice and which was not otherwise objectionable, should be potentially liable for the costs of the opposing party to the extent of the funding provided. In that way a successful opponent would not be denied all his costs while commercial funders who provided help to those seeking access to justice which they could not otherwise afford would not be deterred by the fear of disproportionate costs consequences if the litigation they were supporting did not succeed. In consequence, if funding was provided on a contingency basis of recovery, a funder would require, as the price of the funding, a greater share of the recovery if the claim were to succeed and the net recovery of a successful claimant would be diminished. That was a cost that the impecunious claimant could reasonably be expected to bear. Overall justice would thus be better served than by leaving defendants in a position where they had no right to recover any costs from a professional funder whose intervention had permitted the continuation of a claim which had ultimately proved to be without merit. The likely consequence of that approach was that professional funders would cap the funds provided in order to limit their exposure to a reasonable amount, which should have effect in keeping

costs proportionate. Professional funders would also have to consider with even greater care whether the prospects of the litigation were sufficiently good to justify the support that they were asked to give. Accordingly, in the instant case, MPC would be ordered to pay by way of contribution to defence costs an amount equal to the amount of support that it had provided to the claimant (see [38], [40]–[42], [45], below).

Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807 considered.

Notes

For costs orders in favour of or against non-parties, see 10 *Halsbury's Laws* (4th edn reissue) para 202.

Cases referred to in judgment

Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira [1986] 2 All ER 409, [1986] AC 965, [1986] 2 WLR 1051, HL.

Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation (2001) 179 ALR 406, Aus HC.

Chapman (TGA) Ltd v Christopher [1998] 2 All ER 873, [1998] 1 WLR 12, CA.

Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] UKPC 39, [2004] 1 WLR 2807.

Edginton v Clark (Macassey and ors (Trustees of Whitley House Trust), third parties) [1963] 3 All ER 468, [1964] 1 QB 367, [1963] 3 WLR 721, CA.

Gulf Azov Shipping Co Ltd v Idisi [2004] EWCA Civ 292, [2004] All ER (D) 284 (Mar), CA.

Hamilton v Al Fayed (No 2) [2002] EWCA Civ 665, [2002] 3 All ER 641, [2003] QB 1175, [2003] 2 WLR 128.

Hill v Archbold [1967] 3 All ER 110, [1968] 1 QB 686, [1967] 3 WLR 1218, CA.

Kebaro Pty Ltd v Saunders [2003] FACFC 5, Aus FC.

Knight v FP Special Assets Ltd (1992) 107 ALR 585, (1992) 179 CLR 178, Aus HC.

Johnson v Ribbins (Sir Francis Pittis & Son (a firm), third party) [1977] 1 All ER 806, [1977] 1 WLR 1458, CA.

McFarlane v EE Caledonia Ltd (No 2) [1995] 1 WLR 366.

Metalloy Supplies Ltd (in liq) v MA (UK) Ltd [1997] 1 All ER 418, [1997] 1 WLR 1613, CA.

Murphy v Young & Co's Brewery plc [1997] 1 All ER 518, [1997] 1 WLR 1591, CA.

R (on the application of Factortame) Ltd v Secretary of State for Transport, Environment and the Regions (No 2) [2002] EWCA Civ 932, [2002] 4 All ER 97, [2003] QB 381, [2002] 3 WLR 1104.

Roache v News Group Newspapers Ltd [1998] EMLR 161, CA.

Sanderson v Blyth Theatre Co [1903] 2 KB 533, CA.

Appeals

The defendants, Borchard Lines Ltd (Borchard), Camomile Lines plc (Camomile) and Furness (Withy) Shipping Ltd (Furness), and the active Pt 20 defendants, Zim Israel Navigation Co Ltd (Zim), Deutsche Nah-Ost Linien GmbH & Co KG (DNOL) and KNSM-Kroonbergh BV (KNSM) appealed with permission of Colman J from his decision on 27 November 2003 ([2003] EWHC 2844 (Comm), [2004] 1 Lloyd's Rep 88) in which he refused to order that Managers and Processors of Claims Ltd (MPC) pay the costs of the defendants and Pt 20 defendants in proceedings brought by the claimant Yeheshkel Arkin against the defendants (which had been partially funded as to £1·3m by MPC, a company added as a Pt 20 defendant for the purposes of costs only under CPR 48.2) in which judgment had been given against the claimant. Borchard also appealed with permission of Dyson LJ against the order of Colman J

on 16 December 2003 ([2003] EWHC 3088 (Comm), [2004] 1 Lloyd's Rep 636) that it should pay 90% of Zim's costs, and 80% of each of DNOL's and KNSM's costs. The facts are set out in the judgment of the court.

Charles Gibson QC and *Peter Irvin* (instructed by *Constant & Constant*) for Borchard.
Steven Gee QC and *Hugh Mercer* (instructed by *Davies Arnold Cooper*) for Camomile, Furness, DNOL and KNSM.
Vasanti Selvaratnam QC and *Fergus Randolph* (instructed by *Berwin Leighton Paisner*) for Zim.
Guy Mansfield QC and *Sarah Lambert* (instructed by *Gordon Dadds*) for MPC.

Cur adv vult

26 May 2005. The following judgment of the court was delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR.

INTRODUCTION

[1] This is the judgment of the court to which all members have contributed. The court is concerned with the considerable fall-out of a disastrous piece of litigation. The claimant, Mr Arkin, is and was a man without means. His lawyers were acting for him under conditional fee agreements. He was, however, only able to pursue his claim to judgment because of the financial support provided by a professional funder, Managers and Processors of Claim Ltd (MPC). Mr Arkin's claim failed. His lawyers have recovered nothing. MPC's support has cost them in excess of £1·3m, for no return. Very substantial costs have been incurred by the defendants and the CPR Pt 20 defendants. Together these amount to nearly £6m. This appeal is about those costs.

[2] The four defendants, whom we shall call respectively Borchard, Camomile, Furness and Manchester, and the active Pt 20 defendants, namely the third, whom we shall call DNOL, the fifth whom we shall call KNSM and the first and sixth, whom we shall Zim, sought to persuade Colman J that MPC should be ordered to pay their costs. In a judgment delivered on 27 November 2003 ([2003] EWHC 2844 (Comm), [2004] 1 Lloyd's Rep 88) the judge declined to make the order sought. They appeal against that judgment, pursuant to permission granted by the judge himself.

[3] Pursuant to a judgment dated 16 December 2003 ([2003] EWHC 3088 (Comm), [2004] 1 Lloyd's Rep 636) Colman J ordered that Borchard should pay 90% of Zim's costs and 80% of each of DNOL and KNSM's costs. Borchard appeals against that order, pursuant to permission granted by Dyson LJ.

THE FACTS

[4] At this point we shall set out the facts in outline. In due course we shall have to elaborate some of them in a little more detail. Mr Arkin and his wife founded and owned a company called BCL Shipping Line Ltd (BCL). It traded between 1988 and 1992. Its trade was the operation of liner services on varied routes to and from Haifa and Ashdod in Israel. In January 1989 BCL complained to the European Commission that two shipping conferences were infringing articles of the Treaty of Rome, which are now arts 81 and 82 EC. We shall refer to them as such. The conferences in question were CONISCON and UKISCON. The defendants and the

Pt 20 defendants were members of one or both of these conferences, as were a number of other companies. a

[5] In November 1991 the European Commission issued a 'Statement of Objections' indicating an intention to fine the conferences for breach of art 81. The members of the conferences other than Borchard joined together to defend themselves, instructing a single firm of solicitors to represent them and sharing the costs of so doing. There was a hearing in April 1992. In September 1993 the b Commission determined that there was an insufficiently strong European Community (EC) interest to justify proceeding to a decision because the conferences' agreements had been amended in a material respect in early 1991.

[6] Meanwhile, in May 1992, BCL had ceased trading. In September 1993 BCL was struck off the companies register for failing to file accounts. The company was c insolvent and was dissolved. Mr Arkin contended that the company's business had been destroyed by the unlawful activities of the two shipping conferences.

[7] It was not until 1996 that Mr Arkin took the first steps that led to the litigation with which we are concerned. He got BCL restored to the register and placed in liquidation. He then took an assignment from the liquidator of claims against the d members of the conferences for breaches of arts 81 and 82 on terms that he would share any recoveries with BCL's creditors on a 50/50 basis. He obtained legal aid and, on 18 April 1997, served the writ in these proceedings. For reasons which have always been unclear, he impleaded only four United Kingdom-based members of the UKISCON conference, Borchard, Camomile, Furness and Manchester (in fact e the latter did not trade in the relevant market and played no effective role in the events complained of in the litigation with which we are concerned).

[8] The statement of claim was served on 2 May 1997. It alleged that the four defendants acted collectively with the other members of the two conferences to abuse a dominant position by predatory pricing and other activities that infringed f art 82 and that they were guilty of price fixing that infringed art 81.

[9] No sooner had Mr Arkin commenced proceedings than his legal aid was withdrawn. He had no resources to fund the litigation. He persuaded solicitors, and later counsel, to act for him on a conditional fee basis. The same course was not open to him in relation to expert evidence. However, under an agreement g concluded on 2 August 2000, he persuaded MPC to agree to fund the expert evidence and the cost of organising documents on a contingent fee basis. MPC would only be paid if the claim succeeded. If it did, they would receive a share of the damages recovered.

[10] On 27 July 2001 Borchard were granted permission to issue Pt 20 notices h against DNOL, KNSM and Zim.

[11] The trial began on 20 February 2002 and, on 26 April 2002, it was adjourned part heard. On 23 May 2002 an application was made by the defendants and Pt 20 defendants that MPC should provide security for their costs. The application was refused. On 10 April 2003 judgment was given in favour of the defendants and the j Pt 20 defendants ([2003] EWHC 687 (Comm), [2003] All ER (D) 173 (Apr)). Mr Arkin was comprehensively defeated. On breach of duty the judge found that Mr Arkin had failed to prove infringement of art 81 or art 82. On causation the judge found that BCL's cessation of trading had not been proved to be attributable to events on the relevant market.

THE MPC APPEAL

MPC's role

[12] MPC was founded in 1996 by the amalgamation of three firms that specialised in work relating to claims for compensation and, in particular, the quantification of loss. Its business was described by its managing director as 'the managing and processing of compensation claims and providing assistance in claims assessment and litigation'. As part of its business MPC responded to requests for assistance in funding litigation in circumstances where legal aid was not an option. In such circumstances, the funding was provided on terms that MPC would receive a percentage of the recovery if the claim succeeded and nothing if it did not.

[13] Under their agreement with Mr Arkin, MPC undertook to instruct, engage and pay for one or more expert forensic accountants in the firm of Ernst & Young to provide a report on the quantum of BCL's loss attributable to the actions of the defendants. They also agreed to provide various services ancillary to this accountancy exercise, including secretarial services. Their agreed remuneration was 25% of recoveries from the litigation up to £5m and 23% thereafter. In addition they were to receive any payments in respect of costs of witnesses in relation to quantum recovered from the defendants. If the initial expert's report suggested that the damages recovered would be inadequate to enable MPC to cover their costs, they had an option to withdraw from the agreement. Thereafter, they were locked in. The agreement provided that Mr Arkin should have the conduct of the proceedings, but would need the consent of MPC to any settlement or compromise. In the event of dispute, the decision of leading counsel acting for Mr Arkin was to prevail.

[14] The judge found that MPC took no part in the taking of decisions as to the conduct of Mr Arkin's case. Although MPC were kept well informed at all times, they did not attempt to control the litigation.

[15] The judge accepted that, when MPC entered into the agreement, they estimated that their total outlay up to the end of the trial might amount to some £600,000. He also referred to evidence that suggested that MPC viewed the probable settlement range as being between $US5m and $US10m. While in argument counsel suggested that MPC may have had their sights on a very much larger recovery, we have seen nothing that invalidates the judge's assessment of the position.

The judge's approach

[16] Although Mr Arkin's claim failed on every front, the judge observed that counsel had advised that Mr Arkin had a very strong claim and that he was not persuaded that it should have been blindingly obvious that, however strong the case might be on liability, it was doomed on causation of loss. He also observed that, if Mr Arkin had not entered into the MPC agreement, or an agreement with another professional funder on substantially similar terms, he could not have pursued his claim to trial. The judge's view of the implication of these facts appears from the following paragraph of his judgment:

> '[71] It is indeed highly desirable that impecunious claimants who have reasonably sustainable claims should be enabled to bring them to trial by means of non-party funding. It is further highly desirable in the interests of providing access for such claimants to the courts that non-party funders, such as MPC should be encouraged to provide funding, subject always to their being unable to interfere in the due administration of justice, particularly in order to forward

their own interest in their stake in the amount recovered. If all professional funders were by definition to be subject to non-party costs orders, there would be no such funders to provide access to the courts to those who could not otherwise afford it.'

[17] The judge examined a number of authorities and subjected two to detailed scrutiny. These were *R (on the application of Factortame) Ltd v Secretary of State for Transport, Environment and the Regions (No 2)* [2002] EWCA Civ 932, [2002] 4 All ER 97, [2003] QB 381 and *Hamilton v Al Fayed (No 2)* [2002] EWCA Civ 665, [2002] 3 All ER 641, [2003] QB 1175. He concluded that these established that support of litigation furthered the important public policy objective of facilitating access to justice. Providing that such support was not attended by adverse features which would offend against the prohibition of champerty, such support was to be encouraged, not discouraged. Holding MPC liable for the defendants' costs would discourage the funding of litigation. Accordingly the applications for costs orders against MPC would be rejected.

[18] The appellants attacked the judge's reasoning. Their counsel submitted that the judge had wrongly equated the test for deciding whether a funding agreement was champertous with the test for deciding whether costs should be ordered against a non-party. The two questions were not the same. The latter question required the court to have regard to the requirements of fairness. It was fair that a funder who, for profit, had supported a claim which had turned out to be without foundation, should be required to indemnify the successful defendant against legal costs reasonably incurred in resisting the claim.

[19] The appellants submitted that their case was supported by the authorities. We turn to consider these.

THE AUTHORITIES

[20] Section 51(1) and (3) of the Supreme Court Act 1981 provides:

'Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings ... shall be in the discretion of the court ... The court shall have full power to determine by whom and to what extent the costs are to be paid.'

In *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] 2 All ER 409, [1986] AC 965 the House of Lords held that this power was expressed in wide terms, leaving it to the rule-making authority, if it saw fit to do so, to control its exercise by rules of court and to the appellate courts to establish principles for its exercise. In particular, there was no justification for implying a limitation on the power to award costs to the effect that an award could only be made against a party to the litigation.

[21] CPR 48.2 provides that where the court is considering whether to exercise its power under s 51 to make a costs order against a person who is not a party to the proceedings, that person must be added to the proceedings for the purposes of costs only. It was in accordance with this rule that MPC were added as eleventh Pt 20 defendants.

[22] Rule 44.3 deals with the discretion of the court in relation to awarding costs and the circumstances to be taken into account when exercising its discretion. Rule 44.3(2)(a) provides that if the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. Rule 44.3 goes on to set out circumstances that may lead the court

not to follow the general rule. Broadly speaking r 44.3 evidences a policy of using costs as a sanction for the conduct of legal proceedings that deviates from the 'overriding objective' that is laid down by r 1. A party whose unreasonable conduct causes unnecessary costs to be incurred is at risk of being ordered to pay those costs, even if successful. This is not inconsistent with the main principle that underlies the general rule that the unsuccessful party pays the successful party's costs. It is important in the context of this appeal to bear that principle in mind.

[23] 'Cost shifting' under which costs usually follow the event is not a universal rule in common law jurisdictions. In particular, it is not a rule that applies in the United States. The main principle that underlies the rule is that if one party *causes* another unreasonably to incur legal costs he ought as a matter of justice to indemnify that party for the costs incurred. A defendant who has wrongfully injured a claimant and who has refused to pay the compensation due should pay the costs that he has *caused* the claimant to incur, so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting that claim should indemnify the defendant in respect of the costs he has *caused* the defendant to incur. Causation is usually a vital factor when considering whether to make an award of costs against a party.

[24] Causation is also often a vital factor in leading a court to make a costs order against a non-party. If the non-party is wholly or partly responsible for the fact that litigation has taken place, justice may demand that he indemnify the successful party for the costs that he has incurred. There have been various circumstances in which the court has considered making an order for costs against a non-party. We shall confine our attention to those cases where this course has been urged on the ground that the non-party had supported the unsuccessful claimant.

[25] By way of background we must refer to the decision of the Court of Appeal in *Hill v Archbold* [1967] 3 All ER 110, [1968] 1 QB 686. In that case an issue arose as to whether a trade union, which had funded an unsuccessful libel action by two claimants, had been guilty of unlawful maintenance. Giving the leading judgment Lord Denning MR held that it had not. He said ([1967] 3 All ER 110 at 112, [1968] 1 QB 686 at 694–695):

> 'Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the State itself. Very few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side.'

[26] In *McFarlane v EE Caledonia Ltd (No 2)* [1995] 1 WLR 366 the conduct of a Scottish company was in issue. It had been formed to support personal injury claims on a contingency basis and had done so in relation to an unsuccessful claim for personal injury that had been brought in the English court. Its policy was not to accept liability for a successful adverse party's costs. Longmore J made an order for costs against the company. Citing *Hill v Archbold*, he observed that the exercise of this policy affected the contingency agreement with illegality under English law, quite apart from the additional illegality that arose out of the champertous nature of the agreement.

[27] In *Murphy v Young & Co's Brewery plc* [1997] 1 All ER 518, [1997] 1 WLR 1591 the plaintiff had brought an unsuccessful action for wrongful dismissal. This had been funded as to £25,000, the limit of the cover, under what would now be called before the event (BTE) insurance against legal costs. The successful defendant sought an order for costs against the insurers. In the leading judgment Phillips LJ rejected this application, holding that legal expense insurance was in the public interest in that it not only provided desirable protection to the assured, but a potential source of meeting the costs of the adverse party. Agreeing, Sir John Balcombe distinguished the case from one in which a third party funded a particular claim and had a direct commercial interest in the outcome.

[28] The result in that case differed from that in *TGA Chapman Ltd v Christopher* [1998] 2 All ER 873, [1998] 1 WLR 12, where a costs order was made against insurers. The insurers in question were the liability insurers of an unsuccessful and impecunious defendant. They were contingently liable to the claimants by reason of the provisions of the Third Parties (Rights Against Insurers) Act 1930. They funded and conducted the unsuccessful defence in their own interest. But for their intervention the action would not have been defended. All of these factors were material in leading the Court of Appeal to the conclusion that it was just to order the insurers to pay the successful claimants' costs.

[29] We now come to one of the decisions to which Colman J attached particular importance. In *Hamilton v Al Fayed (No 2)* [2002] 3 All ER 641, [2003] QB 1175 the claimant, an impecunious MP, brought a libel action against a well-known and extremely wealthy businessman. Most of his legal expenses were paid for out of a 'fighting fund' to which several hundred donors had contributed. The action failed and the defendant sought an order that nine of the major contributors to the fighting fund, whose identities he had ascertained pursuant to a court order, should pay the costs which he was unable to recover from the claimant. The judge rejected this application and the claimant appealed.

[30] The leading judgment in the Court of Appeal was given by Simon Brown LJ. After extensive consideration of authority, including the cases to which we have referred above, he identified that there was a conflict between two principles: on the one hand the desirability of the funded party obtaining access to justice; on the other, the desirability that the successful party should recover his costs. He considered that, where the funders were 'pure funders' the former principle should prevail. There were indications that this result accorded with public policy. The statutory scheme under which lawyers could act under a conditional fee agreement (CFA) encouraged litigation in circumstances where the defendant would have to pay the claimant's costs, including a success fee, if the claim succeeded, but would be unable to recover his costs if the claim failed. '[I]f in these cases solicitors (or, indeed, barristers) are not to be liable for the other side's costs if their client's claim fails, why should the pure funder be?' (See [2002] All ER 641 at [45].) Where the legal aid fund supported a claim that failed, the successful defendant would not normally have recourse to the fund to recover his costs. Nor did the law require an impecunious claimant to put up security for costs as a condition of pursuing his claim:

> 'So long as the law continues to allow impoverished parties to litigate without their having to provide security for their opponent's costs, those sympathetic to their plight should not be discouraged from assisting them to secure representation.' (See [48].)

[31] The term 'pure funder' was one that Morland J had employed in the court below ([2001] All ER (D) 181 (Jul), (2001) Times, 25 July) to describe a funder who contributes to costs as an act of charity, without control over how his donation is spent, who plays no part in the management of the trial and who has no interest in its outcome, other than the hope that his donation may be repaid if the claim succeeds. Morland J had commented, in passages cited with apparent approval by Simon Brown LJ, on the contrast between the pure funder and the professional funder:

> '70. The position of the professional funder is very different. Almost always the funding arises out of a contractual obligation, for example where the funder is a trade union, an insurer or a professional or trade association. Normally such a funder exercises considerable control management and supervision of the litigation ...
>
> 71. ... It would be very exceptional that a situation would arise where it would not be just and reasonable to make a s 51 order against a professional funder.
>
> 72. The reverse is the position in the case of a pure funder. It will be rare or very rare that it will be just and reasonable to make an order against him.'

[32] Simon Brown LJ recognised that one benefit of the principle that costs follow the event was that this deterred the bringing of actions that were likely to be lost (see *Roache v News Group Newspapers Ltd* [1998] EMLR 161). The fact that lawyers would assess the merits carefully before appearing under a CFA, and that the Legal Services Commission required a similar exercise before approving the grant of legal aid were likely to achieve the same benefit. Pure funders were less likely to exercise the same careful judgment. None the less, the desirability of access to justice prevailed.

[33] In a concurring judgment, Chadwick LJ observed ([2002] 3 All ER 641 at [63]):

> 'The starting point, as it seems to me, is to recognise that, where there is tension between the principle that a party who is successful in defending a claim made against him ought not to be required to bear the costs of his defence and the principle that a claimant should not be denied access to the courts on the grounds of impecuniosity, that tension has to be resolved in favour of the second of those principles.'

Hale LJ concurred, albeit with some reservation.

[34] In *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292, [2004] All ER (D) 284 (Mar) this court refused an application for a costs order against an individual who had provided funding for an unsuccessful defendant. We remarked (at [54]):

> 'We are not sure that the adjective "pure" assists in the analysis. It is, we believe, designed to draw a distinction between those who assist a litigant without ulterior motive and those who do so because they have a personal interest in the outcome of the litigation. Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation. Intervention to this end will not normally render the intervener liable to pay costs. If the intervener has agreed, or anticipates, some reward for his intervention, this will not necessarily expose

him to liability for costs. Whether it does will depend upon what is just, having regard to the facts of the individual case. If the intervention is in bad faith, or for some ulterior motive, then the intervener will be at risk in relation to costs occasioned as a consequence of his intervention.' a

[35] Colman J cited extensively from the judgment of this court in *R (on the application of Factortame) Ltd v Secretary of State for Transport, Environment and the Regions (No 2)* [2002] 4 All ER 97, [2003] QB 381. That judgment concerned fees paid by the successful claimants to a firm of accountants, Grant Thornton. The claimants had agreed to pay Grant Thornton 8% 'of the final settlement received'. This was to constitute payment for Grant Thornton's accountancy and back-up services in relation to the assessment of quantum and for the retention and payment by Grant Thornton of independent expert witnesses. The defendant challenged the claimants' right to recover this payment as costs on the ground that the agreement in question was champertous and unenforceable. The court rejected this argument. Relevant to its decision was the fact that Grant Thornton did not attempt to exert any influence upon the conduct of this phase of the litigation, the fact that the 8% recovery did not exceed what would have been fair remuneration for Grant Thornton's services, indeed it acted as a cap on their fees, and the fact that the agreement to remunerate Grant Thornton in this way had been necessary in order to procure for the claimants access to justice. The court observed that the introduction of CFAs evidenced a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees would be contingent on success. b c d e

[36] The most recent decision, delivered after Colman J's judgment, was the one upon which the appellants placed most reliance. *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807 was an appeal to the Privy Council from the Court of Appeal of New Zealand. In giving the advice of the board, Lord Brown of Eaton-under-Heywood stated that there was no difference of approach on the part of the courts of England, New Zealand and, indeed, Australia when considering whether to make an award of costs against a non-party. The board held that, in the circumstances of the case before it, justice required a costs order against a non-party. The non-party in question was a family company, Associated, which had advanced moneys to the defendant in the litigation which was secured by a debenture. Associated had funded appeals to the Court of Appeal and to the Privy Council, in their own interest, and those appeals would not have been brought without their support. Lord Brown set out (at [25]) the principles to be derived from the English and Commonwealth authorities as follows: f g

'(1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against "pure funders", described in *Hamilton v Al Fayed (No 2)* ([2002] 3 All ER 641 at [40], [2003] QB 1175]) as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control h j

its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence—see, for example, the judgments of the High Court of Australia in [*Knight v FP Special Assets Ltd* (1992) 107 ALR 585, (1992) 179 CLR 178] and Millett LJ's judgment in *Metalloy Supplies Ltd (in liq) v MA (UK) Ltd* ([1997] 1 All ER 418, [1997] 1 WLR 1613). Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* ([1998] 2 All ER 873, [1998] 1 WLR 12) as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in [*Knight v FP Special Assets Ltd*], provided that he is "a real party in ... very important and critical respects": see *Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation* (2001) 179 ALR 406 at 414, referred to in [*Kebaro Pty Ltd v Saunders* [2003] FACFC 5 at [96], [103] and [111]]. Some reflection of this concept of "the real party" is to be found in CPR r 25.13(2)(f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant". (4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests.'

DISCUSSION

[37] If Colman J had had the benefit of the summary of the principles given by Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* we do not believe that he would have approached the fact that MPC were professional funders in the way that he did. After considering the passages from the judgment of Morland J in *Hamilton v Al Fayed (No 2)*, that we have quoted at [31], above, he held ([2004] 1 Lloyd's Rep 88):

'[21] It is, in my judgment, a misunderstanding of this passage and seriously inconsistent with the relevant principles to suggest that a third party costs order will necessarily be appropriate against a professional funder given that he is by definition not a pure funder. Whether such an order is appropriate in any given case must depend primarily on whether on the evidence before it on the application the Court is satisfied that such an order is appropriate to reflect (i) the defendant's success and (ii) the risk of prejudice to the objective of protection of the due administration of justice. Specifically, I am unable to accept that the mere fact of a contract for a share in the proceeds of the litigation necessarily involves such material prejudice. Whether it does will depend on the legal and practical relationship between the professional funder and the claimant. If that relationship by reason of the terms of the funding agreement is such as not to give rise to any material opportunity to the funder to influence the conduct of the litigation to serve his own interests as distinct from the proper running of the trial and the funder does not in the event intervene or attempt to do so, there will be strong grounds for declining to make an order for

costs against him where, but for such funding, access to the Court would have been impossible.' a

[38] While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event. *R (on the application of Factortame) Ltd v Secretary of State for Transport, Environment and the Regions (No 2)* [2002] 4 All ER 97, [2003] QB 381, on which he strongly relied, was not a case in which there was any need to take this balancing factor into account. In our judgment the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed. b c

[39] If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above. d e

[40] The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail. The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation. f g

[41] We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the funding provided.* The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit. h j

[42] If the course which we have proposed becomes generally accepted, it is likely to have the following consequences. Professional funders are likely to cap the funds that they provide in order to limit their exposure to a reasonable amount. This should have a salutary effect in keeping costs proportionate. In the present case there was no such cap, and it is at least possible that the costs that MPC had agreed

to fund grew to an extent where they ceased to be proportionate. Professional funders will also have to consider with even greater care whether the prospects of the litigation are sufficiently good to justify the support that they are asked to give. This also will be in the public interest.

[43] In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action. We have not, however, had to explore the ramifications of an extension of the solution we propose beyond the facts of the present case, where the funder merely covered the costs incurred by the claimant in instructing expert witnesses.

[44] While we have confined our comments to professional funders, it does not follow that it will never be appropriate to order that those who, for motives other than profit, have contributed to the costs of unsuccessful litigation, should contribute to the successful party's costs on a similar basis.

THE RESULT IN THIS CASE

[45] MPC will not have entered into the funding agreement with Mr Arkin on the assumption that they would be held liable to pay, or to contribute to, the defendants' costs should Mr Arkin's claim not succeed. They must, however, have contemplated that this was at least a possibility. At the hearing of the application against MPC for security for costs, which took place in the period during which the trial had been adjourned, it does not appear that MPC challenged the proposition that they were contingently at risk of a costs order. In his judgment on that application Colman J remarked that the magnitude of the risk that MPC would be ordered to contribute to the defendants' costs should Mr Arkin's claim fail seemed to him to be 'very substantial'. In these circumstances, we can see nothing unjust in applying the approach that we have outlined above. Accordingly, we propose to order that MPC pay £1·3m by way of contribution to defence costs. To whose benefit this payment should accrue, and the form of order necessary to ensure that it does, is a matter to which we shall revert after the second part of this judgment (see [83], [84], below).

THE COSTS ORDER AGAINST BORCHARD

[46] We now turn to Borchard's appeal against the order made by the judge on 16 December 2003 ([2004] 1 Lloyd's Rep 636) to the effect that it should pay 90% of Zim's costs and 80% of each of DNOL's and KNSM's costs. DNOL and KNSM, while resisting this appeal, are seeking in the alternative an order that Borchard should pay the whole or an appropriate part of the costs they incurred in preparing and adducing expert evidence for the purposes of the trial.

[47] The judge's general approach, which we will examine in greater detail in due course, was that there was no particular feature of this case to take it outside the general rule that the costs of Pt 20 proceedings should follow the event in the Pt 20 proceedings, so that when the claimant's claim failed and the Pt 20 proceedings were as a consequence dismissed, the claimant in the Pt 20 proceedings should pay the costs of the defendants to the Pt 20 proceedings whom it had chosen to join.

THE HISTORY OF THE LITIGATION

[48] In order to understand the reasons why Borchard came to join Zim and other conference members as Pt 20 defendants in the summer of 2001 it is necessary

to understand the course which the litigation had taken up to this point. For all practical purposes connected with the litigation we need only consider the two conferences as comprising four companies each: the UKISCON conference comprising Borchard, Furness, Camomile and Zim, and the CONISCON conference comprising Borchard, DNOL, KNSM and Zim. Zim, who were the Israeli national carrier and by far the single largest participant in each group, were not joined to the action by Mr Arkin, although at the relevant time they had an office in London at which service could have been effected. Instead, he limited himself to suing the three other companies in the UKISCON conference (we exclude the fourth defendants Manchester, for whom see [7], above). As a result a direct claim by Mr Arkin against Zim, DNOL, and KNSM became effectively statute-barred soon after the writ was issued, but they were always answerable to a claim in Pt 20 proceedings.

[49] By the spring of 2000, when Borchard's amended defence was served, the litigation was limited to Arkin's claims for damages for breaches of duty committed during the six years immediately preceding the issue of the writ in April 1997. The general nature of Mr Arkin's claim is summarised at [8], above. In essence he was saying that the companies we have mentioned, acting 'collectively as both Conferences', caused loss to BCL by the abuse of their dominant position. Part of his claim involved a contention that the conferences were not entitled to the benefit of a block EC exemption in favour of liner conferences for the reasons the judge summarised at [31] of his main judgment.

[50] Zim was a very important participant in each conference, and Mr Arkin's decision to seek compensation from the three other extant members of the UKISCON conference, and not from Zim, created difficulties in terms of the documentary material and other evidence which would be available to the trial judge. These difficulties were accentuated because Mr Arkin developed a very detailed case to the effect that he was also entitled to rely on Zim's anti-competitive activities on a container route which embraced ports in South Africa, Greece, Turkey and Israel, in which none of the other participants in the two conferences were involved at all. Paragraphs 4–10 of the 'strike-out' judgment, delivered on 19 June 2001 ([2001] All ER (D) 187 (Jun)), shows how this case first surfaced in a single paragraph in a schedule to the amended statement of claim, was developed in further information served in January 2000, was further developed in the reply served in July 2000, and particularised in greater detail when yet further information was served and later amended in the ensuing months. These allegations created unusual difficulties from a procedural standpoint because Borchard and the other two defendants were being charged with legal liability in respect of matters in which they had not participated at all and in which the prime mover, Zim, was a non-party outside the jurisdiction of the English court. We will refer to these issues generally as 'the ancillary market issues'.

[51] Furness (a member, like DNOL, of the Hamburg Sud group of companies) and Camomile (a member, like KNSM, of the P & O group of companies) decided from the outset to instruct the same firm of solicitors, Davies, Arnold & Cooper (DAC). Borchard, which is a family-owned company, declined a suggestion that they should instruct the same firm, and they later turned down an overture from DAC to the effect that they should collaborate in preparing the evidence for the trial: in particular, they refused to share the cost of instructing expert witnesses. In August 2000 Miss Holmes, the DAC solicitor in charge of her clients' case, called on the Haifa offices of Mr David Malkoff while she was visiting Israel on other business. He was a lawyer for Zim who had defended most of the conference participants when

they were collaborating in their response to BCL's complaints to the EC Commission in the late 1980s.

[52] Mr Malkoff gave her access to such documents as he had in his office, which mainly related to the EC case, but when she asked for access to Zim's documents more generally (in so far as they related to activities that were relevant to the issues in this litigation), he told her that Zim had now closed their London office. All in all she did not receive a very positive response to her request.

[53] The judge held a number of hearings in late 2000 and early 2001 to deal with different aspects of the case, and at one such hearing, on 28 February 2001, he discussed with counsel some outstanding issues relating to discovery of documents, and in particular a problem arising out of the non-availability of the minutes of a body called the Freight Marketing Committee (FMC), of which only two sets of minutes were in the possession of any of the parties. Counsel for Mr Arkin told the judge that there was no possibility that his client might be able to get any more of these minutes, and that Zim was the likely repository of these documents. The judge suggested that the effective way forward would be for his client either to approach Zim or to bring proceedings against them. Mr Arkin refused to take the latter course, and the upshot of further discussion between the judge and counsel was that the judge made an order in these terms:

> 'The Claimant, by 1st March 2001, will write to Zim to ask for disclosure of the additional documents referred to in the Claimant's application for disclosure (which application, for the avoidance of doubt, remains currently pending before the Court). The Defendants will also write to Zim informing Zim that they have no objections to Zim's production of those documents to the Claimant, and the Defendants will copy those letters to the Claimant by 1st March 2001.'

By the same order the judge directed that the matter should be set down for a seven-week trial starting on the first available date in January 2002.

THE APPROACH TO ZIM IN MARCH 2001 AND THE STRIKE-OUT APPLICATION

[54] On 1 March, therefore, the claimant's solicitors wrote to Zim, in pursuance of the judge's order, indicating a very large variety of documents of which they required disclosure. On 5 March Mr Tubb (of Borchard) told his solicitor Mr Reynolds that he had spoken to Mr Stramer (of Zim) who told him that the letter of 1 March had been referred to Mr Malkoff's office. Mr Tubb gained the impression, however, that Zim would be unlikely to reply to the letter in any event, and that is how things turned out. On 6 and 7 March Borchard's solicitors and DAC both wrote to Zim along the lines suggested by the judge's order, but Zim did not respond to any of these letters, either.

[55] The effect of these problems might have been mitigated if the defendants had succeeded in an application they now made to the judge for an order striking out the ancillary market issues, alternatively for summary judgment on this aspect of the case. On 19 June 2001 the judge dismissed this application, but during his judgment he showed himself well aware of the difficulties created by Zim's non-involvement in the litigation. He said (at para 50) that it could not be assumed that anything like all the relevant evidence from the defendants and Zim was before the court, and that further disclosure might well give rise to evidence which was further supportive of

the claimant's case. He had referred earlier in his judgment to the role played by Mr Levy (of Zim), and he now said:

> '... [I]t cannot be said that there is no realistic prospect of any further supportive evidence by means of further disclosure or by means of the cross-examination of witnesses who are likely to give evidence. For example, the defendants might be placed in a very questionable position if without good reason they failed to call Mr Levy, even though he was an employee of Zim and not of the defendants. Given that there is some, albeit slender evidence to support the claimant's allegation, it would be quite unfair to deny the claimant the opportunity for further disclosure and further investigation through cross-examination offered by a full trial. CPR 24.2 has the purpose of anticipating the claim which is fanciful but not the claim which is merely improbable.'

[56] The judge had accepted (at para 45) that there was some uncertainty as to the minimum that needed to be proved in order to implicate in liability for the anti-competitive acts of a cartel member other members of the cartel if they had participated in arriving at an agreed overall anti-competitive policy and had also exchanged information about competitors, even if they had little or no knowledge of the specific anti-competitive conduct of that member. He took the view, however, that the law was clearly in a process of development, and that the outcome in any particular case would depend on the precise facts as to the availability of information to cartel members and their means of knowledge and actual knowledge of such facts.

THE DECISION TO JOIN THE PT 20 DEFENDANTS AND THE PHASE 3 DIRECTIONS

[57] This order created a dilemma for Borchard and the other two defendants. Mr Reynolds believes that Mr Tubb (who had died before Mr Reynolds made a witness statement about these events two years later) spoke to Mr Stramer at least twice in the week following the strike-out judgment. Nothing came of these conversations, and Mr Tubb then instructed his solicitors to seek to join Zim (and DNOL and KNSM, as the other two relevant members of CONISCON) as Pt 20 defendants. On 27 July 2001 the judge granted this application. In giving detailed case management directions leading up to a trial commencing on 28 January 2002 the judge accepted an undertaking from DAC's clients that they would write to Zim forthwith to call for Zim to make available any relevant documents during the period April 2001 to May 2002. In other words, Borchard sought to resolve the dilemma created by the judge's order by joining further parties, including Zim, as Pt 20 defendants. DAC's clients, for their part, sought to proceed by way of further correspondence with Zim.

[58] On 17 September 2001 the judge gave directions in the Pt 20 proceedings. That hearing, of which we have been provided with a transcript, throws a vivid light on the attitude of all the defendants following the strike-out judgment, with the trial due to start in four-and-a-half months' time. After referring to Miss Holmes's evidence about her visit to Haifa the previous year, Borchard's counsel told the judge:

> 'This rather seems to bear out Mr Reynolds's surmise ... that Zim are deliberately dragging their heels. That perhaps makes it all the more pressing that some sort of an order should be made that brings them here,

albeit kicking and screaming, and makes it desirable that they should be forced to join the party or be bound by the result if they do not want to. What we discussed last time, what we would want to avoid particularly in a case where we cannot win, and you are never going to get any costs from the claimant, is to have to spend a lot of money pursuing Zim in separate proceedings where they may not even be bound by the result of the earlier proceedings and where a whole lot of new material and evidence may suddenly pop up which may show that the original result perhaps was wrong. They have not acted expeditiously. They have obviously been keeping tabs on the action as it goes along, as they must be able to see some potential liability even at the stage where interlocutory proceedings were going on.'

[59] Counsel then appearing for the second and third defendants, for his part, told the judge (after the judge had resolved to make an order for substituted service on Zim):

'Our position is we would like a CMC [case management conference] earlier because we do want Zim to actively participate in the trial ... We do want Zim brought in. We do want them brought in as soon as possible and we do want a CMC as soon as possible so that we can start marshalling our forces. So we would suggest if they are allowed 14 days to acknowledge service.'

[60] The next case management conference took place on 11 October 2001. By this time DAC had been instructed by DNOL and KNSM as well, and Zim was now represented by a firm of London solicitors. In the light of Zim's concerns about the imminence of the trial date, the judge postponed the start of the trial for two weeks and directed that the hearing would be divided into two phases. Phase 1 would be confined to issues of liability and questions in respect of the North European market. Phase 2, which would relate to all other issues, including the ancillary market issues, would be heard 'not before the beginning of the April term'. In further directions, given on 20 December 2001, the earliest date for the start of the phase 2 trial was now to be July 2002.

[61] Further directions were given by the judge, in agreed terms, on 18 January 2002. These included what were called 'Phase 3 Directions' in these terms, so far as are material:

'7. Issues of contribution, if relevant, shall be resolved in a third phase to the trial of this action, such phase to follow the judgment on matters of liability and question in the main action ...

9. Each Defendant and Part 20 Defendant shall be deemed to have served a Part 20 contribution notice on every other Defendant and Part 20 Defendant. In the event that the matter cannot be agreed between the parties, there shall be directions at a further CMC for appropriate pleadings to be exchanged in respect of such contribution proceedings following the judgment on liability and questions on the main action.

10. Each Part 20 Defendant to be bound by the judgment of the main action ...

12. Nothing in this part of the Order is intended to affect the incidence of costs.' a

[62] On 27 May 2002 the judge made an order directing that the balance of the trial of the phase 1 proceedings would be completed in the hearing now fixed for October 2002, and noting that the phase 2 proceedings had been discontinued. (We were told that Mr Arkin took this step following some unfavourable b comments by the judge on the case he had heard so far.) The hearing of the phase 1 trial was completed on 31 October, and after a hearing arranged before Christmas for counsel's closing submissions, the judge delivered his main judgment on 10 April 2003, when he dismissed all the claimant's claims (for his judgment see [2003] 2 Lloyd's Rep 225). His judgment on the incidence of costs c as between the defendants and the Pt 20 defendants was delivered on 16 December 2003 ([2004] 1 Lloyd's Rep 636).

THE JUDGE'S REASONS FOR HIS JUDGMENT ON COSTS

[63] In this costs judgment the judge accepted that what he called a cut-through d order (see *Sanderson v Blyth Theatre Co* [1903] 2 KB 533) might be made in those cases where a claimant was impecunious and justice required that an unsuccessful defendant should pay the costs of a successful defendant direct. The judgment of this court in *Johnson v Ribbins (Sir Francis Pittis & Son (a firm), third party)* [1977] 1 All ER 806, [1977] 1 WLR 1458, however, showed that the impecuniosity of the claimant was e not in itself a feature sufficient to justify a departure from the normal rule that the costs of third party proceedings should follow the event in those proceedings. He accepted that this type of order should not be regarded as inviolate, but he said that it would only be in exceptional cases that what he called 'the separability principle' (whereby Pt 20 proceedings were treated as quite separate from the main proceedings) would justifiably be departed from. His judgment continued ([2004] 1 f Lloyd's Rep 636):

'[34] Further, in the present case, the Part 20 proceedings were not such as would necessarily be conclusively determined by the result of the main action. I can see that in cases where, if the defendant lost to the claimant, it would g inevitably follow that the third party must be liable to the defendant, to impose on the defendant the burden of the Part 20 defendant's costs as well as his own might amount to an injustice so great as to justify making an order that the Part 20 defendant should recover his costs direct from the impecunious claimant. However, where, as in this case, there were likely to be discrete h Part 20 issues arising out of the Conference Agreements and the conduct of Zim in relation to conference members, the Part 20 issues do no more than overlap on the issues in the main action. They are not co-extensive.

[35] Additionally, this is not a case where Borchard and the third party Part 20 defendants made common cause as to joinder. Quite the contrary. j Borchard did not send letters before action or invite conditional acceptance of liability before commencing the Part 20 proceedings. Instead it pursued an arms [sic] length approach to the Part 20 defendants which was consistent with the maintenance of the separate nature of the Part 20 proceedings. Further, Borchard has derived from the joinder of Zim the benefit of both factual and expert evidence, while adducing no expert evidence itself. It may well be that

even if Zim had not been joined, the factual evidence would still have been available. However, the expert evidence would not.

[36] In these circumstances this would not, in my judgment, be an appropriate case in which to make a cut-through order confining the Part 20 defendants to recovery of their costs direct from Mr. Arkin.'

[64] The judge then refused to make an order requiring Borchard to contribute to the costs incurred by the second and third defendants in instructing expert witnesses. He also refused to spare Borchard the obligation of paying the whole of the costs incurred by the Pt 20 defendants in instructing expert witnesses. He said (at [40]):

'In reaching this conclusion I have very much in mind that Borchard was aware at the time when it joined the Part 20 defendants that it was facing an impecunious claimant and that absent a s. 51(3) order against an outside funder (MPC) it was exposed to the risk of the Court taking the approach to costs identified in *Johnson v. Ribbins* ... It made no attempt before the trial to co-operate with the other conference members as to the provision of or the cost of expert evidence and was content to pursue its defence by the cheapest means possible — reliance on the expert evidence adduced and paid for by others. There was a very low level of co-operation between Borchard and all the other parties as to how expert evidence was to be deployed by way of defence.'

[65] It is not easy to see how in reaching his ultimate conclusions the judge took into account some of the matters to which he had alluded at the beginning of his judgment. Thus he recalled (at [3]) how Mr Arkin had made specific allegations against Zim in relation to the ancillary market issues, and how it had become clear at an early stage in the pre-trial hearings that evidence of central importance to the case against all the other defendants was likely to be in Zim's possession. At [4] he described how he had himself raised the question of how the trial could be sensibly conducted in Zim's absence, and how he had given a strong indication that Zim ought to be joined. At [5] he said he was satisfied that there was nothing intrinsically unreasonable in joining Zim:

'In particular, Zim occupied a central position in Mr. Arkin's allegations of abusive conduct and, on the face of it, had evidence directly material to those allegations. Secondly, although Zim had given a measure of co-operation to Ms. Holmes of the second to fourth defendants' solicitors in the course of her visit to Israel in 2000, it was far from clear whether they had approached the process of disclosure of documents as effectively and searchingly as would have been the case if they had been a party to the proceedings. Thirdly, it was quite unrealistic for Borchard to fight the claim on the basis that if Mr. Arkin succeeded, separate proceedings could be pursued against Zim. The risk of inconsistent findings was far too great to leave that to chance.'

He went on to say (at [6]) that Zim played a major part in the trial, did not cause increased costs by duplication of evidence given by other parties, and adduced

evidence of facts, disclosed documents and made available factual witnesses who gave important evidence helpful to the court.

THE PRACTICAL EFFECT OF THE JUDGE'S COSTS ORDER

[66] Borchard complained that the injustice of the judge's order can be seen in the following table, which shows the effect of his order when applied to the costs claimed by the various defendants and Pt 20 defendants:

	Own Costs	*Zim's Costs*	*DNOL/KNSM's Costs*	*Total Liability*
Borchard	£813,000	£1·62m	£1·085m	£3·518m
Furness/ Camomile	£1·830m			£915,000 each
DNOL/ KNSM	£1·36m		£271,000	£135,500 each
Zim	£1·8m	£180,000		£180,000

[67] We have recited the facts as they appeared to Borchard. Borchard's own costs were lower than those of the other parties because they adduced no expert evidence and their factual evidence was attenuated by reason of Mr Tubb's untimely death. It appears that they did not join in the common defence to the EC Commission proceedings, either, because of their differences of opinion with other conference members at that time.

[68] The costs of DAC's four clients (whom we will call 'the DAC parties') were substantially greater because they bore the cost of instructing accountancy experts and shipping experts at the trial. Although DNOL/KNSM agreed to share the expense equally with Furness and Camomile from the time they were joined to the proceedings, Mr Steven Gee QC, who appeared for all the DAC parties, accepted that this internal costs sharing agreement would not necessarily be binding as against Borchard when costs came to be assessed.

[69] Zim, for its part, instructed an economist, but the bulk of its costs represented legal costs and disbursements and the cost of advisory accountants who did not give evidence at the trial. The judge, as we have seen, praised Zim for not duplicating the costs of other parties. Zim adduced evidence from Mr Malkoff to the effect that Borchard had made no attempts to secure Zim's co-operation until after the Pt 20 proceedings had been issued. He averred that Zim had expressed itself more than willing to co-operate with DAC, and that they would have been willing to help Borchard if they had approached them. Earlier, in October 2001, he had filed a witness statement in which he sought to soften the impression that might have arisen from Borchard's need to seek an order for substituted service and the delay that occurred in August and September 2001, culminating in an acknowledgment of service filed by Zim on 2 October 2001 indicating an intention to challenge the jurisdiction of the English court.

[70] He did not address the problems created earlier by Zim's failure to respond in any way to the letters sent to them, at the judge's direction, in early March 2001 (see

[54], above). Instead he said that Zim was just starting to look for relevant documents in early October 2001, and he accepted that his clients were the only participant in either conference who were in a position to lend evidence dealing with the relevant facts relating to the route to South Africa.

[71] When the judge made his ruling on the incidence of costs as between the defendants and the Pt 20 defendants, the phase 2 proceedings had been discontinued and no expense had been incurred as between any of the parties in connection with the prospective phase 3 contribution proceedings other than the exchange of statements of case in the Pt 20 proceedings whose effect has been helpfully set out in a single Pt 20 case memorandum. We heard enough by way of submissions from counsel, however, to show us that even if the judge had held that all these parties had collective responsibility for breaches of arts 81 or 82 of the Treaty of Rome vis-à-vis BCL, there would have been plenty for them to argue about if and when the judge went on to consider how much of this collective liability should fall on each of them. Except for the costs of preparing their pleaded cases, however, the parties did not incur any expense in preparation for this potential dogfight.

HOW SHOULD THE COSTS BE APPORTIONED JUSTLY?

[72] How, then, should the costs have been justly apportioned between the various parties, given that they all took part in the successful defence to the claimant's claim? And was the judge wrong in the approach he adopted and the order he made?

[73] As has often been said by this court, the CPR represents a new procedural code, and it is often unwise to place too much weight on decisions made under the former rules. The ground rules are very simply set out in Pts 1, 20 and 44.

[74] Rules 1.1 and 1.2 make it clear that the overriding objective of enabling the court to deal with cases justly must permeate the interpretation of any rule and the way in which the court exercises any power given to it by the Rules. Rule 20.3(1) provides that a Pt 20 claim should be treated as if it were a claim for the purposes of the CPR, and the note beneath r 20.9(1)(c) refers back to the court's case management powers under r 3.1(2)(e) and (j). And r 44.3 provides:

> '(1) The court has discretion as to—(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order.'

[75] In the usual course of things the court will consider the incidence of costs in the main proceedings quite separately from the incidence of costs in the Pt 20 proceedings, but nobody submitted that this was an inviolable rule. Even under the former regime, and long before the House of Lords illuminated the wide scope of s 51 of the Supreme Court Act 1981 in *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] 2 All ER 409, [1986] AC 965, this court had held that both the High Court and the county court had 'full and ample power to make such orders as to costs as between defendants and third and subsequent parties as the justice of the case may require' (see *Edginton v Clark (Macassey and ors (Trustees of Whitley House Trust), third parties)* [1963] 3 All ER 468 at 476, [1964] 1 QB 367 at 384 where Upjohn LJ said that the court would have been prepared to order that the plaintiff should pay the third party's costs directly if the defendants had invited them to).

[76] *Johnson v Ribbins (Sir Francis Pittis & Son (a firm), third party)* [1977] 1 All ER 806, [1977] 1 WLR 1458 is a good example of a case decided under the old regime. A

legally-aided plaintiff had failed in her action against her mortgagees for negligently selling her hotel at a gross under-value. The mortgagees' third party claim against the estate agents who had advised them therefore fell to be dismissed. This court applied the normal rule (see RSC Ord 62, r 3(2)) that costs should follow the event in the third party proceedings, and said that the judge had been wrong to make an order that the legally-aided plaintiff, who had the benefit of the costs protection available to legally-aided parties, should pay the third party direct. Goff LJ said ([1977] 1 All ER 806 at 811, [1977] 1 WLR 1458 at 1464):

> 'Apart from the impact of legal aid the consideration of which, as we have already observed, is excluded by the Legal Aid Act 1974 itself, we can see nothing which the defendants can call in aid, except the impecuniosity of the plaintiff, but it cannot be right to deprive a third party of an order for costs to which he is otherwise entitled against the defendant, because the defendant when looking to the plaintiff for reimbursement finds a person not worth powder and shot.'

[77] In the ordinary run of cases under the CPR the same principle will be applied. A successful Pt 20 defendant should not be deprived of his prima facie right to an order for costs against a Pt 20 claimant merely on the ground of the claimant's impecuniosity (see Goff LJ [1977] 1 All ER 806 at 812, [1977] 1 WLR 1458 at 1465–1466). The fact that in an appropriate case a defendant may, and a Pt 20 defendant may not, obtain an order for security for costs against a claimant may be a relevant factor in some cases, but in the present litigation DAC endeavoured but failed to obtain such an order against Mr Arkin, so that the point does not arise. The issue that has to be determined on the peculiar facts of the present litigation is whether the interests of justice deemed that some different order should be made (see r 44.3(2)) as between the various conference participants who successfully beat off the claimant's claim.

[78] In our judgment the judge fell into error in the exercise of his discretion by apparently giving no weight to the important matters to which he alluded ([2004] 1 Lloyd's Rep 636 at [3]–[5]) (see [65], above) and by failing to take into consideration the very unusual circumstances of the claim. This was akin to being a conspiracy claim in which it was being asserted that the various conference participants bore collective responsibility pursuant to arts 81 and 82 of the Treaty of Rome for the losses BCL had suffered at the hands of any of them, so long as they were implementing conference policy. And not only that: it was also being asserted that they bore collective responsibility in relation to the ancillary market issues, about which none of them, apart from Zim, knew anything at all. The fact that Mr Arkin chose to sue only three of them, and did not sue Zim or the other parties to the CONISCON conference, must not be permitted to produce an unjust result, so far as the incidence of costs as between the conference parties is concerned.

[79] As the judge indicated, Zim were joined after he had intimated that he could not see how he could try the case, and particularly the ancillary issues, fairly in the absence of Zim's documents and the oral evidence of Mr Levy. Although Mr Malkoff was to assert in the autumn of 2001 how co-operative his clients would have been willing to be in the absence of joinder, their previous conduct (see [50]–[54], above) did not evidence such willingness in any great measure, and after the failure of the judge-inspired correspondence in March 2001 and the judge's refusal to strike out the ancillary market issues in mid-June 2001, Borchard had to take urgent action to protect its position with the trial date in January 2002 looming ever nearer. The fact that the DAC defendants prudently decided to shelter behind Borchard's coat-tails once they knew that Borchard was intent on embarking on Pt 20 proceedings—their solicitors

were shown the Pt 20 claim in draft in early July 2001—does not in our judgment mean that justice requires them to be treated more favourably. Their enthusiasm for what Borchard had done is amply evidenced by what their then counsel told the judge on 17 September 2001 (see [59], above), and by their willingness to join in the agreed order for the phase 3 trial whereby all the conference participants were deemed to be seeking contribution from all the others without further order.

OUR CONCLUSIONS ON BORCHARD'S APPEAL

[80] In our judgment justice demands that we should set aside the judge's order, which produces a very unfair result. But what should we put in its place? We were persuaded by the submissions we received, particularly from Zim, that the sharing of costs liability in accordance with the conference participants' trade share would be unjust. We see no merit in remitting the matter for the judge to decide, however, since we would have to indicate the basis on which he should decide it, and short of allowing him to embark on an expensive additional further hearing we can decide the matter just as well ourselves.

[81] Were it not for one matter, we would have considered it fair to allow the six parties' costs to lie where they fall. The reason why we do not consider that to be a just solution is that it would permit Borchard, who incurred no costs in instructing experts (whether in an evidential or in an advisory capacity), to benefit from the costs incurred by their fellow conference members who did bear this expense.

[82] We therefore direct that on the assessment of the defendants and Pt 20 defendants' costs an inquiry should be made into the costs incurred by the DAC parties and Zim in and about instructing experts, whether such experts were to act in an evidentiary or an advisory role, such costs to include the legal costs associated with giving such instructions. Once the total of those costs has been ascertained, they should be borne equally by Borchard, the four DAC parties and Zim as to a one-sixth share apiece. Subject to this, these six parties should bear their own costs both in the main proceedings and in the Pt 20 proceedings, and the appeal of Borchard and the cross-appeal of the DAC parties will be allowed to this extent.

THE DISTRIBUTION OF MPC'S LIABILITY FOR COSTS BETWEEN THE SIX PARTIES

[83] We consider it just that the £1·3m which we have ordered MPC to pay should be divided between the six parties in proportion to the amount each has borne in respect of the costs of its defence and the Pt 20 proceedings excluding the costs of and occasioned by the Pt 20 costs applications and appeal. This is to be ascertained after taking into account any payments made between the six parties in respect of instructing of experts under our order. We considered, and discarded, the idea that MPC's liability should be divided into six equal parts. Although this solution would have been easier to administer, it would not have afforded justice to those who contributed more heavily to the costs of the successful defence.

[84] We will hear counsel as to the terms of the order we should make in order to put our judgment into effect. It may be desirable that in the first instance MPC should pay the £1·3m into a fund to be controlled by the six parties' solicitors, and that its ultimate disposition should await the final ascertainment or agreement, of the costs liabilities, with interim payments out of the fund being made by agreement, or in default of agreement, by the commercial court.

Appeals allowed.

Kate O'Hanlon Barrister.

Sawkins v Hyperion Records Ltd

[2005] EWCA Civ 565

COURT OF APPEAL, CIVIL DIVISION

MUMMERY, MANCE AND JACOB LJJ

15, 17 MARCH, 19 MAY 2005

Copyright – Musical work – Originality – Existing composition – Whether copyright subsisting in modern performing editions of out-of-copyright music – Copyright, Designs and Patents Act 1988, ss 1(1), 3(1).

The claimant, an acknowledged world authority on a baroque composer who had died in 1726, prepared modern performing editions of four of the composer's works. The defendant record company produced a compact disc featuring sound recordings of performances played from the scores of the performing editions, without the claimant's consent. While agreeing that the claimant was entitled to a hire fee for his work in providing the scores of the editions for the recording the defendant denied that the claimant had any rights in them and refused to pay him any royalties. The claimant brought proceedings against the defendant for infringement of copyright on the basis that he was the author of original musical works within s 1(1) [a] of the Copyright, Designs and Patents Act 1988. Section 3(1)[b] of the 1988 Act defined 'musical work' as 'a work consisting of music'. The claimant's case was that he had originated the performing editions by his own expert and scholarly exertions, the editions had not previously existed in that form, the contents of his editions affected the combination of sounds produced by the performers who used them at the defendant's recording session and the resulting combination of sounds embodied in the compact disc was music. The judge held that the defendant had infringed the copyright in three of the works. The defendant appealed. It denied that the three performing editions were either 'original' or musical' within the meaning of the 1988 Act and submitted that the judge was wrong in treating the 'playability' of the editions as an indicator of the subsistence of an independent copyright in them.

Held – The effort, skill and time spent in making the three performing editions were sufficient to satisfy the requirement that they were 'original' works. That was so even though the claimant worked on the scores of existing musical works composed by another person, the composer's works were out of copyright and the claimant had no intention of adding any new notes of music of his own. The performing editions were 'musical' works within the meaning of the 1988 Act. There was nothing either in the 1988 Act or in the general principles of copyright law to support the restrictive approach advocated by the defendant that unless the edition included the composition of new music in the form of the notes on the score (and not merely the correction of wrong or unsatisfactory notes in the scores used) no copyright would exist in the edition as a musical work. The fallacies in the defendant's arguments were that they only treated the actual notes

a Section 1, so far as material, is set out at [73], below

b Section 3, so far as material is set out at [73], below

in the score as music and they approached the issue of subsistence from the wrong direction by dividing the whole of the performing edition into separate segments and by then discarding particular segments on the basis that they were not music and not therefore covered by copyright, which was contrary to the correct approach. There was no reason for regarding the actual notes of music as the only matter covered by musical copyright, any more than, in the case of a dramatic work, only the words to be spoken by the actors were covered by dramatic copyright. It was wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that made some contribution to the sound of music when performed, such as performing indications, tempo and performance practice indicators, if they were the product of a person's effort, skill and time, bearing in mind the relatively modest level of the threshold for a work to qualify for protection. In the instant case the claimant's work had sufficient aural and musical significance to attract copyright protection. The appeal would therefore be dismissed (see [36], [48]-[50], [55], [56], [70]–[72], [87], below).

Walter v Lane [1900–3] All ER Rep Ext 1666 applied.

Decision of Patten J [2004] 4 All ER 418 affirmed.

Notes

For originality, and for dramatic and musical works and adaptations, see 9(2) *Halsbury's Laws* (4th edn reissue) paras 64, 72, 73.

For the Copyright, Designs and Patents Act 1988, ss 1, 3 see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 408, 410.

Cases referred to in judgments

Austin v Columbia Gramophone Co Ltd [1917–23] MCC 398.

Autospin (Oil Seals) Ltd v Beehive Spinning (a firm) [1995] RPC 683.

Biogen Inc v Medeva plc (1996) 38 BMLR 149, HL.

Black v Murray & Son (1870) 9 M 341, Ct of Sess.

Express Newspapers plc v News (UK) Ltd [1990] 3 All ER 376, [1990] 1 WLR 1320.

Hadley v Kemp [1999] EMLR 589.

Interlego AG v Tyco Industries Inc [1988] 3 All ER 949, [1989] AC 217, [1988] 3 WLR 678, PC.

Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 All ER 465, [1964] 1 WLR 273, HL.

Sands & McDougall Pty Ltd v Robinson (1917) 23 CLR 49, Aus HC.

Sawkins v Harmonia Mundi (19 January 2005, unreported), Trib Gd In Nanterre.

Walter v Lane [1900] AC 539, [1900–3] All ER Rep Ext 1666, HL.

Appeal

The defendant, Hyperion Records Ltd, appealed with the permission of Patten J from his decision on 1 July 2004 ([2004] EWHC 1530 (Ch), [2004] 4 All ER 418) whereby he held that sound recordings of music on a compact disc made and sold by Hyperion infringed the copyright in three performing editions originated by the claimant, Dr Sawkins. The facts are set out in the judgment of Mummery LJ.

Richard Spearman QC and *Jacqueline Reid* (instructed by *Wiggin LLP*) for Hyperion.

Richard Arnold QC and *Andrew Norris* (instructed by *Carter-Ruck*) for Dr Sawkins.

Cur adv vult

19 May 2005. The following judgments were delivered.

MUMMERY LJ.

INTRODUCTION

[1] Does copyright subsist in modern performing editions of the out-of-copyright music of Michel-Richard de Lalande, the principal court composer at the courts of Louis XIV and Louis XV? If, as Patten J held ([2004] EWHC 1530 (Ch), [2004] 4 All ER 418), it does and has been breached, the infringements are actionable by Dr Lionel Sawkins. He is the composer of the performing editions, the claimant in the action and the respondent to this appeal.

[2] Copyright disputes about works of this character and quality are infrequent. They rarely reach trial and hardly ever come before the appellate courts. In this case some interesting copyright points have been argued in depth by leading counsel. In deciding the appeal this court should be specially attentive to the judge's findings of fact about the composition of the performing editions by Dr Sawkins and about the use made of them without his consent by the appellant, Hyperion Records Ltd (Hyperion). The result of the appeal ultimately turns, in my judgment, on the application of familiar copyright principles to Patten J's findings of fact.

[3] There has been litigation elsewhere. The court was informed that Dr Sawkins successfully brought proceedings in the French courts for infringement of the copyright in the same kind of performing editions of other music by Lalande. The court was shown a translation of the judgment of the Tribunal de Grande Instance de Nanterre of 19 January 2005, *Sawkins v Harmonia Mundi*, relating to his adaptation of Lalande's works *Miserere à grand Coeur* and *Dies Irae*. The legal content of the formal judgment is of more assistance to Dr Sawkins than it is to this court: we are concerned with different editions of different music governed by a different national law of copyright. The same comment applies to the extracts from Pt II of the German Law on Copyright and Neighbouring Rights 1965 (as amended), which were cited as an instance of copyright protection for editions of non-copyright works.

THE APPEAL

[4] On 1 July 2004 Patten J held that sound recordings of music on a compact disc (the CD) made and sold by Hyperion infringed the copyright in three performing editions originated by Dr Sawkins. The judge ordered an account of profits or, at the option of Dr Sawkins, an inquiry as to damages for infringement. The judgment (to which I would pay tribute for its firm findings of fact, its clear conclusions and its careful treatment of the legal issues) is reported at [2004] 4 All ER 418.

[5] Hyperion, for whom Mr Richard Spearman QC appears, appeals with the permission of the judge in respect of the three performing editions on which Dr Sawkins succeeded. (The claim in respect of a fourth work was rejected by Patten J. Dr Sawkins, for whom Mr Richard Arnold QC appears, does not cross-appeal against that ruling.)

[6] Patten J also held that the moral rights of Dr Sawkins had been infringed. Hyperion had not identified him as the author of the three editions in question in accordance with s 77 of the Copyright, Designs and Patents Act 1988. The judge ordered an inquiry as to the damage suffered by Dr Sawkins for acts of infringement of his 'paternity right' in respect of the editions.

PERFORMING EDITIONS OF LALANDE

[7] Lalande composed the original music in Dr Sawkins's performing editions. Lalande was born in 1657 and he died in 1726. Any copyright that may have subsisted in his music in the United Kingdom obviously expired long ago. Until fairly recently his sacred music in the form of grands motets was largely neglected. Few of the original manuscripts have survived.

[8] By August 2001 Dr Sawkins, who is a musicological scholar of high repute and a world authority on Lalande, had completed his modern performing editions of three of Lalande's grands motets. They contain sections, which are divided into vocal passages for single voices and for choirs, and orchestral interludes:

(1) *Te Deum laudamus* (section 32). This dates from 1684. Lalande later reduced its length and revised it. Dr Sawkins added a figured bass line. He made 1,139 corrections and additions to the notation necessary to make the music playable.

(2) *La grande pièce royale* (section 161). This orchestral piece dates from about 1695. It was published in a Paillard edition in 1964. Dr Sawkins re-created missing viola parts in respect of 153 of Lalande's 268 bars.

(3) *Venite, exultemus* (section 58). This dates from 1701. Dr Sawkins corrected 27 wrong notes. He made changes or additions to the figured bass (figuring for the basse continue).

(4) *Sacris solemniis* (section 74). Only the sixth movement (*Panis Angelicus*) was included in the sound recording on the CD. As there was very limited editorial input by Dr Sawkins and his performing edition was not substantially copied on the CD, the judge held that no infringement had occurred. I say no more about it in this judgment.

[9] Dr Sawkins spent about 300 hours working on each of the performing editions of the four pieces, making the changes and corrections and modernising the notation. He registered the completed editions with the Performing Right Society and the Mechanical Copyright Protection Society, who license the performance and mechanical recording rights in copyright music on behalf of copyright owners. He asserted a claim to copyright with his name and the date on the front page of each of the scores of his editions.

[10] He made a grand total of 3,000 editorial interventions in the four pieces. It is, of course, more relevant to consider the nature and amount of the work by Dr Sawkins on the individual editions, as he claims a separate and independent copyright in each of them.

THE HYPERION CD

[11] Hyperion is a small record company specialising in recordings of neglected works. In October 2002 Hyperion produced the CD *Music for the Sun King*. It featured sound recordings of performances played from the scores of the four performing editions by the Ex Cathedra choral and orchestral ensemble. Ex Cathedra enjoys a reputation for the performance of French Baroque music. It was conducted by Jeffrey Skidmore. The sound recordings went ahead without the consent of Dr Sawkins. His prior assertion of copyright in the performing editions of the four pieces as 'original musical works' was disputed by Hyperion. While agreeing that Dr Sawkins was entitled to a hire fee for his work in providing the scores of the editions for the recording (£1,350), Hyperion denied that he had any rights in them and refused to pay him any royalties. Hyperion's

position is that an editor should never obtain copyright in a performing edition of non-copyright music.

[12] The scores produced by Dr Sawkins were used by the orchestral and vocal performers at Hyperion's recording sessions. The recording of the combination of sounds produced by the ensemble's use of the scores of the performing editions is embodied in the CD. It was accepted that none of the original Lalande music could have been performed by the Ex Cathedra ensemble using only the extant earlier Lalande scores.

[13] Hyperion's principal point is quite simply that the recordings on the CD were of performances of the music composed by Lalande. They were not recordings of music composed by Dr Sawkins. That is the basis of Hyperion's denial of any legal obligation to pay royalties to him for using the non-copyright music of a composer who died nearly 280 years ago.

SUBSISTENCE OF COPYRIGHT

[14] In a copyright action it is necessary to identify the work in which copyright is claimed and then to determine (a) whether the work is one in which copyright subsists under the 1988 Act, (b) who is the author and owner of the relevant copyright and (c) whether the work has been substantially copied without the consent of the owner.

[15] As there has been some misunderstanding about the legal issues in the case, I should first make clear what the case is *not* about. Dr Sawkins has not made any claim in this action to any copyright in (a) the music composed by Lalande; or (b) an arrangement, transcription or interpretation of Lalande's music; or (c) a compilation of Lalande's music; or (d) a typographical arrangement of Lalande's music.

[16] The claim made by Dr Sawkins is confined to copyright in the particular works originated by him. They take the material form of musical scores embodying performing editions of three pieces of music by Lalande. Dr Sawkins originated the performing editions in the copyright sense: that is, he used his own substantial and independent effort, skill and time to create them. They did not exist as such before he produced them. He is the author (again in the copyright sense) of each of the editions.

[17] The dispute is whether any of them fall within the statutory definition of an 'original musical work' in the 1988 Act. In brief, Dr Sawkins's case is that they do because (a) he originated the performing editions by his own expert and scholarly exertions, (b) the editions did not previously exist in that form, (c) the contents of his editions affected the combination of sounds produced by the Ex Cathedra performers who used them at the Hyperion recording session and (d) the resulting combination of sounds embodied in the CD was music.

[18] Each edition also exists in the form of printed musical scores produced by Dr Sawkins. They contain musical information in conventional modern notation with indications or directions for the performers. The performing indications either affect or potentially affect the sounds, which may be produced by the performers who use the scores: which instrument to play, whether it is to be played soft or loud, or fast or slow, and ornaments, such as trills or slurs. The performance of the editions creates a combination of sounds available for hearing and appreciation through the ears of the listeners.

[19] In finding for Dr Sawkins on the subsistence issue, the judge held that the performing editions satisfied the statutory definition of 'original musical works'. Copyright subsists in an original musical work, which has been recorded in

writing or otherwise (ss 1(1)(a) and 3(2) of the 1988 Act). '[W]riting' includes any form of notation, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded (s 178). '[M]usical work' is defined in s 3(1) as 'a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music'.

[20] Hyperion denies that the three performing editions are either 'original' or 'musical' within the meaning of the 1988 Act. The judge was wrong, it submits, in treating the 'playability' of the editions as an indicator of the subsistence of an independent copyright in them.

THE PERFORMING EDITIONS

[21] At this point the relation between Lalande's original music and the performing editions produced by Dr Sawkins requires elaboration.

[22] It was the aim of Dr Sawkins, so far as was possible, to reproduce faithfully Lalande's music in the form of an accurate edition close to the composer's original intentions (see [2004] 4 All ER 418 at [13]). This involved consulting and drawing on manuscript and printed sources dating from the late seventeenth and early eighteenth centuries. They were scattered in various libraries, mainly on the Continent. Work was necessary in order to select a version and to produce a score and a series of parts which would be playable. That involved transcription of the music from the original scores into modern notation and interpretation of the 'shorthands', as in the case of the *Te Deum*, on the original scores for the benefit of the performers. (The detailed work of Dr Sawkins is described in detail by the judge at [16]–[22].)

[23] The work of Dr Sawkins did not, in general, involve recomposition of Lalande's music or making an 'arrangement' of it in the copyright sense (see s 21(3)(b) of the 1988 Act). Nevertheless, the production of the performing editions required substantial effort, skill and time on the part of Dr Sawkins. As the judge said:

> '[20] ... the process of editing undertaken by Dr Sawkins combines the scholarship and knowledge derived from a long and detailed study of the composer's music with a certain amount of artistic inventiveness ...
>
> [63] There can be no doubt that Dr Sawkins has applied to the task of editing the four editions under consideration considerable skill and labour based on his own expertise in respect of Lalande. The work was laborious and painstaking and extended over a considerable period of time ...'

[24] The judge rejected Hyperion's contention that Dr Sawkins had not utilised 'the right kind' of skill and labour to acquire an independent copyright, as he had not produced original music. Indeed, he accepted that he had, to a very large degree, reproduced the musical contents of the Lalande source material. The editions, Hyperion contend, are no more than transcriptions of Lalande's music and did not involve the creation of new music in the form of notes or sounds.

[25] The response of Dr Sawkins (which was accepted by the judge—see [64]) was that none of the music could have been played or performed by Ex Cathedra at the Hyperion recording session by using any of the earlier extant Lalande scores, except perhaps by using the 1964 Paillard edition of *La grande pièce royale*. To make the Lalande music playable Dr Sawkins had transposed the source material into conventional modern notation, corrected it where necessary and made certain other additions. He accepted that only in the re-creation of the viola

part in the case of one work (*La grande pièce royale*) had he actually composed new notes.

[26] The judge made detailed findings of fact in respect of each of the three editions, which I will summarise.

A. *Te Deum laudamus (1684)* ([32]–[37])

Dr Sawkins made necessary corrections and additions to the notation to make the music playable (see [65]). The corrections and recompositions totalled 141. He added figuring to the bass line. The construction of a figured bass accounted for 672 of 1,139 corrections to the score, either by correcting mistakes or enhancing the performers' comprehension of the chords to be played by adding extra figures. 319 of these were his own interventions. They were not derived from other source materials. Ornamentation in the form of trills on notes was also added.

B. *La grande pièce royale (1695—Paillard edition 1964)* ([23]–[31])

This orchestral suite in six linked movements was derived from four sources. Dr Sawkins re-created viola parts for passages of it that were missing. This took up 153 bars of the work's 268 bars. It was the bulk of the work done by Dr Sawkins. There were also 34 editorial interventions. Patten J found (at [64]) that Dr Sawkins had made the music playable by transposing from the source material the common notation and, where necessary, had corrected it. Hyperion now accepts that the viola part is a significant recomposition and that it is music in which copyright can subsist, but submits that it was copied from the Paillard edition and that Dr Sawkins has no copyright in it. The judge held, however, that Dr Sawkins did not consciously or unconsciously copy from the Paillard edition (see [31]). I shall return to this point later in the judgment.

C. *Venite, exultemus (1701)* ([43]–[47])

This is a large-scale choral and orchestral piece in eight movements. It lasts for 26 minutes. Dr Sawkins derived it from various scores and from editions by Cauvin in 1715 and Hué 1729–34. Most of the work done by Dr Sawkins was in adding the figured bass. The changes and additions also included the correction of 27 wrong notes and recomposition of the text. There were 659 corrections to figured bass. 134 of them were not derived from any of the sources, such as Hué. He made a total of 747 interventions.

PRINCIPLES OF COPYRIGHT LAW

[27] I now turn to consider the policy of copyright law, its governing principles and their application to the facts found by the judge.

A. *Originality*

[28] The general policy of copyright is to prevent the unauthorised copying of certain material forms of expression (literary, dramatic, artistic and musical, for example) resulting from intellectual exertions of the human mind. The scope of protection available is subject to numerous qualifying conditions, restrictions, exceptions and defences, which are not relevant to this case.

[29] The important point is that copyright can be used to prevent copying of a substantial part of the relevant form of expression, but it does not prevent use of the information, thoughts or emotions expressed in the copyright work. It does not prevent another person from coincidentally creating a similar work by

his own independent efforts. It is not an intellectual property monopoly in the same sense as a patent or a registered design. There is no infringement of copyright in the absence of a direct or indirect causal link between the copyright work and the alleged copy.

[30] Thus, if the claim of Dr Sawkins to copyright in the performing editions were upheld, that would not prevent other musicologists, composers, performers or record companies from copying Lalande's music directly or indirectly or from making fresh performing editions of their own. All that Dr Sawkins can prevent them from doing, without his consent, is taking the short-cut of copying his performing editions in order to save themselves the trouble that he went to in order to produce them.

[31] The policy of copyright protection and its limited scope explain why the threshold requirement of an 'original' work has been interpreted as not imposing objective standards of novelty, usefulness, inventiveness, aesthetic merit, quality or value. A work may be complete rubbish and utterly worthless, but copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music. A work need only be 'original' in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person.

[32] The first question is whether the performing editions are incapable of being regarded as 'original' works because Lalande composed the music and Dr Sawkins made his editions of that music with the intention that they should be as close as possible to the Lalande originals.

[33] The essential elements of originality were expounded by the House of Lords over century ago in *Walter v Lane* [1900] AC 539, a decision on the Copyright Act 1842. It remains good law: see *Express Newspapers plc v News (UK) Ltd* [1990] 3 All ER 376 at 380–381, [1990] 1 WLR 1320 at 1325–1326. The House of Lords held that copyright subsisted in shorthand writers' reports of public speeches as 'original literary' works. The speeches were made by Lord Rosebery in public when reporters were present. The reporters made notes in shorthand, transcribed them, corrected, revised and punctuated them and published them in newspapers as verbatim reports of the speeches. A speech and a report of a speech are two different things. Lord Rosebery was the author of his speeches. The shorthand writers were the authors of their reports of his speeches. They spent effort, skill and time in writing up their reports of speeches that they themselves had not written.

[34] The reports were held to be 'original' literary works, even though the intention of the reporters was to produce as accurate a report as possible of a work of which they were not the authors. (As the shorthand writers were employed, the copyright initially vested in The Times as their employer, but that fact does not affect the basic principle.) The copyright in the newspaper reports was infringed when a book was published by the defendant containing unauthorised copies of the reports of the speeches.

[35] Lord Halsbury LC held that the law did not permit 'one man to make profit and to appropriate to himself the labour, skill, and capital of another' ([1900] AC 539 at 545). The reporter was the author of his report and the report of the speech was the original work of the reporter, even though he 'obtained his words or ideas from somebody else'(see 547). If there was more then one reporter reporting the particular speech, each reporter would be entitled to the copyright in his own report of it (see 549). Each is entitled to write his own report of the event. (Even if the reports are very similar they would not be copies of

other reports, the similarity being attributable to the common source of the speeches reported.)

[36] In my judgment, on the application of *Walter v Lane* to this case, the effort, skill and time which the judge found Dr Sawkins spent in making the three performing editions were sufficient to satisfy the requirement that they should be 'original' works in the copyright sense. This is so even though (a) Dr Sawkins worked on the scores of existing musical works composed by another person (Lalande), (b) Lalande's works are out of copyright and (c) Dr Sawkins had no intention of adding any new notes of music of his own.

B. *Music*

[37] The next question is whether the performing editions are 'musical' works within the meaning of the 1988 Act. A first reaction (and a reasonable one, in my view) is to ask: why not? If the creative work contributed by Dr Sawkins, as evidenced by his scores of the performing editions, enables musicians to participate in the organised production of combinations of sound, why is that not music?

[38] Hyperion's principal objection is that a performing edition does not amount to a new and substantive musical work in itself. The edition does not, it submits, make an impact on the sound over and above that belonging to Lalande's musical work. The critical question is whether the effort spent by Dr Sawkins resulted in a new musical work. On the 'sound test' approach Dr Sawkins's editing work on the texts had not made any significant relevant contribution to the musical content (ie sound) of Lalande's original music. For example, transcription from one form of notation to another in the marked-up scores was only a matter of the form of presentation of the original work. It did not result in the creation of a new musical work: all the notes and harmonies of the original work were retained. It was no different from the case of a person making a copy of another's work (such as the copy of a painting or the enlargement of a photograph): the process might call for effort, skill and judgment, but it did not transform a copy of a work into an original work attracting a fresh copyright: see *Interlego AG v Tyco Industries Inc* [1988] 3 All ER 949 at 971–972, [1989] AC 217 at 262–263 per Lord Oliver of Aylmerton (a case of artistic copyright). The Judicial Committee approved the test laid down in *Black v Murray & Son* (1870) 9 M 341 (a case of literary copyright) for the creation of a copyright in the new edition of a literary work. It is necessary to make extensive and substantial alterations in order to create a new literary work, not just a few emendations and the addition of a few unimportant notes.

[39] Hyperion also submitted that, as a matter of public policy, the claim made by Dr Sawkins to musical copyright in his editions was objectionable. It was acknowledged that his work of applied scholarship was meritorious; that it might attract copyright in the typographical arrangement, which would protect him against the activities of photocopyists; and that he was possibly entitled to literary copyright in the additional notation and in the compilation of Lalande's works. But no copyright of that character was claimed by him in these proceedings.

[40] An objection to his claim to musical copyright was that there was public interest in the availability of ancient music. Attributing new periods of musical copyright to editorial work of the kind performed by Dr Sawkins would expand the proper limits of intellectual property protection by extending the life of the copyright and even creating 'a perpetual monopoly': see the *Interlego* case [1988] 3 All ER 949 at 966, [1989] AC 217 at 256 (redrawings with minor alterations).

This development would have an impact on the performance and recording of non-copyright music and its cost. More consents would have to be obtained for performances and recordings. The impact would be felt by the record industry, by performers and by orchestras.

[41] The effect of the editorial interventions of Dr Sawkins was, as he asserted was his intention, only to produce more faithful and better copies of Lalande's original music and to make it playable, rather than to create new music of his own. The kind of effort and skill expended by Dr Sawkins was not appropriate or relevant to the creation of a fresh musical copyright, such as might be achieved by changes to the melody and harmony of the underlying work.

[42] On the approach advocated by Hyperion most of the exertions of Dr Sawkins, such as researching the source materials, selecting the best versions to edit, transcribing them into modern notation, making them playable, or more easily playable, correcting errors, inserting missing material from other sources, the inclusion of the figured bass and determining such matters as layout of the scores on the page and inserting 'advisory' or courtesy indications, such as tempo and ornamentation, are irrelevant to the issue whether he created an original musical work. They were not part of the music. Thus the material shown on the marked-up copies of the scores adduced in evidence by Dr Sawkins, in order to illustrate the nature and extent of the editorial interventions by him to the text bar-by-bar, might be academically sound and valuable, but was insufficient to attract musical copyright. It was not 'the right kind of skill and labour'. Its effect on the sound of Lalande's music was not such as to amount to a new and substantive musical work in itself: see *Hadley v Kemp* [1999] EMLR 589 at 643 (a case on the different question of whether a joint work was created by contributions to its performance and interpretation, as distinct from creation of a musical work, sufficient to give the contributors shares in the copyright).

[43] Although I agree that some aspects of Dr Sawkins's exertions, such as time and labour spent on the discovery or retrieval of the original scores and in their layout on the page, are irrelevant to the subsistence of copyright in a musical work, I do not accept the narrow approach advocated by Hyperion as to the type and nature of the work required to attract musical copyright.

[44] Hyperion's emphasis is on the necessity for composition or recomposition of new notes of music, as in a musical adaptation or arrangement, in order to produce an original combination of sounds appreciated by the ear, rather than on the exacting scholarly exertions of Dr Sawkins on the notation of the scores and the inclusion of performing indications and directions.

[45] The 1988 Act lays down three essential ingredients of an original musical work in which copyright subsists: it must consist of 'music' and accompanying words or action are excluded; it must be 'original' in the 'originating' sense already discussed; and it must be 'recorded' in some form, such as being fixed in writing. The real contest is on the first point. It is not disputed that Dr Sawkins both originated and recorded the editorial interventions on the scores, which, Hyperion contends, are not 'music' and do not originate a new musical work. This submission is illustrated in the arguments and in the findings of the judge on the insertion of the figured bass in the score of two of the three works.

THE FIGURED BASS

[46] The inclusion by Dr Sawkins of the figured bass (basse continue) in *Te Deum laudamus* and *Venite, exultemus* was particularly relied on by the judge in his finding of subsistence of copyright claimed by Dr Sawkins. (The figured bass

in *La grande pièce royale* was derived from the sources.) The judge's findings were that: a

'[14] ... Basse continue (meaning continuous bass) is, as Mr Guy Protheroe, the defendants' expert, explained, a feature of most music of the baroque period. It consists of a bass line only, which is to be played on instruments such as the cello, viola de gamba, double-bass or bassoon. Another chord-playing instrument such as an organ or harpsichord also plays the bass line, but adds the chords above it, which are drawn from and match the music in the lines above. In order to save this player from having to read all the orchestral parts to work out what chords to play, composers developed what came to be described as a figured bass. This involved placing figures either above or below the notes in the bass line, although the modern practice (followed by Dr Sawkins) is to place them below. Where there is no figure under a note, the convention is that this denotes the most common chord, which Mr Protheroe describes as a root-position chord: ie a triad with a root note, the third above and the fifth above. When (for example) the figure 6 appears, this means that instead of the top of the chord being the fifth note, it is to be the sixth. b c d

[15] Dr Sawkins said that he derived most of the figuring from other sources, where it was correct and compatible with the full score. Both Dr Sawkins and Mr Protheroe were agreed that the figured bass is intended to give the chord-player guidance, but not to provide what may be described as a complete and inflexible code. The figuring does not always tell the keyboard player what is the complete chord and Dr Sawkins's practice in producing the editions was to reproduce what he described as the minimum possible in order to avoid accidents. It acts in effect as a shorthand for reading the other orchestral and voice parts above the bass line and for playing the harmonies. The performer still has to use his own skill and experience to play what he considers to be the appropriate notes, but Dr Sawkins accepted that this was a skill which nowadays is usual in the case of anyone who is adept or experienced at playing baroque music. One way of assisting the keyboard player is to fully realise the figured bass, and in earlier editions that was occasionally done. But both Dr Sawkins and the experts told me that the practice is now very rare, largely because of the increase in the number of skilled players of baroque music. A fully realised figured bass is also restrictive, and most experienced players prefer to realise the figured bass themselves during performance. Dr Sawkins said that the aim of a modern editor is usually, even when providing a realisation of the figured bass, to give the simplest possible realisation and not to write in what he described as a lot of fancy detail. In the case of the editions which are the subject matter of this claim, no attempt was made by Dr Sawkins to realise the figured bass at all. This was in contrast, for example, to the Paillard edition of *La grande pièce royale*, where there is a full realisation of the figured bass line. The inclusion of the figuring without any realisation leaves the keyboard player with a considerable amount of freedom to play what he considers to be tasteful and useful. Those were the adjectives used by Dr Sawkins. In the present case this is what in fact happened during the recording session. It is evident from the score used by the basse continue player (Dr Ponsford) that he has added his own figuring in a number of places to that provided on Dr Sawkins's edition. Dr Sawkins said that a lot e f g h j

a of what Dr Ponsford had added was not strictly necessary in order to read the music, but simply acted as an aide-mémoire to ensure that during the recording session he did not accidentally play the wrong chord.'

[47] Hyperion submits that the judge was wrong to place reliance on this kind of editorial intervention, as its inclusion or omission had no 'aural impact' on the b listener. It was an academic exercise using material derived by Dr Sawkins from the existing music of Lalande. It did not dictate what was to be played. The basse continue players (including Dr Ponsford on the organ) had considerable freedom in what they played and Dr Ponsford made interventions of his own without expecting to receive any rights in respect of his contribution.

c CONCLUSION ON SUBSISTENCE

[48] As Patten J pointed out (at [50]) the premise of Hyperion's submission on subsistence was that in essence—

d 'unless the edition includes the composition of new music in the form of the notes on the score (and ... not merely the correction of wrong or unsatisfactory notes in the scores used) then no copyright would exist in the edition as a musical work.'

[49] In my judgment, the fallacies in Hyperion's arguments are that (a) they only treat the actual notes in the score as music and (b) they approach the issue e of subsistence from the wrong direction by dividing the whole of the performing edition into separate segments and by then discarding particular segments on the basis that they are not music and not therefore covered by copyright. That is contrary to the correct approach to subsistence of copyright laid down by the House of Lords in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 at 469, 474, 475, and 479, [1964] 1 WLR 273 at 277, 284, 285, 290 f and 291. The subsistence of copyright involves an assessment of the whole work in which copyright is claimed. It is wrong to make that assessment by dissecting the whole into separate parts and then submitting that there is no copyright in the parts. Hyperion's arguments ignore the fact that the totality of the sounds produced by the musicians are affected, or potentially affected, by the g information inserted in the performing editions produced by Dr Sawkins. The sound on the CD is not just that of the musicians playing music composed by Lalande. In order to produce the sounds the musicians played from Dr Sawkins's scores of his edition. Without them Ex Cathedra would not have produced the combination of sounds of *Te Deum*, *La grande pièce royale* or *Venite, exultemus* for recording on the CD.

h [50] There is nothing either in the 1988 Act or in the general principles of copyright law emerging from the cases to support the restrictive approach advocated by Hyperion to the definition of a 'musical work'. As already observed, the definition in s 3(1) has an inclusive part ('consisting of music') and an exclusive part ('exclusive of any words or action intended to be sung, spoken j or performed with the music'). It is not contended that the work of Dr Sawkins falls within the exclusion: the argument has to be that it does not consist of 'music'. That submission rests on an unduly narrow view of what constitutes 'music' for copyright purposes.

[51] Patten J pointed out (at [54]) that the 1988 Act did not define what is meant by 'music'. As he observed, however, that is what this case is really about:

'... the real issue which divides the parties is whether a musical work includes items such as the figuring of the bass, ornamentation and performance directions or is really limited for copyright purposes to the notes on the score, so that in the case of an existing work nothing less than significant rearrangement of, or significant additions to, the melody will create a new copyright in the edition of a musical work.'

[52] I agree. I am also with the judge in rejecting Hyperion's contention that Dr Sawkins did not acquire any copyright by virtue of the considerable effort, skill and time spent by him on the task of creating the performing editions of the three works in question. To argue, as Hyperion does, that the work of Dr Sawkins is not 'the creation of new music' begs the question of what is 'music' and what amounts to 'creation' of music.

[53] In the absence of a special statutory definition of music, ordinary usage assists: as indicated in the dictionaries, the essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it. Music must be distinguished from the fact and form of its fixation as a record of a musical composition. The score is the traditional and convenient form of fixation of the music and conforms to the requirement that a copyright work must be recorded in some material form. But the fixation in the written score or on a record is not in itself the music in which copyright subsists. There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or of improvisations of sounds by a group of people with or without musical instruments should not be regarded as 'music' for copyright purposes.

[54] The fact that in musical copyright the sounds are more important than the notes in the text is recognised, for example, in the approach to infringement. The test of substantial reproduction is not a note-by-note textual comparison of the scores. It involves listening to and comparing the sounds of the copyright work and of the infringing work. So it is possible to infringe the copyright in a musical work without taking the actual notes (see *Austin v Columbia Gramophone Co Ltd* [1917–23] MCC 398).

[55] In principle, there is no reason for regarding the actual notes of music as the *only* matter covered by musical copyright, any more than, in the case of a dramatic work, only the words to be spoken by the actors are covered by dramatic copyright. Added stage directions may affect the performance of the play on the stage or on the screen and have an impact on the performance seen by the audience. Stage directions are as much part of a dramatic work as plot, character and dialogue.

[56] It is wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators, if they are the product of a person's effort, skill and time, bearing in mind, of course, the 'relatively modest' level (see Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* (3rd edn, 2000) para 3.58) of the threshold for a work to qualify for protection. The work of Dr Sawkins has sufficient aural and musical significance to attract copyright protection.

OTHER MATTERS

[57] There are three other matters which can be dealt with shortly: infringement, the Paillard edition and moral rights.

A. *Infringement of copyright*

[58] Patten J held that the copyright subsisting in the performing editions of Dr Sawkins had been infringed by Hyperion, except in the case of the *Panis Angelicus*. It had appropriated 'a substantial part of the claimant's own skill and labour expended on the creation of the original work', ie his original editorial input as the source from which the infringing work is derived (see [68]).

[59] Hyperion criticised the judge for applying the wrong test to infringement, as well as to subsistence, of copyright. Some of the same arguments against subsistence of musical copyright in the performing editions also apply to the issue of infringement by substantial reproduction of a copyright work. Substantial reproduction depends on the nature of the copyright work in issue: see *Autospin (Oil Seals) Ltd v Beehive Spinning (a firm)* [1995] RPC 683 at 700 per Laddie J.

[60] Hyperion submitted that Patten J failed (a) to consider which of the editorial interventions of Dr Sawkins impacted on the sound of the music and (b) to take account of the fact that the figured bass had added nothing to the sound of the music. It was without musical significance, either for the subsistence of copyright or for its infringement. The judge had simply found that the figured bass and most of the performing indications added by Dr Sawkins had been followed in the CD recording without assessing the musical impact of the interventions.

[61] In my judgment, the judge was right on the issue of infringement. If copyright did not subsist in the performing editions, there could be no infringement. If, as the judge correctly held, copyright subsisted in them, the judge was entitled to find that the performers, who used the performing edition scores produced by Dr Sawkins, reproduced the 'overwhelming majority of editorial interventions marked up by Dr Sawkins' in his scores, including the chords indicated by the figured bass and the corrected notes. The sound recordings on the Hyperion CD embodied the combined musical sounds made by the performers playing from the scores of the performing editions.

[62] Evidence that some additional figures by Dr Ponsford on the organ were included and that there were some minor omissions of performing indications and ornamentation does not, in my judgment, invalidate the judge's conclusion that the sound recordings reproduced a substantial part of the performing editions. Infringement of copyright depends on the quality and importance of what has been copied from the copyright work without the consent of the owner. The substantial copying of the copyright material is not diminished by the infringer's addition of fresh material of his own to the unauthorised copy.

B. *Originality of* La grande pièce royale

[63] Patten J rejected Hyperion's contention that there was no fresh copyright in this piece because he had copied it from the Paillard edition. Hyperion contended that there was such a high degree of similarity between the performing edition produced by Dr Sawkins and the Paillard edition, with which he was familiar, that the burden shifted to Dr Sawkins to explain how such similarity occurred.

[64] Patten J dismissed the charge of copying, holding that there was no 'attempt ... by Dr Sawkins to copy the Paillard edition, whether consciously or

unconsciously' (see [31]). This conclusion was criticised by Hyperion as a misdirection on the ground that intention was implicit in 'attempt' and intention is irrelevant to the nature of unconscious copying; that the judge gave no other reason for rejecting the explanation that the similarity was due to some form of copying, as opposed to being the independent work of Dr Sawkins; and that Dr Sawkins had failed to discharge the burden of explaining the degree of similarity between his performing edition and the Paillard edition.

[65] In my judgment, the judge was entitled to find as a fact on the evidence before him that Dr Sawkins had not copied the Paillard edition and that his performing edition was originated by him by his own independent effort. There was no misdirection of the judge on the ingredients of unconscious copying. The judge did not misdirect himself on the issue of unconscious copying in his reference to there being no 'attempt' by Dr Sawkins to copy. As I read this part of the judgment the judge rejected the contention that Dr Sawkins attempted to copy the Paillard edition consciously and also rejected the claim of unconscious copying of it by him.

C. *Moral rights*

[66] Section 77 of the 1988 Act confers on the author of a musical work the right to be identified as the author of the work in the circumstances specified in the section. It includes the right to be identified whenever copies of sound recordings of the work are issued to the public (s 77(3)(b)). If the author in asserting his right to be identified specifies some particular form of identification that form shall be used; otherwise any reasonable form of identification may be used (s 77(8)).

[67] The judge held that the acknowledgement by Hyperion of the contribution of Dr Sawkins in the CD booklet ('With thanks to Dr Lionel Sawkins for his preparation of performance materials for this recording') was inadequate to identify Dr Sawkins as the author of the performing editions; that the form of identification required by him in his letter of 6 February 2002 was not followed by Hyperion ('© Copyright 2002 by Lionel Sawkins'); and that s 77(1) of the 1988 Act had not been complied with.

[68] It was submitted that, as a matter of law, s 77(8) does not require the use of a specific form of words to describe the authorship of the work and that the judge's conclusion was contrary to evidence that the 'performance materials' could only be understood as referring to the scores supplied by Dr Sawkins for the recording.

[69] In my judgment, the judge was right to conclude that there was a breach of s 77. Although the CD sleeve named Dr Sawkins, it did not identify his authorship. This is hardly surprising, as it was Hyperion's case that Lalande and not Dr Sawkins was the sole composer of the music on the CD. The judge found (at [49]) that Hyperion had an established policy, based on its view of the law, that no separate copyright royalties would be paid to an editor or publisher, who supplies an edition of a composer's non-copyright music. According to its managing director, Hyperion's firm view was it is the composer's music which is recorded, not that of the editor. In those circumstances it is highly unlikely that Hyperion would intend to breach its own firm policy by deciding to identify Dr Sawkins as the author.

RESULT

[70] I would dismiss the appeal.

MANCE LJ.

[71] I agree both with the judgment of Mummery LJ and with that which follows from Jacob LJ. Like Jacob LJ, I had some initial doubts. These related, as a matter of law, particularly to the question whether it was possible to reconcile the House of Lords decision in *Walter v Lane* [1900] AC 539, assuming it still to apply under the more modern revised statutory wording, with the obiter dictum of Lord Oliver of Aylmerton in *Interlego AG v Tyco Industries Inc* [1988] 3 All ER 949, [1989] AC 217, and, as a matter of fact, particularly to the position in respect of the *Venite*, where Dr Sawkins's impact was on its face considerably less than in the case of the other two works. However, I have come to the conclusion, for the reasons set out in Jacob LJ's judgment, that the line should be drawn in the way he explains, and that on this basis the judge's judgment cannot be disturbed and that the appeal should be dismissed in respect of all the works under appeal.

JACOB LJ.

[72] I agree and have nothing to add on the issues of infringement of copyright and moral rights. I also agree with Mummery LJ's reasoning about the Paillard edition point. As regards the issue of subsistence at first I had great difficulty but in the end have concluded that Dr Sawkins is right. I must explain why.

[73] The relevant statutory provisions (now in the Copyright, Designs and Patents Act 1988, though there was no change in meaning from the earlier legislation) are simply these:

> '**1.** *Copyright and copyright works.*—(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—(a) original literary, dramatic, musical or artistic works ...
>
> **3.** *Literary, dramatic and musical works.*—(1) In this Part ... "musical work" means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music ...
>
> **9.** *Authorship of work.*—(1) In this Part "author", in relation to a work, means the person who creates it ...'

[74] The definition of 'music' is not a definition at all—its obvious purpose is just to separate out lyrics or choreographical directions or the like. They go into a different 'box' for copyright purposes, for instance lyrics into 'literary works' and choreographical works into 'dramatic works'. Clearly in this case we are concerned with 'musical works'. The question is whether what Dr Sawkins did was to 'create' (the word of s 9) 'original musical works'.

[75] Following the concession that Dr Sawkins's composition of the viola parts for *La grande pièce royale* was a sufficient act of original creation to confer copyright, there remain two works in issue, the *Te Deum* and *Venite*. He did lesser work on the latter. So it follows that if there is a copyright in that, there will also be a copyright in the *Te Deum* as an a fortiori case. I have therefore primarily considered *Venite*.

[76] I begin by recording the following cross-examination of Dr Sawkins:

> 'Q. Can I just be clear this is not one of the pieces that you actually claimed to have recomposed anything—there is no new music in *Venite*? A. No, there is no new music. There are corrections to the musical text, which you could argue are the same thing, but they are individual notes.'

[77] It is that answer—'no new music'—which lies at the heart of Hyperion's objection to the existence of an original musical work. Dr Sawkins was not, they

say, engaged in creation of a musical work at all. It was that answer which also caused me to pause.

[78] And it is an important factor to be borne in mind. But in the end, in my opinion it is essential to consider exactly what Dr Sawkins did to decide (both qualitatively and quantitatively) whether he created an original musical work within the meaning of the 1988 Act. For, whilst it is trite that mere servile copying (for instance tracing or photocopying) does not amount to originality, there are clearly forms of 'copying' which do—the shorthand writer's copyright is a paradigm example which has stood since *Walter v Lane* [1900] AC 539.

[79] In this connection I accept the opinion of the authors of Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* (3rd edn, 2000) (para 3.52) that it is 'highly probable that it [*Walter v Lane*] is still good law', notwithstanding the addition of the word 'original' to the Copyright Act 1911. The reasoning in *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49 adopted in *Express Newspapers plc v News (UK) Ltd* [1990] 3 All ER 376, [1990] 1 WLR 1320 is right. The authors of *Copinger and Skone James on Copyright* (15th edn, 2005) para 3-124 are of the same opinion (indeed do not qualify it with 'highly probable'). Indeed we were not presented with a full frontal attack upon *Walter v Lane*.

[80] Both textbooks maintain that view despite what was said obiter in *Interlego AG v Tyco Industries Inc* [1988] 3 All ER 949 at 971, [1989] AC 217 at 262–263 by Lord Oliver of Aylmerton:

> 'Take the simplest case of artistic copyright, a painting or photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an "original" artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality.'

[81] The authors of *The Modern Law of Copyright and Designs* comment on this passage (para 4.39). Although the comment is long it is worth setting it out:

> 'However, whilst the remarks made in *Interlego* may be valid if confined to the subject matter then before the Privy Council, they are stated too widely. The Privy Council was there considering fairly simple technical drawings. This is a rather special subject-matter. While the drawing of such a work is more laborious than it looks, it is a fact that any competent draftsman (perhaps, any conscientious amateur) who sets out to reproduce it exactly will almost certainly succeed in the end, because of the mathematical precision of the lines and measurements. This should be contrasted with, e g a painting by Vermeer, where it will be obvious that very few persons, if any, are capable of making an exact replica. Now, assume a number of persons do set out to copy such a painting, each according to his own personal skill. Most will only succeed in making something which all too obviously differs from the original—some of them embarrassingly so. They will get a copyright seeing that in each instance the end result does differ from the original yet it took a measure of skill and labour to produce. If, however, one of these renders the original with all the skill and precision of a Salvador Dali, is he to be denied a copyright where a mere dauber is not? The difference between the two cases (technical drawing and old master painting) is that in the latter there is room for individual interpretation even

a where faithful replication is sought to be attempted while in the former there is not. Further, a photographer who carefully took a photograph of an original painting might get a copyright and, if this is so, it is rather hard to see why a copy of the same degree of fidelity, if rendered by an artist of the calibre aforementioned, would not be copyright. These considerations suggest that the proposition under discussion is suspect. It is therefore b submitted that, for example, a picture restorer may get a copyright for the result of his efforts. Be that as it may, it is submitted that the *Interlego* proposition is anyway distinguishable where the replicator succeeds in preserving for posterity an original to which access is difficult.'

[82] The authors of *Copinger* likewise take the view that the passage should be c read as confined (see para 3-142).

[83] I agree with the textbooks. I do not think the comment as a generality is consistent with *Walter v Lane*. I think the true position is that one has to consider the extent to which the 'copyist' is a mere copyist—merely performing an easy mechanical function. The more that is so the less is his contribution likely to be d taken as 'original'. Professor Jane Ginsberg ('The Concept of Authorship in Comparative Copyright Law' Columbia Law School, Pub. Law Research No. 03–51 http://ssrn.com/abstract=368481) puts it this way:

> 'Reproductions requiring great talent and technical skill may qualify as protectable works of authorship, even if they are copies of pre-existing e works. This would be the case for photographic and other high quality replicas of works of art.'

In the end the question is one of degree: how much skill, labour and judgment in the making of the copy is that of the creator of that copy? Both individual creative input and sweat of brow may be involved and will be factors in the overall f evaluation.

[84] Coming closer to this case, for instance, consider what was done by the 14-year-old Mozart. After hearing Allegri's *Miserere* (a supposedly secret piece of music in that the manuscripts had never been published) at a performance in the Vatican he wrote it down. That seems to me to be the exact musical equivalent of what is done by a shorthand writer with a speech—indeed it involved even g more skill for he wrote from memory whilst a shorthand writer writes as the speaker talks. Of course Mozart wrote 'no new music' but it would be logically impossible to deny him copyright in his transcription of the music but grant it to a shorthand writer for his transcription of the spoken word.

[85] Therefore, as it seems to me, one is bound to have to consider whether h what Dr Sawkins did involved enough to confer originality—did it go beyond mere servile copying? Patten J held that it did. He applied this test (at [58]):

> 'The question to ask in any case where the material produced is based on an existing score is whether the new work is sufficiently original in terms of the skill and labour used to produce it.'

j

[86] That seems to me to be exactly right. Of course the test involves a question of degree—mere photocopying or merely changing the key would not be enough. But a high degree of skill and labour was involved. This must be considered as a whole—it would not be right to look at each contribution and say 'that is not enough' and conclude that the same goes for the whole. Dr Sawkins started by choosing which original manuscript(s) to use (actually he used mainly

two out of four, using one to correct ambiguities in the other), he checked every note and supplied 27 'corrections' (ie his personal evaluation as to what note Lalande really intended), supplied many suggestions for the figured bass, and put the whole into modern notation. This was not mere servile copying. It had the practical value (unchallenged) of making the work playable. He re-created Lalande's work using a considerable amount of personal judgment. His re-creative work was such as to create something really new using his own original (not merely copied) work.

[87] I therefore think Patten J was right and agree that this appeal should be dismissed. I would add two points. (i) This sort of question (sufficient work to be 'original') is just the sort of value judgment by a trial judge with which the Court of Appeal should be slow to interfere (see *Biogen Inc v Medeva plc* (1996) 38 BMLR 149 at 165, [1997] RPC 1 at 45). Some error of principle is called for. Here there was none. (ii) The solution accords with a reasonable view of public policy—that the sort of work done by Dr Sawkins should be encouraged. It saves others the time and trouble of re-creation of near-lost works, but in no sense creates monopoly in them. If someone wants to use Dr Sawkins's short-cut, they need his permission.

[88] Finally Mr Spearman QC sought to make some submissions about the level of damages—suggesting that they might be lower for a derivative work of this sort than for a wholly fresh composition. He may be right, but the point simply does not arise at this stage.

Appeal dismissed.

Celia Fox Barrister.

Baldock v Webster and others

[2005] EWCA Civ 1869

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, LAWS AND ARDEN LJJ

21 DECEMBER 2004

Judge – Judge in fact – De facto doctrine – Recorder eligible for authorisation to act as High Court judge but not so authorised – Recorder adjudicating on High Court action believing action to be in County Court – Whether order to be set aside – Whether recorder acting as de facto High Court judge.

The trial of a preliminary issue was ordered in proceedings in the High Court brought by the claimant against the defendants. The preliminary issue was heard by a recorder who had not been authorised under the Supreme Court Act 1981 to sit as a judge of the High Court, although he was eligible to be so authorised. The recorder was unaware that it was a High Court matter and believed throughout that he was dealing with a County Court case. He determined the issue in favour of the claimant. It then came to light that the recorder had not been authorised to hear the case. The defendants appealed contending that the recorder's order had to be set aside as being made without jurisdiction as the recorder could not be said to have been acting de facto as a High Court judge because he had at no stage believed he had authority to sit in the High Court.

Held – The doctrine of de facto office applied in circumstances where the mistake as to the judicial authority of the individual concerned was a mistake by a recorder as to the status of the court in which he was sitting, just as it did where the mistake was as to the nature or the extent of the jurisdiction which a judicial officer possessed. That accorded with the public policy on which the doctrine was based, namely the desirability of upholding a judge's acts when he had acted in the office under a general supposition of his competence to do so. The general reputation of the law and the public's confidence in it had to be protected as surely as the interests of individual parties who had proceeded on the assumption that a judgment in their case was perfectly valid, where that was exactly how it seemed to all the world. The requirement was, therefore, that there be a court of competent jurisdiction convened to hear the case, that the judicial officer not be a usurper, and that he had a colourable title to sit where he did sit. In the instant case those requirements had been met as the judge had apprehended no defect in his appointment or authority, and was a duly appointed recorder eligible to be authorised to sit in the High Court. The appeal would therefore be dismissed (see [15], [17], [19]–[21], [23], below).

Fawdry & Co (a firm) v Murfitt (Lord Chancellor intervening) [2003] 4 All ER 60 and *Coppard v Customs and Excise Comrs* [2003] 3 All ER 351 applied.

Notes

For appointment of recorders, see 10 *Halsbury's Laws* (4th edn reissue) para 526.

Cases referred to in judgments

Aldridge, Re (1897) 15 NZLR 361, NZ CA.

Coppard v Customs and Excise Comrs [2003] EWCA Civ 511, [2003] 3 All ER 351, [2003] QB 1428, [2003] 2 WLR 1618.

Curtin v Barton (1893) 139 NY 505, NY CA.

Fawdry & Co (a firm) v Murfitt (Lord Chancellor intervening) [2002] EWCA Civ 643, [2003] 4 All ER 60, [2003] QB 104, [2002] 3 WLR 1354.

State v Carroll (1871) 38 Conn 449, Connecticut SC.

Cases referred to in skeleton arguments

Butcher v Rowe [2004] EWCA Civ 1794, [2004] All ER (D) 457 (Nov).

James (an insolvent) (A-G intervening), Re [1977] 1 All ER 364, [1977] Ch 41, [1977] 2 WLR 1, CA.

Sharif v Garrett & Co [2001] EWCA Civ 1269, [2002] 3 All ER 195, [2002] 1 WLR 3118.

Sinclair Roche & Temperley v Heard [2004] IRLR 763, EAT.

Appeal

The defendants, James Webster, George Down, and John King, appealed with permission of Sedley LJ given on 9 December 2004 from the order of Mr Recorder Hamer on 28 September 2004 in the Brighton District Registry in a preliminary issue in proceedings brought by the claimant Stanley Baldock, the respondent to the appeal, on the ground that the order should be set aside as having been made without jurisdiction. The facts are set out in the judgment of Laws LJ.

Adrian Salter (instructed by *Cripps Harries Hall*, Tunbridge Wells) for the appellants.

Robert Leonard (instructed by *DMH*, Brighton) for the respondent.

LAWS LJ (giving the first judgment at the invitation of Kennedy LJ).

[1] This appeal requires the court to revisit the principles of the common law relating to what is known as de facto office.

[2] The respondent to the appeal, Mr Baldock, suffered an accident in the course of his employment on about 6 December 1989. He instructed the appellants, a firm of solicitors, to act for him. They issued proceedings on his behalf, but they were struck out for want of prosecution on 2 July 1999. At length, the respondent issued proceedings against the appellants for damages for professional negligence. These were issued in the Brighton District Registry of the High Court. One of the questions in the action concerned causation. It is common ground that the respondent, who was born on 20 July 1938, suffered from atrial fibrillation and impaired ventricular function after the diagnosis of a mitral valve prolapse in August 1996. The question was whether or to what extent the accident of December 1989 had caused or contributed to these cardiac problems.

[3] On 30 March 2004 the deputy district judge ordered the trial of a preliminary issue in these terms:

> 'Would there have been more than a speculative chance (if so what percentage of chance?) of the claimant establishing that the accident which he suffered on or about 6 September 1989 caused an injury to his heart and if so to what extent, if any, has it contributed to heart defects and other

> problems from which the claimant has suffered since that time, and how, if at all, has it affected his ability to work?'

The deputy district judge directed that the preliminary issue be heard before a circuit judge on the first open day after 1 July 2004. A date was fixed for 21 September 2004, with a time estimate of three days. The date was subsequently put back to the next day, 22 September. The venue was the Brighton District Registry which occupies the same building as the Brighton County Court.

[4] Mr Recorder Hamer was booked to sit at the Brighton County Court for nine days between 13 and 24 September 2004. The trial of the preliminary issue was listed before him. He heard it on 22, 23 and 24 September and gave judgment on 28 September 2004. He determined that in the original action the respondent would have had a 75% chance of establishing that the accident had caused atrial fibrillation and the development of breathlessness, and accelerated previously asymptomatic and undiagnosed cardiac problems by eight years.

[5] The recorder made other orders for the further conduct of the action and, in particular, fixed a trial date to commence on 10 January 2005.

[6] As I have said, the respondent's action against the appellants was commenced in the High Court where it has at all times remained. At no stage has there been a transfer to the county court pursuant to s 40 of the County Courts Act 1984.

[7] In late October, about a month after the recorder's judgment had been delivered, it came to light, first it seems from a telephone call from the court to the parties, that the recorder had not been authorised to hear and determine the preliminary issue. As is shown by a helpful letter from the recorder himself dated 11 November 2004, he was appointed a recorder on 8 May 2000 and had been authorised to sit in the county court on 10 December 1992 when he had been an assistant recorder. However a recorder may only sit as a judge of the High Court if he is authorised by the Lord Chancellor to do so pursuant to s 9 of the Supreme Court Act 1981, which provides, so far as material:

> '(1) A person within any entry in column 1 of the following Table may ... at any time, at the request of the appropriate authority, act—(a) as a judge of a relevant court specified in the request; or (b) if the request relates to a particular division of a relevant court so specified, as a judge of that court in that division.'

The table referred to shows that a recorder is included in column 1, and the High Court is a court where he may be requested to sit. The appropriate authority is the Lord Chancellor. Here, Mr Recorder Hamer was not authorised under s 9 to sit in the High Court either for this case or generally or at all.

[8] Although the court's documents and the parties' skeleton arguments carried the High Court heading, it is plain from the recorder's letter that in September 2004 he believed that he was dealing with a county court case. He persisted in that belief until, some weeks after giving judgment, he noticed that the draft order sent for his approval bore the High Court heading. It seems to be plain that the case had simply been erroneously listed before the recorder. Court documents relating to the listing, such as the cause list, suggest that the case was being treated as a county court matter. At any rate, no differentiation appears on the face of those documents between the High Court and the county court.

[9] The only issue in this appeal against the recorder's order of 28 September 2004, for which Sedley LJ gave permission to appeal on 9 December, is whether the order must be set aside as being made without jurisdiction or whether it can be saved by application of the doctrine of de facto office.

[10] There are two recent authorities of this court in which this doctrine has been examined: *Fawdry & Co (a firm) v Murfitt (Lord Chancellor intervening)* [2002] EWCA Civ 643, [2003] 4 All ER 60, [2003] QB 104 and *Coppard v Customs and Excise Comrs* [2003] EWCA Civ 511, [2003] 3 All ER 351, [2003] QB 1428. The doctrine is summarised in Wade and Forsyth *Administrative Law* thus:

> 'The acts of an officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so.'

That citation was given by Hale LJ in the *Fawdrey* case [2003] 4 All ER 60 at [18] from the eighth edition of *Wade and Forsyth* (2000), but the passage is replicated in the ninth edition (2004). Hale's LJ judgment in that case contains a review of past authority, which I regard as required reading for any proper study of the subject. At this stage, I may simply state one proposition apparent from the learning set out by Hale LJ, namely that the doctrine is founded on public policy. In *Curtin v Barton* (1893) 139 NY 505 at 511, it was said:

> 'When a court with competent jurisdiction is established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge, who presides in the court, to his office.'

[11] The *Fawdrey* case, a case brought in the Queen's Bench Division of the High Court, was heard by a circuit judge who was authorised to sit as a judge of the Family Division of the High Court and also in the Technology and Construction Court. The question was whether she had had jurisdiction to hear the case. In fact, the appeal there was resolved by it being held that the case had been validly transferred to the Technology and Construction Court despite a failure to give the required notice of transfer to the parties. However all three judgments given in that case addressed the de facto doctrine.

[12] In *Coppard*'s case, a Queen's Bench case had been heard by a circuit judge who knew that he had not been authorised under s 9 of the 1981 Act to sit as a judge of the High Court, but wrongly believed that he had authority to sit in the Queen's Bench Division by force of his appointment under s 68 of the same statute to sit as a judge of the Technology and Construction Court. In *Coppard*'s case all parties believed that the judge had authority to hear the case. It was held that the validity of the proceedings was protected by the de facto doctrine.

[13] In *Coppard*'s case, Sedley LJ gave the judgment of the court. He recalled and cited passages from the judgments in the *Fawdrey* case. He said ([2003] 3 All ER 351 at [18]):

> 'We would hold that the de facto doctrine cannot validate the acts, nor therefore ratify the authority, of a person who, though believed by the world to be a judge of the court in which he sits, knows that he is not. We accept, on well-known principles, that a person who knows he lacks authority includes a

person who has shut his eyes to that fact when it is obvious, but not a person who has simply neglected to find it out. We will call such a person a usurper.'

[14] It is submitted for the appellants in this case by Mr Salter that the recorder's adjudication cannot be saved by the de facto doctrine because the recorder knew perfectly well that he had no authority to sit in the High Court, and Mr Salter says the doctrine is limited so as only to save the acts of an officer purporting to act in a particular office. The case is to be distinguished from both the *Fawdrey* case and *Coppard*'s case. But of course, as is emphasised for the respondent, although the recorder perfectly well knew that he had no authority to sit in the High Court, he fully believed that he was authorised to hear the case. He thought it was proceeding in the county court where he was, without question, authorised to sit.

[15] In my judgment the answer to this case is to be found by recalling the public policy on which the de facto doctrine is based. As *Wade and Forsyth* puts it in the passage I have set out:

'The logic of annulling all his acts has to yield to the desirability of upholding them when he has acted in the office under a general supposition of his competence to do so.'

No doubt the general reputation of the law and the public's confidence in it must be protected as surely as the interests of individual parties who have proceeded on the assumption that a judgment in their case is perfectly valid, where that is exactly how it seems to all the world. Public confidence as well as individual parties are, in my judgment, protected by the requirement that there be a court of competent jurisdiction convened to hear the case, that the judicial officer be not a usurper and that he have a colourable title to sit where he does sit.

[16] In this case Mr Salter sought to argue this morning that the recorder should have realised that he was confronted with a High Court case, and so should be treated as a usurper. I do not agree. The recorder might have picked up that there was a problem from the title in the case papers or skeleton argument, but he was, in my judgment, surely entitled to suppose that the case was advisedly listed before him. In fact I doubt whether it is open to Mr Salter to take this point.

[17] The real question here is whether the nature of the recorder's mistake makes any difference to the application of the de facto rule. I repeat, his mistake was not as to the nature or the extent of the jurisdiction he possessed. He knew he was not a s 9 judge. His mistake was as to the status of the court in which he was sitting. For the purpose of the public policy which underpins the de facto doctrine, that, in my judgment, is a distinction without a difference. I would express my respectful agreement with this reasoning of the court in *Coppard v Customs and Excise Comrs* [2003] 3 All ER 351:

'[21] ... the basis of the de facto doctrine is not the nature but the occurrence of a mistake as to the judicial authority of the individual concerned.

[22] The argument is in our view not advanced by the distinction that Mr Macpherson has sought to make between an error as to appointment and an error as to authority. His suggestion is that cases such as [*Re Aldridge* (1897) 15 NZLR 361] and *State v Carroll* (1871) 38 Conn 449 depended on the judge's belief that he had been appointed, not simply (as in the present case) that he had authority. This seems to us a distinction without a difference in the present context.'

Likewise, in my judgment, here.

[18] I would also wish respectfully to underline the dictum in *Coppard*'s case (at [32]) that the de facto doctrine— a

> 'postulates, in the interests of certainty and finality, that a person who is believed and believes himself to have the necessary judicial authority will be regarded in law as possessing such authority.'

b

[19] The plain fact here is that the case was proceeding in a court competent to hear it. The judge was not a usurper. The parties and the judge apprehended no defect in his appointment or authority. He had what has been called 'colourable authority' or 'colourable title' because he was a duly appointed recorder eligible to be authorised by the Lord Chancellor to sit in the High Court.

[20] For all these reasons the de facto doctrine plainly applies to these facts. I would accordingly dismiss the appeal. c

ARDEN LJ.

[21] I agree with the judgment that Laws LJ has given. In applying the public policy to which Laws LJ has referred, the public is also protected by the fact that the county court and the High Court are both parts of the established judicial system of England and Wales. The judge was a properly appointed member of the part-time judiciary, and, if grounds had existed, his decision could have been the subject of an appeal on its merits. d

[22] To draw overtechnical distinctions in the application of the de facto doctrine would, in my judgment, provide an undesirable incentive for a party dissatisfied by the judgment of a judge to investigate and challenge his authority to hear that case. e

KENNEDY LJ. f

[23] I agree with both judgments which have just been delivered.

[24] We have in this country an elaborate system to ensure that cases—particularly civil cases with which we are today concerned—should be tried by those best qualified to try them. It is important that that system be maintained. In reality, it is maintained by listing officers ensuring that cases are listed before g those who are competent to deal with them, by judges themselves checking to ensure that the cases placed in their lists are cases of the sort which they ought to try and, in the last resort, by the advocates on either side—where there is a possibility that the tribunal may not be the appropriate tribunal for the particular case—raising the question either with the court or with the court officer before the h case is embarked upon. So there are considerable safeguards to ensure the sort of mishap which occurred in this case does not occur in other cases. It is important that those safeguards be exercised. Of course, in the last resort if the case is not properly tried there is always, in addition, the possibility of an appeal on the merits.

[25] As to this particular case, I need say no more than I said at the beginning, j that is to say, that I agree with both of the judgments already delivered.

Appeal dismissed.

Dilys Tausz Barrister.

Barker v Saint-Gobain Pipelines plc

[2004] EWCA Civ 545

COURT OF APPEAL, CIVIL DIVISION

KAY, KEENE AND WALL LJJ

19 FEBRUARY, 5 MAY 2004

Negligence – Causation – Breach of duty causing or materially contributing to damage – Causal connection between breach of duty and damage – Employee developing mesothelioma after being exposed to asbestos dust by successive employers in breach of duty and by self-employment – Whether exposure during self-employment precluding employee from recovering damages from employers.

Damages – Apportionment – Indivisible injury – Claimant developing mesothelioma after being exposed to asbestos dust by successive employers in breach of duty and by self-employment – Whether liability for damages to be apportioned.

The claimant was the widow of a man who had died from mesothelioma contracted as a result of exposure to asbestos dust. He had been so exposed while working as an employee of a company for whose liabilities the defendant accepted it was responsible, while working for another employer, and while self-employed. The claimant's action against the defendant for damages was successful in the High Court, under the principle established by the House of Lords that where an employee had been exposed by different employers during different periods of employment to inhalation of asbestos dust in breach of each employer's duty to protect him from the risk of mesothelioma and where he did contract the disease, the fact that the medical evidence could not attribute the onset of the disease to any particular or cumulative exposure did not prevent him from successfully bringing a claim against any one or more of the employers, provided that the exposure for which that employer was responsible was not insignificant. The defendant appealed, contending (i) that the principle established by the House of Lords did not apply where one element of the overall exposure to asbestos dust resulted from a claimant's exposure during a period of self-employment; and (ii) that if liability were established, the court should apportion liability to reflect the fact that the deceased had also been exposed to asbestos dust which might equally have caused mesothelioma during the period of his employment for the other employer and whilst self-employed. The claimant contended that mesothelioma had to be considered an indivisible injury and that any tortfeasor who contributed to such an injury was liable for the whole loss.

Held – (1) Faced with the impossibility of attributing precise responsibility for the contracting of mesothelioma, the law provided the most equitable solution by imposing liability on those who were responsible for materially increasing risk which later materialised, even though others were also responsible for increasing the risk. In the case of a person whose exposure outside his employment with a defendant was during a period of self-employment, the application of that approach would give rise to no greater degree of injustice or potential injustice to the defendant than would be the case where the other exposure was during

employment with a third party. Where there was fault on the part of the claimant, that would be reflected by a finding of contributory negligence (see [35], [41]–[43], [46], [47], [50], [53], [54], below); *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] 3 All ER 305 explained and applied.

(2) The principle that, where there was a single indivisible injury, there would be no apportionment of the responsibility for the damage suffered, applied in mesothelioma cases. There was no compelling reason to depart from the accepted rule in the instant circumstances. The appeal would therefore be dismissed (see [44]–[46], [52]–[54], below); *Rahman v Arearose Ltd* (2000) 62 BMLR 84 and *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] 3 All ER 305 considered.

Notes

For safety, health and welfare: negligence; in general, see 20(1) *Halsbury's Laws* (4th edn reissue) para 619, and for causation, see 12(1) *Halsbury's Laws* (4th edn reissue) paras 854, 855.

Cases referred to in judgments

Dingle v Associated Newspapers Ltd [1961] 1 All ER 897, [1961] 2 QB 162, [1961] 2 WLR 523, CA.

Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32, [2002] 3 WLR 89.

McGhee v National Coal Board [1972] 3 All ER 1008, [1973] 1 WLR 1, HL.

Rahman v Arearose Ltd (2000) 62 BMLR 84, [2001] QB 351, [2000] 3 WLR 1184, CA.

Cases referred to in skeleton arguments

Hatton v Sutherland, Barber v Somerset CC, Jones v Sandwell MBC, Bishop v Baker Refractories Ltd [2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613.

Holtby v Brigham & Cowan (Hull) Ltd [2000] 3 All ER 421, [2000] ICR 1086, CA.

McFarlane v Tayside Health Board [1999] 4 All ER 961, [2000] 2 AC 59, [1999] 3 WLR 1301, HL.

Thompson v Smiths Shiprepairers (North Shields) Ltd [1984] 1 All ER 881, [1984] QB 405, [1984] 2 WLR 522.

Appeal

The defendant, Saint-Gobain Pipelines plc, appealed as to liability and quantum from the decision of Moses J in the Manchester District Registry on 23 May 2003 awarding damages of £152,000 to the claimant, Sylvia Barker, whose husband had died from mesothelioma contracted as a result of exposure to asbestos dust. The deceased had been exposed to asbestos dust (i) during his employment by a company for whose liabilities the defendant was responsible; (ii) during his employment by Graessers Ltd; (iii) and during a period when he had been self-employed. The damages awarded the claimant had been reduced by one-fifth based on a finding of contributory negligence. The facts are set out in the judgment of Kay LJ.

David Allan QC (instructed by *John Pickering and Partners*, Oldham) for the claimant.

Charles Feeny (instructed by *Berrymans Lace Mawer*, Liverpool) for the defendant.

Cur adv vult

5 May 2004. The following judgments were delivered.

KAY LJ.

[1] In *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32, the House of Lords decided that where an employee had been exposed by different employers during different periods of employment to inhalation of asbestos dust in breach of each employer's duty to protect him from the risk of contracting mesothelioma and where he did contract the disease, the fact that the medical evidence could not attribute the onset of the disease to any particular or cumulative exposure did not prevent him from successfully bringing a claim against any one or more of the employers provided that the exposure for which that employer was responsible is not insignificant. This appeal raises two matters arising from that decision. The first is an issue expressly left open by the House of Lords because the point had not been argued on the appeal, namely whether an employer is entitled to an apportionment of his liability to reflect the extent of the overall exposure for which he is responsible. The second raises issues as to the application of the decision in a case where apart from periods of employment with others during which exposure to asbestos dust has occurred, there have also been periods of self-employment during which there has been such exposure.

[2] The appeal is an appeal against a decision of Moses J sitting at Manchester on 23 May 2003 by which he awarded damages to the widow of a man who had died from mesothelioma contracted as a result of exposure to asbestos dust. The damages awarded were £152,000 representing four-fifths of the sum agreed as the measure of damages if the claim succeeded in full. The reduction of one-fifth was based on a finding of contributory negligence. The defendant was responsible for the liabilities of a former employer of the deceased, who it was accepted had negligently exposed him to asbestos dust. The appeal is brought by the defendant contending that there should have been no finding of any liability on its part or alternatively that the award should have been lower reflecting an apportionment argument that had been rejected by the judge.

THE FACTS

[3] The facts, as agreed or found by the judge, can be related quite shortly since there is no appeal against the judge's findings of fact. The deceased, Mr Barker, very sadly died from mesothelioma at the age of 57 on 14 June 1996. It was accepted that his condition and his death resulted from exposure to asbestos dust.

[4] Between March 1960 and December 1968, he had worked at the Shotton steelworks in Deeside for John Summers and Sons Ltd. The defendant accepts that it is responsible for discharging the liabilities of that company. During this employment, he was exposed to asbestos dust and it was accepted that such exposure constituted a breach of the duty owed to the deceased as an employee

and that the breach contributed to the risk that the deceased might contract mesothelioma. a

[5] It was further agreed that there were other periods during the deceased's working life when he was exposed to asbestos dust. These other relevant periods of employment were a six-week period in 1958 when he worked for a firm called Graessers Ltd (Graessers) and a period from December 1968 to April 1989 when he was a self-employed plasterer. b

[6] During the first of the three relevant periods of exposure, when he was working for Graessers, throughout the six-week period he daily mixed asbestos for pipe laggers and occasionally himself lagged pipes. The exposure was assessed as 'heavy, regular, frequent and of medium duration', which was defined by the expert evidence as more than 20 fibres per millilitre, on a daily basis for more than an hour a day but less than half a day. c

[7] During the second of the periods, that in respect of which the defendant was liable, the deceased worked as a labourer in a variety of locations in the plant. The greatest exposure occurred during a six-month period when he was working as a part of a pool responsible for cleaning up the galvanising section of the works. In that area, there were four furnaces, the insulation for which consisted in part d of asbestos in the form of boards, wool and blankets. There were regular leaks which required repair. To discover the location of leaks in the furnaces, the insulation had to be stripped away to provide access to the joints. Clouds of asbestos would escape and large pieces of asbestos broke off. Dust would gather on the floor. The labourers from the pool, of which the deceased was a part, would be required to sweep it up. This exposure was described by the expert e evidence as 'heavy, regular, frequent and of long duration'.

[8] The third relevant period was the much longer period of over 20 years during which he was self-employed as a plasterer. The judge found that on three distinct occasions during this long period the deceased had had contact with asbestos dust. In 1974, he was involved in cutting asbestos sheets to be fixed to f ceilings and to stud partitions. In approximately 1975, he cut asbestos sheets to be fixed to ceilings. In about the same year, he made good loose plaster and pipes lagged with asbestos. The judge accepted that on these occasions there would have been heavy exposure but that on each occasion it was for no more than a short period.

[9] In *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305 at [7], [2003] g 1 AC 32, the then medical understanding of the etiology of mesothelioma was recorded by Lord Bingham of Cornhill:

> 'It is accepted that the risk of developing a mesothelioma increases in proportion to the quantity of asbestos dust and fibres inhaled: the greater the h quantity of dust and fibre inhaled, the greater the risk. But the condition may be caused by a single fibre, or a few fibres, or many fibres: medical opinion holds none of these possibilities to be more probable than any other, and the condition once caused is not aggravated by further exposure.'

[10] The medical position was unchanged by the date of the hearing of this j case by Moses J.

THE ISSUES AT TRIAL

[11] Moses J identified three distinct legal issues that had to be resolved by him. He conveniently set these out in his judgment:

'[10] ... Firstly, can the claimant bring the cause of the deceased's death within the principle of the causal requirements for establishing liability for mesothelioma caused by exposure to asbestos dust, as explained in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305, [2003] 1 AC 32 ... notwithstanding his exposure to asbestos dust whilst working as a self-employed plasterer?

[11] The defendants contend the fact of such exposure during a period when he was self-employed has the consequence that the claimant cannot bring the cause of the deceased's mesothelioma within the principle in *Fairchild v Glenhaven Funeral Services Ltd*, and for that reason the claim should fail. I shall describe this issue as the causation issue.

[12] Secondly, whether, if liability is established, the court should apportion the liability of the defendants to reflect the fact that the deceased was also exposed to asbestos dust which might equally have caused mesothelioma during the period of his employment at Graessers Ltd and whilst self-employed. I shall call that issue the apportionment issue.

[13] Thirdly, whether damages fall to be reduced on account of contributory negligence, in that the deceased failed to take any precautions when handling asbestos as a self-employed plasterer.

[13A] It is important to record that this third issue is not the same as the first. On the first issue the defendants contend that liability cannot be established, whether the deceased was guilty of contributory negligence or not.'

[12] No issue arises on this appeal on the question of contributory negligence provided liability on the part of the defendant is established. There is an extent to which the availability of a finding of contributory negligence has a bearing on the causation issue but save in this context it will be unnecessary to make further reference to it.

THE CAUSATION ISSUE AT TRIAL

[13] Mr Feeny, on behalf of the defendant, argued that the adapting of the orthodox test of causation by the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* was essentially based upon the premise that the claimants were innocent victims of the negligent acts of their various employers so that there would be a real injustice if they could not recover compensation simply because medically it was impossible to identify which employer or employers were responsible for the fibre or fibres that had led to the mesothelioma. He argued that the same characterisation as an 'innocent victim' could not be said to be present in a case where one element of the overall exposure resulted from the claimant's exposure during a period of self-employment. If the exposure during self-employment resulted from his own fault, he was not 'innocent' and in any event he was not necessarily the 'victim' of another's wrongdoing since it was just as likely that he suffered the harm through no fault of any employer.

[14] In order to make good his contention that the claimant's status as an 'innocent victim' was an essential prerequisite of the modified test of causation, Mr Feeny drew attention to a number of passages in *Fairchild v Glenhaven Funeral Services Ltd*.

[15] Lord Bingham said ([2002] 3 All ER 305 at [23]):

'The problem of attributing legal responsibility where a victim has suffered a legal wrong but cannot show which of several possible candidates (all in

breach of duty) is the culprit who has caused him harm is one that has vexed jurists in many parts of the world for many years.' a

[16] Lord Nicholls of Birkenhead said:

'[41] The present appeals are another example of such circumstances, where good policy reasons exist for departing from the usual threshold "but for" test of causal connection. Inhalation of asbestos dust carries a risk of b mesothelioma. That is one of the very risks from which an employer's duty of care is intended to protect employees. Tragically, each claimant acquired this fatal disease from wrongful exposure to asbestos dust in the course of his employment. A former employee's inability to identify which particular period of wrongful exposure brought about the onset of his disease ought c not, in all justice, to preclude recovery of compensation.

[42] So long as it was not insignificant, each employer's wrongful exposure of its employee to asbestos dust and, hence, to the risk of contracting mesothelioma, should be regarded by the law as a sufficient degree of causal connection. This is sufficient to justify requiring the employer to assume responsibility for causing or materially contributing to d the onset of the mesothelioma when, in the present state of medical knowledge, no more exact causal connection is ever capable of being established. Given the present state of medical science, this outcome may cast responsibility on a defendant whose exposure of a claimant to the risk of contracting the disease had in fact no causative effect. But the e unattractiveness of casting the net of responsibility as widely as this is far outweighed by the unattractiveness of the alternative outcome.

[43] I need hardly add that considerable restraint is called for in any relaxation of the threshold "but for" test of causal connection. The principle applied on these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty, perhaps understandable f difficulty, in discharging the burden of proof resting on him. Unless closely confined in its application this principle could become a source of injustice to defendants. There must be good reason for departing from the normal threshold "but for" test. The reason must be sufficiently weighty to justify depriving the defendant of the protection this test normally and rightly g affords him, and it must be plain and obvious that this is so. Policy questions will loom large when a court has to decide whether the difficulties of proof confronting the plaintiff justify taking this exceptional course. It is impossible to be more specific.'

[17] Lord Hutton made clear ([2002] 3 All ER 305 at [77]) that the arguments h in that case were based on an acceptance that one or other employer was responsible for the injury and he explained ([2002] 3 All ER 305 at [116]) why he considered that the appeal should be allowed:

'... I concluded that the breach of duty by each defendant materially j increasing the risk of the onset of mesothelioma in [the claimants] involved a substantial contribution to the disease suffered by them and it was for this reason that I allowed the appeals.'

[18] Mr Feeny places particular reliance on the speech of Lord Rodger of Earlsferry which is summarised in his conclusions ([2002] 3 All ER 305 at [170]):

a '... the principle applies where the other possible source of the claimant's injury is a similar wrongful act or omission of another person, but it can also apply where, as in [*McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1], the other possible source of the injury is a similar, but lawful, act or omission of the same defendant. I reserve my opinion as to whether the principle applies where the other possible source of injury is a similar but b lawful act or omission of someone else or a natural occurrence.'

[19] The argument on behalf of the defendant is put succinctly by Mr Feeny when he says 'to compensate people who may have injured themselves is to push the boundaries of tort too far'. Before the considerations that led to the modification of the general rule as to causation in *Fairchild v Glenhaven Funeral* c *Services Ltd* can operate, it is necessary to establish that the condition does result from the act or omission of some person other than the claimant. The modification of the rule of causation only comes into play once that fundamental hurdle has been crossed and the difficulty then arises that it is not possible to identify which of several possible candidates actually caused the harm. Thus where there is on the evidence an equally likely possibility that the condition may d have arisen without fault on the part of some other party during a period of self-employment, the modified approach to the proof of causation cannot be justified.

[20] On behalf of the claimant, Mr David Allan QC argued that the distinction sought to be made on behalf of the defendant was not one that was consistent with e the approach of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*. It would, he submitted, lead to the sort of injustices that the House of Lords was not prepared to countenance and it was inconsistent with the decision of the House of Lords in *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, upon which reliance was placed in the reasoning that prevailed in *Fairchild v Glenhaven Funeral Services Ltd*.

f **[21]** He submitted that the rationale for the decision in *Fairchild v Glenhaven Funeral Services Ltd* was explained by Lord Bingham ([2002] 3 All ER 305 at [33]):

'I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim. Were the law otherwise, an g employer exposing his employee to asbestos dust could obtain complete immunity against mesothelioma (but not asbestosis) claims by employing only those who had previously been exposed to excessive quantities of asbestos dust. Such a result would reflect no credit on the law.'

h **[22]** Lord Hoffman said (at [62]):

'In these circumstances, a rule requiring proof of a link between the defendant's asbestos and the claimant's disease would, with the arbitrary exception of single-employer cases, empty the duty of content. If liability depends upon proof that the conduct of the defendant was a necessary j condition of the injury, it cannot effectively exist.'

[23] Mr Allan acknowledged that Lord Bingham (at [2]), Lord Hoffman (at [61]) and Lord Rodger (at [170]) set out criteria to assist in determining whether the modified approach to causation is justified but he submitted that the criteria are not in identical terms and thus cannot be applied rigidly. This had been recognised by Lord Bingham when he said (at [34]): 'It would be unrealistic to

suppose that the principle here affirmed will not over time be the subject of incremental and analogical development.' a

[24] Similarly Lord Hoffman said (at [74]): 'That does not mean that the principle is not capable of development and application in new situations.'

[25] Mr Allan argued that the defendant's contention that the *Fairchild v Glenhaven Funeral Services Ltd* approach is only justified in the case of 'innocent victims' ignores the fact that even if any exposure during self-employment is not b negligent, the victims will still be unable to show that the condition was not contracted as a result of the fault of some other party and hence cannot succeed. Such a person would be an 'innocent victim', who was deprived of a remedy. Where, on the other hand, there is negligence on the part of the claimant in taking precautions for his own protection during the periods of self-employment, the proper solution to the problems arising comes by way of a finding of c contributory negligence under the Law Reform (Contributory Negligence) Act 1945. Where such an issue arises, Mr Allan accepted that a defendant could take advantage of the *Fairchild v Glenhaven Funeral Services Ltd* approach to causation to establish contributory negligence.

[26] Lord Nicholls had made clear ([2002] 3 All ER 305 at [43], set out in full d at [16], above), that policy questions 'loom large' when the taking of 'the exceptional course' falls to be considered. Mr Allan contended that the defendant had failed to advance any policy consideration for placing a claimant who has a period of relevant self-employment at such a disadvantage to those who have been exposed only in the course of employment with others. There was, he suggested, no good reason why the defendant should escape liability when it was e right to hold the defendants in *Fairchild v Glenhaven Funeral Services Ltd* liable.

[27] Mr Allan further submitted that to adopt the defendant's approach would be inconsistent with the approach in *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1. In that case part of the exposure to brick dust for which the defendant was responsible was 'innocent' in the sense that it was without any f unlawful act or omission, and part was in breach of duty. The House of Lords none the less felt compelled to modify the orthodox approach to causation in those circumstances in a way that did not distinguish between the two types of conduct.

THE APPORTIONMENT ISSUE AT TRIAL g

[28] Mr Feeny's second argument was that, even if liability was established, there ought to have been an apportionment of the responsibility for the damage suffered to reflect his other periods of exposure in different employment. He acknowledged that, on the medical evidence, there was a single indivisible injury and that the normal approach to such an injury where there were two concurrent h tortfeasors was for each to be jointly and severally liable in accordance with the principle explained by Devlin LJ in *Dingle v Associated Newspapers Ltd* [1961] 1 All ER 897 at 917, [1961] 2 QB 162 at 188–189 and adopted by Laws LJ in *Rahman v Arearose Ltd* (2000) 62 BMLR 84 at 93–94, [2001] QB 351 at 361–362 (paras 17 and 18). However, the modification of the rule as to causation in *Fairchild v* j *Glenhaven Funeral Services Ltd* required a modification to the approach to apportionment in such cases if injustice was not to result. Mr Feeny contended that it was accepted in *Fairchild v Glenhaven Funeral Services Ltd* that modification of the rule as to causation would create situations in which some defendants would have to accept liability when the defendant was not responsible in fact for the harm suffered. When the rule is repeatedly applied in claim after claim, the

inevitable consequence is that those employers who remain available to compensate claimants because they have not become insolvent or untraceable with the inevitable passage of time involved in this condition will have to shoulder a greater liability at law than their true factual responsibility for the harm that they have caused. This, it is argued, can only be considered as an injustice.

[29] Mr Feeny drew attention to the observations of Laws LJ in *Rahman v Arearose Ltd* (2000) 62 BMLR 84 at 99, [2001] QB 351 at 368 (para 33):

> 'Novus actus interveniens, the eggshell skull, and (in the case of multiple torts) the concept of concurrent tortfeasors are all no more and no less than tools or mechanisms which the law has developed to articulate in practice the extent of any liable defendant's responsibility for the loss and damage which the claimant has suffered.'

He submitted that the use of any tool or mechanism has to be adapted for the task in hand. If the court addressed the full complexities of multiple mesothelioma litigation, then the just solution involved an apportionment as suggested. Mr Feeny further submitted that the application of the *Fairchild v Glenhaven Funeral Services* principle to different factual situations would be more straightforward if an approach based on apportionment was adopted.

[30] Mr Allan contended that the concession made by leading counsel for the defendants in *Fairchild v Glenhaven Funeral Services Ltd* that mesothelioma had to be considered an indivisible injury was undoubtedly correctly made. *Dingle v Associated Newspapers Ltd* and *Rahman v Arearose Ltd* clearly established that for such an injury any tortfeasor who contributed to a single injury is liable for the whole loss. In the absence of any compelling policy reason to modify this rule, it clearly had to be applied and there is no such compelling reason. If another tortfeasor had contributed to the risk of a claimant contracting mesothelioma, a defendant could seek contribution under the provisions of the Civil Liability (Contribution) Act 1978. If the victim had contributed to the asbestos exposure by his own fault damages can be reduced on the basis of contributory negligence.

[31] Mr Allan accepted that if an additional tortfeasor can no longer be sued and if no insurer could be identified, a defendant may be unable to obtain a contribution. However, in such circumstances there was no compelling policy reason why the defendant should only be liable for part of the loss. He is a tortfeasor in breach of his duty who in law is deemed to have contributed to an injury that in this and many cases will result in death. Mr Allan posed the question:

> 'Why in those circumstances should there be a special rule for such a tortfeasor which has the effect of depriving the innocent victim who has suffered a single devastating injury of part of his or her damages? It is through no fault of the claimant that another tortfeasor can no longer be sued.'

[32] Mr Allan argued that in a case where mesothelioma is attributable to exposure by a solvent wrongdoer and an insolvent wrongdoer, it would be unfair to transfer the risks of insolvency from the solvent wrongdoer to the blameless claimant.

The approach of Moses J

[33] Moses J resolved each of these issues in favour of the claimant. Mr Allan placed reliance upon and adopted the judge's reasoning for his conclusion on the causation issue. It is perhaps, therefore helpful to set it out in detail:

> '[60] I should reiterate that the defendant's submission does not depend upon any proof that the deceased was himself to blame. It seems to me that that is a significant and necessary feature of the defendant's argument. If the submission depended upon the fact that the deceased was himself at fault, it would be difficult to sustain. If the deceased was at fault, it is difficult to see why the defendant should escape liability altogether. Justice can be met by reducing the extent of the damage in proportion to the extent of the deceased's responsibility in accordance with conventional principles under the Law Reform (Contributory Negligence) Act 1945.
>
> [61] It is difficult to see why, if the deceased was in part to blame for materially adding to the risk, but only partly to blame, he should receive no compensation whatever. If one supposes that a deceased through his own fault was exposed to asbestos during a very short period of self- employment, but for most of his working life suffered such exposure due to breaches of duty on the part of a number of employers, I can discern no justice in depriving him of compensation altogether.
>
> [62] In the case of one who has been employed throughout his working life and exposed to asbestos dust, but who on a few occasions was guilty of contributory negligence in failing to use protective equipment with which, say, on one occasion he was provided, the claimant would recover, subject to a reduction. I cannot see why the position of a claimant should be any different because he was on occasions self-employed and to some extent at fault, rather than employed, but to some extent at fault. On the contrary, it seems to me that both cases are analogous. Both should be treated in the same way, and both should be at risk not of complete loss, but rather of a reduction of damages.
>
> [63] It was no doubt with that difficulty in mind that the defendant's submission was developed in the way that it was, to include both cases where a deceased was at fault and where he was not. If his submission was confined to cases where the deceased was at fault, a comparison would arise between a negligent self-employed worker and a negligent employee. The defendant would not be able to demonstrate why justice could not be met by the application of traditional principles of contributory negligence.
>
> [64] Those principles would, it was accepted, have to accommodate the principle of causation in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305, [2003] 1 AC 32. A defendant has to do no more than establish that the deceased's own failures materially increase the risk.
>
> [65] But it is at this stage that the defendant's argument begins to unravel. Once it is accepted that in cases where a deceased is at fault, the rules permitting reduction of damages afford a measure of justice to a defendant who has materially increased the risk, it is difficult to see why justice demands that an innocent sufferer whose mesothelioma may be the result of exposure during a period of self-employment should not be able to recover.
>
> [66] In *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, the House of Lords was faced with the stark choice of imposing liability or

not, even though the dermatitis may have been caused without any fault on the part of the employer or depriving the employee of any redress.

[67] I can identify no greater injustice in fixing an employer in breach of duty with liability, even though the mesothelioma may have been caused during a period of self-employment. The source of the problem is the same in all these cases; the impossibility of attributing precise responsibility.

[68] Faced with that impossibility, the law imposes liability on those who were responsible for materially increasing risk which later materialised, even though others were also responsible for increasing the risk. If one of those sharing responsibility turns out to be the deceased, the law provides a measure, but not total relief for a defendant, by a reduction of damages.

[69] If the risk was materially increased without fault, I can identify no just basis for affording complete relief from liability to those who, in breach of duty, themselves increased the risk. To adopt the words of Lord Hoffman ([2002] 3 All ER 305 at [63], [2003] 1 AC 32), as between an employer who has contributed to a period of exposure to risk and an innocent self-employed man who has similarly contributed to a period of exposure, I regard it as inconsistent with the policy of law to deprive that innocent self-employed person of any redress at all in respect of the period when he was employed by an employer in breach of duty.'

[34] As to the apportionment issue, Moses J concluded that, in the light of *Dingle v Associated Newspapers Ltd* [1961] 1 All ER 897, [1961] 2 QB 162 and *Rahman v Arearose Ltd* (2000) 62 BMLR 84, [2001] QB 351, since this was an indivisible injury, it was not open to him to adopt the course suggested on behalf of the defendant. In any event he would have declined the opportunity to limit the amount of the recoverable damages by reference to the extent to which the defendant materially increased the risk even if it was capable of calculation. He said:

'[82] It may be that only one defendant's breach of duty in fact resulted in the mesothelioma. If mesothelioma can be caused by many fibres, it may be that a number of the defendants are responsible.

[83] In such a state of uncertainty, the concept of apportioning blame cannot be rooted in any scientifically provable fact. For reasons of justice and fairness, the law imposes liability on those who are responsible for increasing the risk. It is also readily understandable that as between defendants there should be apportionment on the sensible basis that the greater the exposure, the greater the risk, the third of the five features to which Lord Hoffman drew attention ([2002] 3 All ER 305 at [61], [2003] 1 AC 32).

[84] On the same basis, contributory negligence may lead to a reduction, but in cases where there is no contributory negligence, I can see no just basis for a reduction in damages merely on the basis that someone else may have been responsible.

[85] The rationale for relaxation of the orthodox rule does not, in my view, carry with it justification for altering the traditional liability of a concurrent tortfeasor. Indeed, the justification for the rule as to concurrent tortfeasors as explained by Laws LJ in *Rahman v Arearose Ltd*, bears a striking similarity to the justification for the rule as to causation as explained by the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*. If a claimant is not to be deprived of all redress for want of proof of causation, equally it seems to me his damages ought not, as between him and a tortfeasor, be reduced for want of proof of causation.'

CONCLUSIONS

[35] For my part, having reflected on the competing arguments, I find myself in complete agreement with the approach of Moses J to each of these two issues. I can think of no approach to the problems that arise in a case such as this that would achieve a more just solution if consistently applied.

[36] It seems clear to me that at the very heart of the decision in *Fairchild v Glenhaven Funeral Services Ltd* were policy questions to determine which of two competing arguments should prevail. Each ran an inevitable risk that there might be some injustice to one or other of the parties. The law had to take an objective view as to which would lead to greater injustice or potential injustice and formulate rules accordingly.

[37] This was explained by Lord Bingham in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305 at [33], to which reference has already been made (at [21], above) but it is perhaps important to set out the observations more fully:

> 'The crux of cases such as the present, if the appellants' argument is upheld, is that an employer may be held liable for damage he has not caused. The risk is the greater where all the employers potentially liable are not before the court. This is so on the facts of each of the three appeals before the House, and is always likely to be so given the long latency of this condition and the likelihood that some employers potentially liable will have gone out of business or disappeared during that period. It can properly be said to be unjust to impose liability on a party who has not been shown, even on a balance of probabilities, to have caused the damage complained of. On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered. I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim. Were the law otherwise, an employer exposing his employee to asbestos dust could obtain complete immunity against mesothelioma (but not asbestosis) claims by employing only those who had previously been exposed to excessive quantities of asbestos dust. Such a result would reflect no credit on the law. It seems to me, as it did to Lord Wilberforce in [*McGhee v National Coal Board* [1972] 3 All ER 1008 at 1013, [1973] 1 WLR 1 at 7] that—
>
> "the employers should be liable for an injury, squarely within the risk which they created and that they, not the pursuer, should suffer the consequence of the impossibility, foreseeably inherent in the nature of his injury, of segregating the precise consequence of their default."'

[38] The consideration suggested by Lord Bingham that the employment of those who had already been exposed to asbestos by other employers would offer a means of immunity against liability for mesothelioma would apply equally to those whose exposure was as a result of self-employment as to those employed by others.

[39] Mr Feeny pointed to a situation where 99% of the exposure was during periods of self-employment but there was no negligence on the part of the claimant. In such circumstances, if the period of self-employment was not a bar

to the claimant succeeding, he would recover in full from the defendant who was only responsible for 1% of the exposure since there would be no contributory negligence. This, he submitted, could not be right.

[40] Unsurprisingly Mr Allan countered with the reverse situation where the employer was responsible for 99% of the exposure and the self-employment counted for only 1% with no fault on the claimant's part. For such a claimant to recover nothing when he would have recovered in full, or at worst to the extent of 99% if the apportionment argument succeeded if he had been employed by a third party rather than self-employed, would be manifestly unjust.

[41] Such arguments to my mind only serve to highlight the policy element inherent in developing the law to provide the most equitable solution to the problems inherent in a situation such as this. This was the approach of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* and I believe that it has to be the approach to the first issue in this appeal. It seems to me inevitable that whatever solution the law finds it will always be possible to suggest an extreme situation in which the answer may not seem to be entirely fair to one or other party. The policy decision has to be made on the basis of the generality looking for the fairest solution when the matter is considered in the round.

[42] If that approach is adopted, then the answer given by Moses J seems to me to be entirely consistent with the reasoning of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* and the most likely to achieve the proper objective of the law. Where there is fault on the part of the claimant, this will be reflected by a finding of contributory negligence. Mr Feeny suggested that this was to confuse two distinct principles but I cannot agree with him. In framing policy in respect of the issue being considered, it is perfectly proper, and indeed I consider necessary, to look at all the consequences of such a policy. If possible hardship can be ameliorated by the application of some other principle, it is right to take that into account in the exercise.

[43] In the case of a person whose exposure outside his employment with the defendant is during a period of self-employment, the application of the *Fairchild v Glenhaven Funeral Services Ltd* approach will give rise to no greater degree of injustice or potential injustice to the defendant than would be the case where the other exposure was during employment with a third party. In contrast, exclusion of all liability because there has been a degree of exposure during a period of self-employment, however limited that exposure, provided it was not so insignificant as to be disregarded, would be to run the risk of manifest unfairness to a claimant on precisely the same basis that the House of Lords thought demanded a modified approach in the case of multiple employment. For these reasons, I would respectfully adopt the approach of Moses J on this issue.

[44] The issue of apportionment clearly raises equally difficult considerations. Mr Feeny has recognised that if the normal principles are applied there will be no apportionment on the basis that this was an indivisible injury. He argued that the modification of the causation rules on policy grounds demands a modification of the apportionment rules to take the altered approach into account. It seems to me that it is, therefore, necessary to demonstrate some compelling reason to depart from the accepted rule in the circumstances. In this respect I accept the arguments advanced by Mr Allan. Mr Feeny is quite right in his analysis of the consequences for those employers who remain solvent and traceable. Inevitably it follows that a diminishing number of employers become liable for the totality of the consequences. Looked at exclusively from a defendant's point of view, this might suggest a different approach is needed but the rule is essentially one for the

protection of the person to whom the wrong has been done and consideration from the claimant's angle inevitably introduces further factors. Moses J commented upon the 'striking similarity' of the approach between the rule as to concurrent tortfeasors as explained by Laws LJ in *Rahman v Arearose Ltd* (2000) 62 BMLR 84, [2001] QB 351 and the rule of causation as explained in *Fairchild v Glenhaven Funeral Services Ltd*. I consider that this is the result of very similar policy considerations arising in each case. I have, therefore, concluded that there is no sufficient justification demonstrated to alter the normal rule against apportionment in the circumstances of this case.

[45] For these reasons I would reject each of the arguments advanced by Mr Feeny and dismiss this appeal. I would not wish, however, to leave the case without expressing my considerable gratitude to both Mr Feeny and to Mr Allan for the very clear, helpful and economical way in which the case has been argued before us.

KEENE LJ.

[46] I agree. On the causation issue, emphasis has been placed by the defendant on the fact that the present case does not meet all the criteria identified in *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32 for liability to arise. In particular, it is said by Mr Feeny that it was crucial to that decision that there had been a breach of duty owed to the claimant by someone, with the result that there was undoubtedly a tortfeasor in existence. Reference is made to the way the issue was described by Lord Bingham of Cornhill ([2002] 3 All ER 305 at [23]), where he said:

> 'The problem of attributing legal responsibility where a victim has suffered a legal wrong but cannot show which of several possible candidates (all in breach of duty) is the culprit who has caused him harm is one that has vexed jurists in many parts of the world for many years.'

If the injury may have resulted from the injured party's own actions while self-employed, then contends Mr Feeny one does not know that anyone has been in breach of duty owed to the injured party. There need be no tortfeasor in existence.

[47] It is of course obvious that there is that factual distinction between *Fairchild v Glenhaven Funeral Services Ltd* and the present case. That in itself does not indicate that Moses J was wrong in his conclusion on this issue. As Lord Bingham made clear in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305 at [34]:

> 'It would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development. Cases seeking to develop the principle must be decided when and as they arise. For the present, I think it unwise to decide more than is necessary to resolve these three appeals.'

The law of tort operates within a social context and its development must reflect that. This court must, as Kay LJ has said, have regard to the policy considerations which underlay the decisions in *Fairchild v Glenhaven Funeral Services Ltd* when one comes to resolve the present issue. To deny a claimant any remedy in a situation such as the present merely because his injury *may* have resulted from his own activities is redolent of the days when contributory negligence on the part of a claimant would operate as a complete bar to his recovery of damages.

[48] Moreover, I find helpful guidance in the case of *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, which was very influential in *Fairchild v Glenhaven Funeral Services Ltd*. In *McGhee v National Coal Board*, the injury suffered may have been caused by the lawful, non-tortious acts of the defendant. None the less the defendant was held liable because it had tortiously exposed the claimant to the risk of contracting dermatitis, and such exposure may have led to him contracting the disease. In other words, the injury may have been caused by something other than tortious conduct on the part of someone. It is to be noted that this was recognised by Lord Rodger of Earlsferry in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 All ER 305 at [170], [2003] 1 AC 32, where he stated:

> '... the principle applies where the other possible source of the claimant's injury is a similar wrongful act or omission of another person, but it can also apply where, as in [*McGhee v National Coal Board*], the other possible source of the injury is a similar, but lawful, act or omission of the same defendant.'

Lord Rodger went on to reserve his opinion as to whether the same approach applied where the other possible source of injury is a similar but lawful act or omission of someone other than the defendant or a natural occurrence. But it seems to me that *McGhee v National Coal Board* illustrates that a sufficient causal link may exist even where it cannot be established that anyone's tortious act caused the injury. Mr Feeny's argument that the injury must be shown to have been the result of someone's breach of duty cannot be sustained.

[49] Indeed, Mr Feeny was prepared to take the *Fairchild v Glenhaven Funeral Services Ltd* approach beyond the facts of that case, because he recognised the difficulty of confining the approach to those facts. He conceded in the course of argument that if a claimant had been exposed to the risk of mesothelioma during his employment by each of three employers in succession but one of the three had not acted negligently, then the other two would still be liable under the principle established in *Fairchild v Glenhaven Funeral Services Ltd* for his contracting the disease. That liability would arise, even though it was possible that the injury may not have been caused by anyone's tortious conduct.

[50] I conclude, therefore, on the causation issue that there is no reason for the defendant to escape liability in cases such as the present merely because the claimant's injury may have resulted from exposure during the time when he was self-employed. It is not a pre-condition of liability under the principle in *Fairchild v Glenhaven Funeral Services Ltd* that the injury must have been caused by someone's tortious act, so long as it is established that the defendant in breach of its duty to the claimant exposed him to the risk of contracting mesothelioma and that risk eventuated.

[51] On the issue of apportionment, I was for a time attracted by the defendant's argument that if one is dealing with an exceptional or novel situation, as is the position in these mesothelioma cases in the current state of medical knowledge, then one should be prepared to develop the law in a new direction to achieve a just result, even if it meant departing from the concept of liability for indivisible injuries. It would seem right that the claimant's own conduct in exposing himself to the risk of the disease should be reflected by some mechanism, in the same way that one tortfeasor would usually have the right to claim contribution from another concurrent tortfeasor who has caused the same injury.

[52] However, on reflection I accept the argument advanced on behalf of the claimant that there is no need to depart from the long-established principle

applicable in the case of an indivisible injury. If apportionment were generally to be seen as appropriate in mesothelioma cases, it would be difficult to reconcile with a defendant's right to contribution from a concurrent tortfeasor and could lead to a situation where a claimant would lose part of his damages if there had been an apportionment of liability between the previous employers and one of those previous employers then became insolvent. This simply illustrates the problems which could arise if one were to depart from the established approach to liability for indivisible injuries. If there has been any blameworthiness on the part of a claimant in exposing himself to the risk of the disease, then that is something which can be adequately and more appropriately catered for by applying the principles of contributory negligence under the Law Reform (Contributory Negligence) Act 1945. Those principles were indeed applied in the present case.

[53] For these reasons, I agree that Moses J was right in the conclusions which he reached. I too would dismiss this appeal.

WALL LJ.

[54] I agree to both judgments.

Appeal dismissed.

Kate O'Hanlon Barrister.

Hill and another v Transport for London

[2005] EWHC 856 (Ch)

CHANCERY DIVISION

RIMER J

15–17 FEBRUARY, 16 MAY 2005

Limitation of action – Land – Adverse possession – Accrual of cause of action – Whether intervention of Crown's ownership defeating claim – Limitation Act 1980, Sch 1, para 12.

The claimants claimed title to certain land by adverse possession. The defendant disputed the claim on the ground that even if the claimants proved all the adverse possession they asserted (namely from November 1985), the intervention of the Crown's ownership during that period meant that the relevant limitation period had not expired. Section 15(1)[a] of the Limitation Act 1980 provided, so far as material, that no action should be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claimed, to that person. Paragraph 10[b] of Sch 1 to the 1980 Act provided that s 15(1) applied to the bringing of an action to recover any land by the Crown with the substitution for the reference to 12 years of a reference to 30 years. Paragraph 12[c] provided that notwithstanding s 15(1), where in the case of any action brought by a person other than the Crown the right of action first accrued to the Crown through whom the person in question claimed, the action could be brought at any time before the expiration of (a) the period during which the action could have been brought by the Crown or (b) twelve years from the date on which the right of action accrued to some person other than the Crown whichever period first expired. The defendant contended that the word 'first' in the phrase 'first accrued to the Crown' in para 12 meant 'earlier' or 'previously' rather than 'originally' and that para 12 so interpreted provided it with a complete answer to the claim.

Held – Paragraph 12 of Sch 1 to the 1980 Act provided a complete code for persons claiming through the Crown, whether the right of action accrued originally to the Crown, or only so accrued earlier. The true sense of the word 'first' in para 12 was that of 'earlier' or 'previously'. Accordingly the claim failed, whether or not the claimants could prove that they were in adverse possession of the disputed land from November 1985 (see [25], [26], below).

Notes

For periods of limitation when claim made through the Crown, see 28 *Halsbury's Laws* (4th edn reissue) para 931.

For the Limitation Act 1980, Sch 1, para 12, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 987.

a Section 15(1), so far as material, is set out at [11], below
b Paragraph 10, so far as material, is set out at [14], below
c Paragraph 12, so far as material, is set out at [14], below

Case referred to in judgment

Secretary of State for Foreign and Commonwealth Affairs v Tomlin (1990) Times, 4 December, CA.

Claim

The claimants, Norman Hill and Terence Welford, brought proceedings against the defendant, Transport for London (TfL), claiming title to certain land by adverse possession. The facts are set out in the judgment.

Kirk Reynolds QC and *Philip Kremen* (instructed by *Hughmans*) for the claimants.
Thomas Jefferies (instructed by *Eversheds LLP*) for TfL.

Cur adv vult

16 May 2005. The following judgment was delivered.

RIMER J.

INTRODUCTION

[1] The claimants are Norman Hill and Terence Welford. They claim title to certain land by adverse possession. The defendant, Transport for London (TfL), disputes the claim. The disputed land comprises the land lying between, and the airspace enclosed by, ten arches built in about 1930 to support a flyover forming part of the A13 (the East India Dock Road) at Canning Town where it rises to cross the River Lea. The claimants make no claim to the structure of the arches.

TITLE TO THE RELEVANT LAND

[2] The former London County Council was originally the registered proprietor of the road, the structure of the arches, the disputed land and certain adjoining land. That land became vested in the Greater London Council (the GLC), which was also the highway authority. It was registered under Title No LN 42480.

[3] On 18 November 1985, in consideration of £22,000, the GLC transferred part of this land to John Elliott and Alan Bailey. The part transferred comprised a triangle of land to the east of Lanrick Road and to the immediate north of, and adjacent to, the arches. It is known as Iron Bridge Wharf North and was registered under Title No EGL 174822. On the same day, also in consideration of £22,000, Messrs Elliott and Bailey transferred the same land to Blackwall Transfer Station Ltd (BTSL), a company of which the two claimants were the sole directors and shareholders. The transfers were subject to the following easement reserved to the GLC, namely:

> 'a right of access approximately four metres wide along the entire length of the retaining wall for East India Dock Road in favour of the [GLC] as is shown coloured brown on the plan annexed hereto.'

That right gave the GLC access to the arches (which remained in its ownership) from Lanrick Road and over Iron Bridge Wharf North.

[4] On 20 November 1985, BTSL took a transfer from John Jennings and Messrs Elliott and Bailey of a larger piece of land also lying to the east of Lanrick Road and adjacent to the north-eastern boundary of Iron Bridge Wharf North.

This land was known as Moody Wharf and was registered under Title No NGL 71125.

[5] Some time in 1987, BTSL negotiated a proposed sale of the bulk of its land (mainly comprising Moody Wharf but also part of Iron Bridge Wharf North: I will call it 'the Shanks land') to Shanks and McEwan (Southern) Ltd (Shanks) for some £3m. No sale agreement is in evidence.

[6] On 26 February 1988, and before the transfer of any land to Shanks, BTSL transferred the land in both its titles to the claimants, a transfer stated to be for a consideration of £300,000. On 29 March 1988, the claimants and BTSL charged Moody Wharf and part of Iron Bridge Wharf North to Shanks—

> 'with the payment ... of any monies due from the [claimants and/or BTSL] pursuant to the provisions of an agreement dated 29th March 1988 and made between [the claimants] (1) [BTSL] (2) and the Mortgagor [sic] (3).'

No copy of that agreement is in evidence and I assume that 'Mortgagor' should read 'Mortgagee', a reference to Shanks. A statutory declaration that the claimants made in 2001 suggests that a contract for the sale of the Shanks land was signed on 26 February 1988, and their evidence is that the Shanks land was transferred to Shanks sometime later. The charges register for Iron Bridge Wharf North indicates, however, that the Shanks sale agreement was dated 29 March 1988. The Shanks land did not include a strip of land immediately adjacent to the arches and forming part of Iron Bridge Wharf North, which the claimants retained.

[7] Down to 1 April 1986, the GLC remained the proprietor of the East India Dock Road, the structure of the arches, the land between them and the airspace enclosed by them (such land and airspace being the disputed land). I shall call all this land 'the retained land'. The GLC was abolished on 1 April 1986, when (by the combined effect of the Metropolitan Roads Trunking Order 1986, SI 1986/153 and s 265 of the Highways Act 1980) the retained land vested in the Secretary of State for Transport. As from 1 April 1986, the retained land therefore became Crown land.

[8] From about 1988, and during the 1990s, road improvements in the area were planned. They necessitated the compulsory acquisition of certain land, including the disputed land. A compulsory purchase order was made on 6 August 1998. The title to the retained land—including the disputed land—remained in the Secretary of State until 3 July 2000. On that day, and pursuant to art 2 of the GLA Roads and Side Roads (Transfer of Property etc) Order 2000, SI 2000/2493, the disputed land (with other land) was vested (or purportedly vested) in TfL. TfL claims that it thereafter took possession of the arches (and so, therefore, also of the disputed land) on various dates between 11 July and 11 September 2000. The claimants dispute that and say that TfL did not take such possession until 27 November 2000, but nothing turns on that difference.

[9] The issue raised by the claim is whether (as the claimants contend) at the very moment the disputed land purportedly vested in TfL on 3 July 2000, TfL's title was extinguished by the claimants' prior adverse possession. It is no part of the claimants' case that, immediately prior to such transfer (that is, by 2 July 2000), they had extinguished the *Crown's* title to the land. If the claimants are correct, they are entitled to compensation for the compulsory acquisition of the disputed land although quantum remains to be assessed. If they are wrong, their claim fails. Although the claim is in form therefore about adverse

possession, it is in reality about money and not about still disputed claims to possession. The claim turns on whether, at any time on or after 3 July 2000, TfL could have established a title to the disputed land as against the claimants. The case was argued as if it was a claim by TfL to recover possession of the disputed land from them.

THE LIMITATION ACT 1980

[10] The Crown's title to the disputed land from 1 April 1986 until 2 July 2000 has raised an issue as to the interpretation of the relevant provisions of the Limitation Act 1980. The argument for TfL, for whom Mr Thomas Jefferies appeared, is that the scheme of the legislation is that, even if the claimants prove *all* the adverse possession they assert (namely, from November 1985 onwards), the intervention of the Crown's ownership during that period means that the relevant limitation period has not expired. By contrast, the claimants, for whom Mr Kirk Reynolds QC and Mr Philip Kremen appeared, have submitted that this is wrong, although they accept that on their suggested construction of the legislation they need to prove adverse possession of the disputed land by themselves and their predecessor (BTSL) from a date *prior* to the Crown's acquisition of its title on 1 April 1986. Mr Reynolds accepted that if any such possession only commenced *during* the Crown's ownership, the claim fails. To see how these rival arguments arise, it is necessary to consider the relevant provisions of the 1980 Act.

[11] Section 15 ('Time limit for actions to recover land') provides, so far as material:

> '(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. ...
>
> (7) Part II of [Schedule 1] contains provisions modifying the provisions of this section in their application to actions brought by, or a person claiming through, the Crown or any spiritual or eleemosynary corporation sole.'

[12] Section 17 ('Extinction of title to land after expiration of time limit') provides:

> 'Subject to—(a) section 18 of this Act [which is not material]; and (b) section 75 of the Land Registration Act 1925; at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.'

[13] Section 75 of the Land Registration Act 1925 ('Acquisition of title by possession') provides, so far as material:

> '(1) The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other

person interested in the land whose estate or interest is not extinguished by those Acts.'

[14] Part II of Sch 1 to the 1980 Act provides, in paras 10 and 12, so far as material (and omitting references to spiritual and eleemosynary corporations sole):

'10. ... section 15(1) of this Act shall apply to the bringing of an action to recover any land by the Crown ... with the substitution for the reference to twelve years of a reference to thirty years ...

12. Notwithstanding section 15(1) of this Act, where in the case of any action brought by a person other than the Crown ... the right of action first accrued to the Crown ... through whom the person in question claims, the action may be brought at any time before the expiration of—(a) the period during which the action could have been brought by the Crown ... or (b) twelve years from the date on which the right of action accrued to some person other than the Crown ... whichever period first expires.'

[15] Paragraph 10 shows that where the *Crown* seeks to recover land, a limitation period of 30 years is substituted for the 12-year period prescribed by s 15(1), but that otherwise s 15(1) operates according to its terms. That means that if the Crown had claimed to recover possession from the claimants, it would enjoy a 30-year limitation period from the date when the right of action originally accrued and its claim would have succeeded. In particular, it would make no difference that the right of action had (as the claimants assert on the facts) originally accrued to the GLC, through whom the Crown claims. This latter point is illustrated by the decision of the Court of Appeal in *Secretary of State for Foreign and Commonwealth Affairs v Tomlin* (1990) Times, 4 December. In that case, premises owned by the Royal Government of Cambodia, and used for its diplomatic mission in the United Kingdom, were (so the first defendant claimed) occupied by him as a trespasser on 6 August 1976 following the closure of the embassy in 1975. He claimed he had remained in occupation ever since. The title to the premises remained vested in the Royal Government until 30 March 1988, when it was vested in the Secretary of State by a deed poll executed pursuant to s 2 of the Diplomatic and Consular Premises Act 1987. On 18 April 1990, the Secretary of State served summonses on the defendants claiming possession under RSC Ord 113. Farquharson LJ said the case depended on the 1980 Act and upheld Mantell J's decision that the modification of s 15(1) by para 10 entitled the Secretary of State to the benefit of the extended 30-year limitation period. Russell and Neill LJJ agreed. The Secretary of State was therefore entitled to recover possession from the defendants.

[16] The Crown is not, however, the notional claimant to recover possession in the present case: TfL is that claimant. In those circumstances, Mr Reynolds's submission was that (subject to one qualification) Pt II of Sch 1 has no relevant impact. The claimants' case on the facts is that they commenced adverse possession of the disputed land in November 1985, when the GLC was the owner. It followed that the right of action to recover possession first accrued to the GLC, but no action to recover possession was taken either by the GLC or by its successor in title, the Crown. Mr Reynolds submitted that the result was that the title became extinguished by adverse possession at the moment the disputed land was purportedly vested by the Crown in TfL on 3 July 2000. He did not submit that it had become extinguished by November 1997 (12 years from

November 1985), since the *Tomlin* case precluded that argument. But once the Crown was out of the picture by purporting to vest the land in TfL, and the notional possession claim thereupon became one by TfL, the prior intervention of the Crown's ownership became a historical irrelevance. Mr Reynolds submitted that there is nothing in the 1980 Act prescribing a limitation period different from the basic 12-year one in circumstances in which (a) the right to recover possession first accrued to an owner other than the Crown, (b) the title was then transferred to the Crown, and (c) more than 12 years after the right of action first accrued, the Crown's title was transferred (or purportedly transferred) to the claimant. All that needs to be proved to defeat claimant's title is 12 years of adverse possession prior to his purported ownership.

[17] For TfL, Mr Jefferies submitted that para 12 of Pt II of Sch 1 provides TfL with a complete answer to the claim, even if the claimants had been in adverse possession since before 1 April 1986 so that the right of action originally accrued to the GLC. His submission was that para 12 shows that on 3 July 2000 TfL acquired the benefit of whichever of the two limitation periods referred to in para 12(a) and (b) first expires. The former is 30 years from whenever the right of action originally accrued; and the latter is 12 years from 3 July 2000. The latter will expire first, but TfL is well within it. Counsel agreed that the reference in para 12(b) to 'some person other than the Crown' is, in this case, to TfL.

[18] The difference between these rival submissions turns on the sense of the word 'first' in the phrase 'first accrued to the Crown' in para 12. Mr Jefferies submitted that it means 'earlier' or 'previously' rather than 'originally'. If that is right, then even if the right of action to recover the disputed land *originally* accrued to the GLC, it 'first accrued to the Crown' within the true sense of the word 'first' as used in para 12. So interpreted, para 12 defeats the claim.

[19] Mr Reynolds's submission was that 'first' in that phrase does not mean 'earlier' or 'previously'. It means 'first' in the sense of 'originally', and he pointed to the use of the same word in s 15(1), where he said it obviously means 'originally', not 'earlier' or 'previously'. As Pt II of Sch 1 modifies s 15, it would, he said, be odd if para 12 was using the word in a different sense. If this interpretation of para 12 is correct, Mr Reynolds's further submission was that, subject to one qualification, para 12 has no application to this case. That is because the claimants' case is that their adverse possession dates from November 1985, when the right of action 'first' accrued to the GLC. If, however, they did not commence any adverse possession prior to the Crown's acquisition of the title on 1 April 1986, but only did so afterwards, Mr Reynolds conceded that this *would* be a para 12 case (since the right of action would then have 'first accrued to the Crown'). In that event, he accepted that the claimants could not succeed, because TfL would be entitled to the extended limitation period conferred by para 12.

[20] So does 'first' in para 12 mean 'originally' or does it mean 'earlier' or 'previously'? For reasons submitted by Mr Reynolds, an interpretation in harmony with s 15(1) points to the former meaning and my initial instinct was that that was likely to be the better interpretation. If so, however, it produces odd consequences.

[21] First, para 10 shows that the Crown enjoys a 30-year limitation period from the date when the cause of action originally accrued. Second, the *Tomlin* case shows that it will enjoy that period even if it claims as a successor in title to one who originally had the right of action. Third, the primary intention of para 12 is to prescribe the limitation period applicable to a person claiming

through the Crown. It is agreed that 'some person other than the Crown' in para 12(b) refers to that person; and the basic scheme of para 12 appears to be to give that person a limitation period of (a) 30 years from when the cause of action *originally* accrued (see my first and second points), or (b) 12 years from when he (or the first non-Crown owner through whom he claims) acquired the title from the Crown, whichever period expires first.

[22] Mr Reynolds would not, I think, disagree with most of that. But he would say that that analysis of para 12 only applies to cases in which the cause of action *originally* accrued to the Crown, because that is the sense of the word *first*. If the Crown is merely a successor to the owner to whom the right of action so accrued, para 12 has no application. The consequence is that, although para 10 and the *Tomlin* case show that, as such a successor, the Crown has 30 years from the *original* accrual of that right of action in which to sue, a successor to the Crown who purportedly acquires title more than 12 years after the original accrual of the right of action will acquire no right of action at all. According to Mr Reynolds, the Crown has a full title to the relevant land immediately before the purported transfer to the Crown's successor: but at the very moment of such transfer the title is extinguished by s 17. The successor in title will only have a right of action if that right is one that *originally* accrued to the Crown.

[23] In my judgment, Mr Reynolds's interpretation of para 12 does not identify the correct sense of Pt II of Sch 1 read as a whole. The period during which the Crown could have brought an action is 30 years from the date when the right of action originally accrued, whether that right accrued to the Crown or to a predecessor. Paragraph 12 gives the Crown's successor in title the benefit of that same period or the alternative para 12(b) one, whichever expires first. That shows that the feature of paramount importance in the scheme of para 12 is that the claimant to possession is someone claiming through the Crown, which itself had a right of action. Whether or not the right of action *originally* accrued to the Crown or to someone else appears to be of no importance since, whether it did or not, the longer 30-year period anyway runs from the date of that original accrual. Mr Reynolds's submission that the Crown's successor will only enjoy the benefit of the extended para 12 period if the right of action originally accrued to the Crown rather than to its predecessor appears, therefore, to be a subtlety lacking a rational basis. The argument of course has the support of the narrower, and perhaps more natural, meaning of the word 'first' in the relevant phrase. But in my judgment it is not possible to derive from Pt II as a whole, and para 12 in particular, any logical reason for interpreting 'first' in that narrow way. Nor does it have to be so construed: in an appropriate context it can undoubtedly mean 'earlier' or 'previously', for example a condition that a particular course of action cannot be followed without 'first' serving a notice.

[24] Moreover, if Mr Reynolds is right in his suggested interpretation, what is the limitation period prescribed by the 1980 Act which bars TfL's claim? As I understand it, it is said to be the basic 12-year one prescribed by s 15(1), even though during the Crown's tenure that period was superseded by the 30-year period. That being so, the argument must be that, once the Crown's tenure has expired (after the 12-year period), that basic period was retrospectively re-activated so as to provide an immediate bar to the bringing of a claim by TfL. I accept that this is conceptually possible but I cannot discern in Pt II an indication that it forms part of the legislative intention. If it had been, I regard it as likely that Pt II would have spelt it out in terms approximately as follows:

'12A. For the avoidance of doubt, and notwithstanding anything in paragraphs 10 and 12, where in the case of any action brought by a person other than the Crown ... the right of action originally accrued to a person other than the Crown but subsequently accrued to the Crown ... through whom the person in question claims, the action may not be brought by that person after the expiration of twelve years from the date on which the right of action originally accrued.'

[25] Part II does not spell that out and I consider that that is because that was not the intention. The omission to spell it out creates, if Mr Reynolds is right, a lacuna in the legislation. How *can* the claimants in the present case assert, or the court hold, that the freeholder's title became extinguished in November 1997, after 12 years' adverse possession, when para 10 shows that the title had not become so extinguished by then? If in fact it only became extinguished at midnight on 2/3 July 2000—after something over 14 years of adverse possession—then under which provision in the 1980 Act is that said to be the prescribed limitation period? In my judgment, the answer to these questions is that para 12 provides a complete code for claims brought by persons claiming through the Crown, whether the right of action accrued originally to the Crown, or only so accrued earlier, and I so hold. I agree with, and accept, Mr Jefferies's submission that the true sense of the word 'first' in para 12 is that of 'earlier' or 'previously'.

[26] The consequence of that conclusion is that the claim fails, whether or not the claimants can prove they were in adverse possession of the disputed land from November 1985. In case, however, I am wrong in my interpretation of para 12, and Mr Reynolds is correct that it only applies to the case in which the right of action *originally* accrued to the Crown, I must also make findings on the facts. Before coming to them, I record that Mr Jefferies also submitted that, even if Mr Reynolds was correct as to the true interpretation of para 12, the consequence of his argument could not be to negative the express effect of art 5 of the 2000 Order under which (inter alia) the disputed land was statutorily vested in TfL on 3 July 2000. That raises a difficult question to which it is unnecessary to venture an answer, and so I say no more about it.

THE FACTS

[27] Evidence in support of the claimants' claim was given by Mr Terence Welford. He made a witness statement on 2 February 2005, confirmed its truth in his oral evidence-in-chief and was cross-examined. He explained in it that in his business dealings he had sometimes used his wife's maiden name of Walsh (he did so in the charge of 29 March 1988). He is 59, was born in Stepney, has always worked in the East End and since the age of 20 his business activities have largely involved him in scrap dealing and road haulage. He met his co-claimant, Mr Hill, over 30 years ago after which they ran their merged haulage companies from premises in Blackwall Goods Yard in the East India Dock Road. About two years later, they acquired Blackwall Transfer Station, a waste transfer station, which became so successful that they ceased their haulage business save that they used its vehicles to service the waste transfer business. The nature of that business was that third parties would deposit waste on the site, usually from skips, the claimants would then process and recycle it and transfer the balance to landfill sites in Essex.

[28] Mr Welford said that in about 1984 or 1985, Blackwall Goods Yard was compulsorily purchased. BTSL used the compensation to purchase Moody Wharf and Iron Bridge Wharf North for £235,000 (the two November 1985

purchases). The sites were a few hundred yards from the Blackwall Transfer Station. They were derelict and he said that in November 1985 there was nothing to identify the boundary between them save that each had a separate entrance from Lanrick Road. Immediately adjacent to the southern side of Iron Bridge Wharf North were the ten arches.

[29] Mr Welford explained what he and Mr Hill did when BTSL purchased the two sites in November 1985. They cleared them of all rubbish and demolished the few derelict buildings. They built brick walls on their western and northern boundaries (the eastern one was bounded by the River Lea), retaining the two separate entrances on Lanrick Road, at which they erected metal gates which were padlocked when the yards were shut. They installed drainage and re-wired and concreted the sites. They later constructed a building to house the waste transfer business, along with offices and a workshop. BTSL sold the sites to the claimants in 1988 prior to the onward sale of the Shanks land for £3m, that sale including the waste transfer business.

[30] Mr Welford's evidence then turned to what BTSL did in relation to the arches following the November 1985 acquisitions. He said they were full of rubbish. Some had doors hanging off their hinges but all bore signs of past occupation. He knew that they had in the past been occupied by various transport and haulage businesses. He said that seven of them were bricked up on their southern side (although the brickwork was in poor condition) and that there was evidence that the three others had also been bricked up in the past. He said it was evident that access to them was from Iron Bridge Wharf North and that it was plain that three of them could never have been accessed from the south, since two backed on to an abutment and one was built as a wedge-shaped structure. He said that he and Mr Hill 'immediately bricked up the 3 arches that were open to Ironbridge Wharf South, and repaired and, where necessary, replaced the brickwork in the other Arches'. He said that once this was done, and the boundary walls had been built, the site was completely closed off. He said that after the sale to Shanks, access to the arches could only be had through the Lanrick Road gate into Iron Bridge Wharf North. The arches were served by a roadway within Iron Bridge Wharf North, which ran from the Lanrick Road gate along the entrances to the arches and then continued around the site. The roadway was not apparent at the time of the purchase, it was covered in rubbish.

[31] Mr Welford said that BTSL's clearing of the sites (including the arches), the erection of the boundary walls and the bricking up of the southern side of the arches was carried out within a few weeks of the November 1985 acquisition. He said he and Mr Hill were anxious to get an income stream from letting out the arches as soon as possible. This was because it was going to take time to get the waste transfer business up and running. He said they concreted over the ground of those arches which did not already have hard surfaces, they re-wired the arches and installed electricity meters in them. They installed doors to those arches where the original doors had been removed or were derelict. They installed toilet facilities outside the arches for use by tenants of the arches and laid on a water supply for each tenant to access. He said in his statement:

> '29. The first lettings of the Arches took place within a matter of weeks of [BTSL's] acquisition of the site in 1985. Indeed, this happened whilst clearance of the rest of the site was still going on and prior to the boundary wall being completed. During this period the site was secured by security guards with dogs.

30. Until 1991 [Mr Hill] and I let out the Arches in a fairly informal way. We gave tenants rent books and collected the rents ourselves. There was a high demand for them and a regular turnover of tenants. That having been said, though, a number of them were there from the beginning until we had to give up the land in November 2000.

31. In 1991 we handed over the letting of the Arches to the managing agents Sovereign House Estates in Hackney. They found tenants and collected the rents. Unlike us they required tenants to sign tenancy agreements.'

[32] Mr Welford said the tenants were given keys to the gate serving Iron Bridge Wharf North and also had keys to their own units. He said that on several occasions between 1985 and November 2000 a representative of the local authority turned up at the site and asked for permission to inspect the arches. He had to arrange for the tenants to unlock the doors to the arches.

[33] In cross-examination, Mr Welford said that he and Mr Hill received £108,000 compensation for Blackwall Goods Yard and borrowed £200,000 to purchase Ironbridge Wharf North and Moody Wharf. The plan was to build a new transfer station on that site and then to sell Shanks the site (or part of it) complete with the new transfer station. They did not need to have a deal in place with Shanks before building the transfer station, because they had a loan and were taking money out of their transfer business, which had been turning over about £1m a year although Mr Welford could not say what profit they made. He said that it took about nine months to build the new transfer station. He agreed that they had started the building work in 1987 and that it was finished in about August 1988. He said they never intended to sell Shanks the strip of land adjoining the arches, which he and Mr Hill retained.

[34] Mr Welford was shown a statutory declaration that he and Mr Hill had made on 15 October 2001 in support of their claim for compensation for the disputed land following the compulsory purchase order. In paras 1 and 2, they described the purchase of the sites in November 1985 and the then state of the arches, which they appreciated were not included in their title. They said in paras 3 and 5:

'3. On acquisition of the Site [BTSL] made an application for planning permission to construct a waste transfer station on the site. Whilst that was ongoing we cleared the Site and immediately entered into possession of the Arches, which were used for the storage of machinery, tools, oil and diesel. We constructed a brick wall all the way round the Site save for the riverside wharf ...

5. During the course of the erection of the waste management station on the Site, [BTSL] decided to rent out the Arches under licence agreements for 3 months' duration, although we have been advised that such licenses [sic] may well have actually constituted tenancies. The income generated helped Blackwall to pay the mortgage on the Site. The demand for the Arches was high and none stayed vacant for any length of time after a licensee had vacated.'

[35] The assertions there made (under oath) differed from Mr Welford's evidence (also under oath) in this action, made over three years later. First, there was no suggestion in his latter evidence that BTSL had originally used the arches for storage purposes. His evidence was to the effect that it had promptly

proceeded to let them out, the first lettings being (so he originally said) 'within a matter of weeks of' the acquisition, whilst the site was being cleared. In the statutory declaration, however, Mr Welford and Mr Hill had fixed the first lettings as dating from about the time of the construction of the waste management station, which Mr Welford said in his evidence to me commenced in late 1987. That was a major discrepancy, which he sought to explain by saying he thought he had said the wrong thing in para 5 of the statutory declaration: he should there have said that the lettings dated from the *development* of the site, a reference to when BTSL sought planning permission for the construction of the new transfer station. He said BTSL did rent out the arches before the building work started and that Coopers moved into nos 1 and 2 in the first week of BTSL's occupation, during which week five arches in all were let. This further explanation appeared, therefore, to put the first lettings at a rather earlier time than had his evidence-in-chief. Mr Welford said he could have produced evidence of these lettings, but he produced none. He produced no evidence showing that any of the arches was let before 1 April 1986. He produced no evidence that BTSL had received any rent for them before April 1986. It appears that BTSL's affairs were not in good order: he said there had been a tax investigation but that BTSL paid all the tax it owed.

[36] In connection with the claimants' assertion that their letting of the arches dated from November 1985, Mr Reynolds placed reliance upon some 1988 correspondence. On 4 October 1988, Ashurst Morris Crisp (Ashurst), solicitors for the London Docklands Development Corporation (LDDC), wrote to Mr Hill recording LDDC's understanding that he may have an interest in land east of Lanrick Road in respect of which LDDC was proposing to make a compulsory purchase order for road improvement purposes. They asked him to provide certain information relating to his ownership and occupation of an identified area, being a section of the East India Dock Road including the arches. Mr Welford filled in and returned the information sheet, although the information he provided was of a minimalist nature. To the question as to the 'nature of interest in the premises' he replied 'ARCHS [sic]'. To the question as to the 'purpose for which the premises are being used', he replied 'SMALL'. Below, and slightly to the right of, that response he put a mark of indeterminate nature. Mr Reynolds encouraged Mr Welford (his own witness) to agree that it was an ill-constructed 'B' and that the sense of his response was that the arches were used for the purposes of small businesses. Mr Welford declined to be so led by Mr Reynolds and said he could not explain the mark. The potential importance of the point was that to the next question, as to 'when that use began', Mr Welford replied 'NOVEMBER 1985'. He gave the same answer to the last question, as to the 'time when any activities being carried out on the premises began'.

[37] There is, however, evidence that at least by 1987 (consistently with what the claimants had said in their statutory declaration) the arches were let. A S Lee Glazing appears to have occupied no 7 since 1987; Messrs Derry appear to have occupied no 5 since 1988 (Mr Welford asserted, but was unable to corroborate it, that there was a previous tenant in occupation of that arch); and Axestone Engineering (Axestone) appears to have occupied no 3 since 1988. In a letter of 15 January 2002, Clapshaws (chartered surveyors) asserted that no 3 was in a poor state when Axestone first occupied it and that they had spent considerable sums in improving it, including the construction of an office and a tearoom and the bringing of electricity to it. That is to be contrasted with

Mr Welford's evidence that BTSL had put in the electricity, a job he said had been done by his brother-in-law. His response to Clapshaws' statement was that Axestone were welders and had to lay on heavy duty cables.

[38] A report of an inspection carried out by the London Borough of Newham in 1987 for the Department for Transport records that by then all the arch units were being used for light engineering works or storage facilities. There is further evidence that they were each separately rated as from 1 April 1990 and that as at May 1991 they were all occupied, apart only from no 2, which had been empty since 1 April 1990. On 20 September 1991, the Department for Transport wrote to Sovereign House Estates (Sovereign), who were by then managing the letting of the arches for the claimants, pointed out that it was the highway authority for the A13 and asked for an explanation as to Sovereign's interest in the arches, or that of anyone else known to have an interest in them. Sovereign's reply on 7 October 1991 was that the claimants were the joint freeholders of the arches and that Sovereign was the managing agent. They listed the occupiers of the arches. The Department for Transport replied on 22 June 1992 asserting that the arches were comprised in the Secretary of State's title and that therefore they 'cannot belong to anyone else'. They also wrote to Mr Welford, asking him to explain his claim to the arches. He did not reply and a chaser was sent to Mr Hill on 17 September 1992. That led to a letter from David D Lewis & Co, the claimants' then solicitors, which asserted (so far as relevant) that the arches were 'landlocked' and that—

> 'the Arches have been used by the owners of the land since 1934 and if that point arises we are claiming prospective [sic] use and we are trying to trace back the title so that we can prepare a Statutory Declaration showing 15 years user.'

The Department for Transport's reply was that the arches were not landlocked because it had the benefit of the right of way to them from Lanrick Road and over Iron Bridge Wharf North reserved to the GLC in November 1985. As to the solicitors' apparent belief that proof of 15 years' use would do the trick for the claimants, they referred them to Pt II of Sch 1 to the 1980 Act. They threatened proceedings for possession but took none.

[39] Mr Welford was asked in cross-examination about his and Mr Hill's joint statement in the statutory declaration that: 'The income generated [from the lettings] helped [BTSL] to pay the Mortgage on the Site.' He replied that this was wrong too. He said he knew what a mortgage was and said that BTSL had no mortgage. He said they had borrowed money and had agreed to pay it back. He refused to say from whom the money had been borrowed, save that the lender was an offshore company, that the loan was arranged between the accountants and the lender and that it had been explained to the Inland Revenue. He said the loan was £250,000, which had been raised to buy the site. He said the price of the site was £230,000 (in chief he had said £235,000), but he also said that the documents showed that they had bought for only £150,000. He could not remember the term of the loan but said they repaid it when they sold to Shanks for £3m and that they did not have to repay it before then. He agreed that they made no repayments of the loan before 1988 and said that they did not need the income from the lettings to service it or pay any mortgage. He said that they did need the income to run their business. He could not explain what was secured by the legal charge to Shanks dated 29 March 1988. Although the transfer of

26 February 1988 from BTSL to the claimants evidenced the receipt by BTSL of the price of £300,000, he also said that that sum was not in fact paid.

[40] Mr Welford was cross-examined about his evidence relating to the state of the southern sides of the arches when BTSL acquired the site in 1985. His evidence-in-chief was that seven were already bricked up and that he and Mr Hill 'immediately' bricked up the other three. His evidence about this became confused. He could not remember which three they so bricked up, although whichever they were he said they did it in the first couple of days of occupying the site. He agreed that in fact only nine of the ten arches were accessible from the south. The report of the 1987 inspection recorded that the two most westerly arches—

> 'have no enclosing brickwork on this [south] face although the large amount of spoil deposited in this area reduces the possibility of unauthorised access from this location. ... The presence of this material however also prevented close inspection of the piers and arch slabs to Arch Nos 1 & 2 at this location.'

The report recommended the removal of the spoil and the bricking up of the southern side of those two arches so as to prevent unauthorised access. Mr Welford agreed he had been wrong to say that these two arches were already 'bricked up' in 1985: he should have said they had been blocked off. He said that he and Mr Hill later bricked up these arches as well, although they had not done so by 1987. This claim is to be compared with a report of Newham's 1993 inspection of the arches, which indicated that the removal of the spoil and the bricking up of arches nos 1 and 2 was carried out not by the claimants but by LDDC. Mr Welford denied this and was positive that he and Mr Hill did this work. It is fair to note that the source of the different explanation in the report is not provided and there is no direct contrary evidence as to who actually carried out the work.

[41] Mr Welford explained about the offices he and Mr Hill had. Until 1988, they had one on land south of the East India Dock Road. Following the Shanks sale in 1988, they had one in Lanrick Road, over the road from the site. He remembered two occasions when representatives of the local authority turned up to inspect the arches. He did not think they would have done the inspections without permission.

[42] Mr Hill made a short witness statement confirming the truth of Mr Welford's statement. He confirmed it under oath, but was not cross-examined. Any cross-examination of him would have required the putting of the same questions as were put to Mr Welford and Mr Reynolds said that he would make no point on the omission to cross-examine Mr Hill. He was thereby acknowledging that the claimants' case on the facts stood or fell with Mr Welford's evidence. Mr Hill was a joint signatory of the 2001 statutory declaration, and so he too there swore to the truth of the same matters whose correctness Mr Welford now disputes.

[43] There was some evidence about the inspections carried out to the arches. I have made particular mention of the one in November 1987. This was part of a programme agreed with the Department for Transport, the overall conclusion being that the basic arch structures were in sound condition. The reason for it was because the Department for Transport was by then responsible for the maintenance of their structure. Newham carried out another inspection in December 1993/January 1994, again as agents for the Department for Transport.

The report recorded that all the arch units were occupied and used as repair workshops or for light engineering or storage facilities. It recorded that access to them was obtained from the north side and that no access was available from the south. A further inspection was carried out in 1995.

CONCLUSIONS ON THE EVIDENCE

[44] I find that, at least by some date in the latter part of 1987, the claimants had let out the arches, were receiving rent for them and that they thereafter continued to receive such rents for at least 12 years. I find that this receipt of rents amounted to possession by the claimants of the disputed land and that such possession amounted to adverse possession for the purposes of the 1980 Act. I find that the inspections carried out on behalf of the Department for Transport in 1987, 1993 and 1995 did not amount to an interruption of such possession. They were relatively brief operations, involving the carrying out of minor tests, the most invasive ones being during the 1995 inspection. Whilst Mr Welford could not remember whether his permission was sought for the 1987 inspection, he said it was sought for the latter two and he had to make arrangements for the tenants to give access to the inspectors. Moreover, the basis on which the Department for Transport was claiming to inspect was equivocal. It could have been in right of the Secretary of State's ownership, but could also have been pursuant to the right of entry for survey purposes conferred on highway authorities by s 289 of the Highways Act 1980. In addition, the inspections were of premises occupied by, and known to be occupied by, people who were in no manner recognised as being there by the authority of the Department for Transport and whose occupation was allowed to continue undisturbed. In my judgment, in all these circumstances, the inspections did not interrupt the claimants' possession of the disputed land.

[45] All that these findings show, however, is that the claimants were in adverse possession from 1987 onwards. For reasons explained, the important question is whether they were in such possession from before 1 April 1986 (although this is only important if I am wrong in my interpretation of para 12 of Pt II of Sch 1 to the 1980 Act).

[46] Mr Welford gave evidence of minor acts carried out by BTSL in relation to the arches following the November 1985 acquisition. There was the somewhat confusing evidence about the bricking up of their southern side and there was also his evidence about the concreting of the ground of some of the arches, re-wiring the arches and replacing or fitting doors to some of them. His evidence was also that BTSL let out the arches *before* 1 April 1986. His evidence about the more precise timing of the lettings changed, however, between his evidence-in-chief and in cross-examination. In chief, he said the first lettings 'took place within a matter of weeks of [BTSL's] acquisition of the site in 1985. Indeed, this happened whilst clearance of the rest of the site was still going on and prior to the boundary wall being secured'. In cross-examination, it was pointed out to him that in 2001 he and Mr Hill had sworn that the lettings did not start until 1987. He said that what he had then sworn to was wrong, and then proceeded to say that they had let as many as five arches in the *first* week of BTSL's occupation, with Coopers moving into arches nos 1 and 2 in that week. The net result is that Mr Welford has given three different accounts under oath as to the timing of the lettings.

[47] I found Mr Welford's evidence unsatisfactory. His cross-examination showed him to be a less than scrupulous businessman and his evidence was, on

crucial matters, imprecise and inconsistent. It was critical to the claimants' case to prove that BTSL's assumption of possession of the disputed land pre-dated 1 April 1986 and Mr Reynolds accepted that their case depended on proving that BTSL had tenants in the arches by then. If I were to conclude that the claimants had not proved this, he did not suggest that there was any other evidence justifying a finding that they had been in adverse possession of the disputed land since before 1 April 1986.

[48] I have no doubt that by the time that he came to give evidence Mr Welford was aware of the significance of 1 April 1986: his statement focused on his and Mr Hill's activities on the site during the weeks immediately following the November 1985 acquisition. Whether they were aware of the significance of 1 April 1986 when they made their 2001 declaration is unknown. I regard it as probable, however, that they were not, because that declaration did not make any overt attempt to focus with any precision on the activities carried out in relation to the arches during that early period. In para 3, they swore that they 'immediately entered into possession of the Arches, which were used for the storage of machinery, tools, oil and diesel'. In the context of the paragraph as a whole (earlier quoted in full), I am not clear as to what they meant by 'immediately', but even if they meant immediately after the November 1985 acquisition, that assertion no longer forms part of their case. They do not now suggest they ever used the arches for their own storage purposes. On the contrary, their case has become one in which there was an immediate drive to let them out on tenancies, with two arches being occupied in the first week of BTSL's ownership of the adjoining land and a further three also being let during that week. In 2001 their case was that the first lettings were not achieved until some time in 1987 when they commenced the construction of the new waste transfer station. Mr Welford now says that that was an unfortunate mistake and he did not there mean to say what he did say.

[49] I am not persuaded that the claimants did make any such mistake in the statutory declaration. The declaration can only have been drafted on the basis of instructions they gave, and the picture they then painted was that the arches were first used for their own storage purposes and only rather later—but not till 1987—were they let out. The picture they now paint is different. I find myself therefore faced with conflicting accounts from the claimants as to the relevant facts, all made under oath. The primary question for me is whether I can accept that, on the balance of probabilities, the claimants did let out the arches before 1 April 1986, which is the case they now make. It is for them to prove that and they have not satisfied me that they did. The inconsistencies in their evidence caused me to view their assertions about this with the greatest suspicion. Mr Reynolds urged that it was probable that they would have let the arches out immediately. I do not regard it as so probable, and I regard it as improbable that (as Mr Welford ultimately claimed) they let out five in the first week. In addition, there is no evidence corroborating the claim that any lettings were effected as early as is now claimed. There was no evidence from any of the first alleged tenants; no documentary evidence of any such lettings; and no evidence of the receipt by BTSL of any rents during this early period. There was nothing more than the claimants' unreliable and inconsistent assertions. Nor does Mr Welford's 1988 reply to Ashurst's request on behalf of the LDDC help him: he did not there suggest that BTSL had let out the arches as from November 1985. He simply gave a meaningless answer in response to the request as to the use to which the arches had been put since November 1985.

[50] I therefore reject the claimants' case that BTSL let the arches before 1 April 1986. As regards Mr Welford's other evidence of claimed acts of possession in relation to the disputed land—bricking up, concreting, re-wiring, door fitting—I did not understand Mr Reynolds to suggest that these activities by themselves would amount to the assumption of possession of the disputed land. As to the claimed bricking up of the southern side of the arches, that was consistent (as Mr Reynolds accepted) merely with an intention to shut off a means of access from the south to Iron Bridge Wharf North and to Moody Wharf and did not by itself prove adverse possession of the disputed land. As regards the other alleged activities, I do not regard Mr Welford's evidence as to their timing as in any way reliable, and I regard it as probable, and I find, that they were only carried out once the decision was made to let the arches out, which appears to have been rather later than 1 April 1986.

RESULT

[51] The claimants have therefore failed to prove that they took possession of the disputed land before 1 April 1986, although I accept that they did so during 1987. If I am wrong in my interpretation of para 12 of Pt II of Sch 1 to the 1980 Act, their claim anyway fails on the facts. The claim is dismissed.

Claim dismissed.

Celia Fox Barrister.

Sieff and others v Fox and others

[2005] EWHC 1312 (Ch)

CHANCERY DIVISION

LLOYD LJ (SITTING AS A JUDGE OF THE CHANCERY DIVISION)

21, 22, 23 MARCH, 23 JUNE 2005

Trust and trustee – Powers of trustee – Exercise of powers – Rule of equity requiring trustee to take into account all relevant considerations and not take into account any irrelevant considerations when exercising power – Scope of rule.

The claimants were the trustees of a substantial family trust known as the 1971 settlement and held certain property on discretionary trusts. They took advice on certain proposed trust dispositions and then exercised their general discretionary power of appointment in favour of H (the 2001 appointment), the effect of which, when combined with an assignment made by H several days later, was that certain property became held on the trusts of another discretionary settlement, the 1987 settlement, which had a wider class of objects in whose favour the power of appointment under that settlement could be exercised. The 2001 appointment had required the consent of H. It later transpired that the legal advice obtained by H and the trustees of both settlements in relation to, inter alia, capital gains tax, had been incorrect, and on the terms of the appointment a substantial charge to capital gains tax on H arose. The claimants sought a declaration as to the validity of the appointment. The first defendant to the proceedings was the only trustee of the 1987 settlement who was not also a trustee of the 1971 settlement, H was the second defendant, the third defendant was a retired trustee of the 1971 settlement, and the fourth defendant was a person who was an object of the power of appointment under the 1987 settlement but not under the 1971 settlement, representing the interests of those who would benefit if the 2001 appointment and assignment were valid and effective. The claimants submitted that the 2001 appointment was not effective, on the basis of the principle that the exercise by trustees of a discretionary power was void, or at least voidable, if the trustees failed to take into account considerations that they ought to have taken into account, and, if they had taken those considerations fully and properly into account, they would not have exercised the power as they had done. Each of the claimants and the third defendant stated in evidence that he was not aware of, inter alia, the capital gains tax liability, at the time of the 2001 appointment and that he would not have concluded that the proposals were for the benefit of H, or have executed the appointment, and H stated that if he had been aware of the problems he would not have given his consent to the 2001 appointment. The fourth defendant contended, inter alia, (i) that for the principle to apply the appointment had to have had an effect different from that intended by the trustees and that that was limited to the substantive effect under the settlement and did not extend to consequential matters such as fiscal charges; and (ii) that the duty of the 1971 trustees had extended only to the trusts and beneficiaries of that settlement.

Held – The principle was that where a trustee acted under a discretion given to him by the terms of the trust, but the effect of the exercise was different from that which he intended, the court would interfere with his action if it was clear that he

would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to have taken into account. Fiscal consequences could be relevant considerations which the trustee ought to take into account, and a material difference between the intended and actual fiscal consequences could be sufficient to bring the principle into play. In the instant case, it was not correct to say that the 1971 trustees had not been under a duty to consider what the fiscal results of the transaction would be. They did consider the fiscal results and had been bound to do so because the power of appointment was exercisable for the benefit of beneficiaries and whether, and if so to what extent, a particular appointment would be for the benefit of a beneficiary would be very much affected by its fiscal treatment. The appointment on the part of the trustees was vitiated by their failure to take into account the true consequence of the appointment as regarded capital gains tax, which they had failed to take into account because they had been wrongly advised. The consequences of the appointment as regarded tax were matters which the trustees had been under a duty to consider, and to which they had failed to give proper consideration because they had been provided with wrong advice. Had they had the correct advice they would not have made the 2001 appointment so that the effect of the exercise of their discretion was different from that which they had intended, and they would not have acted as they had done had they known the correct position as regarded the charge to capital gains tax which would have resulted from the appointment. Accordingly, the 2001 appointment would be set aside and declared to be of no effect (see [49], [86], [89], [93], [114], [117], and [120], below).

Re Hastings-Bass (decd), Hastings v IRC [1974] 2 All ER 193, *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 and *Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] STC 1344 applied.

Per curiam. (1) Only in a case where the beneficiary is entitled to require the trustees to act should it suffice to vitiate the trustees' decision to show that they might have acted differently (see [77], [119], below); *Kerr v British Leyland (Staff) Trustees Ltd* (1986) [2001] WTLR 1071 and *Stannard v Fisons Ltd* [1990] 1 PLR 179 distinguished.

(2) The main ways open to the court to control the application of the principle are (a) to insist on a stringent application of the tests as they have been laid down; (b) to take a reasonable and not over-exigent view of what it is that the trustees ought to have taken into account; and (c) to adopt a critical approach to contentions that the trustees would have acted differently if they had realised the true position, especially in cases where it is in the interests of all who are before the court that the appointment should be set aside (see [82], below).

(3) The principle does not apply only in cases where there has been a breach of duty by the trustees, or their advisers or agents (see [119], below).

Notes

For exercise of express powers, for proper exercise of powers, and for discretion as to exercise of powers, see 48 *Halsbury's Laws* (4th edn) (2000 reissue) paras 865, 866, 868.

Cases referred to in judgment

Abacus Trust Co (Isle of Man) Ltd v NSPCC [2001] STC 1344.

Abrahams' Will Trusts, Re, Caplan v Abrahams [1967] 2 All ER 1175, [1969] 1 Ch 463, [1967] 3 WLR 1198.

AMP (UK) plc v Barker [2001] PLR 77
Anker-Petersen v Christensen [2002] WTLR 313.
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.
Barr's Settlement Trusts, Re, Abacus Trust Co (Isle of Man) v Barr [2003] EWHC 114 (Ch), [2003] 1 All ER 763, [2003] Ch 409, [2003] 2 WLR 1362.
Breadner v Granville-Grossman [2000] 4 All ER 705, [2001] Ch 523, [2001] 2 WLR 593.
Burrell v Burrell [2005] EWHC (Ch) 245, [2005] All ER (D) 351 (Feb).
Burroughes v Abbot [1922] 1 Ch 86, [1921] All ER Rep 709.
Butlin's Settlement Trust, Butlin v Butlin [1976] 2 All ER 483, [1976] Ch 251, [1976] 2 WLR 425.
Cloutte v Storey [1911] 1 Ch 18, [1908–10] All ER Rep 1073, CA.
Edge v Pensions Ombudsman [1998] 2 All ER 547, [1998] Ch 512, [1998] 3 WLR 466; *affd* [1999] 4 All ER 546, [2000] Ch 602, [2000] 3 WLR 79, CA.
Ellis v Ellis (1909) 26 TLR 166.
Gibbon v Mitchell [1990] 3 All ER 338, [1990] 1 WLR 1304.
Gisbourne v Gisbourne (1877) 2 App Cas 300, HL.
Green v Cobham [2002] STC 820, [2000] WLR 1101.
Harris v Lord Shuttleworth [1994] ICR 991, CA.
Hastings-Bass (decd), Re, Hastings v IRC [1974] 2 All ER 193, [1975] Ch 25, [1974] 2 WLR 904, CA.
Hearn v Younger [2002] EWHC 963 (Ch), [2002] WTLR 1317.
Henry v Armstrong (1881) 18 Ch D 668.
Hillsdown Holdings plc v Pensions Ombudsman [1997] 1 All ER 862.
Hood of Avalon (Lady) v Mackinnon [1909] 1 Ch 476.
Jervis v Howle [1936] 3 All ER 193, [1937] Ch 67.
Kerr v British Leyland (Staff) Trustees Ltd (1986) [2001] WTLR 1071, CA.
Klug v Klug [1918] 2 Ch 67.
Meadows v Meadows (1853) 16 Beav 401, 51 ER 833.
Mettoy Pension Trustees Ltd v Evans [1991] 2 All ER 513, [1990] 1 WLR 1587.
Mihlenstedt v Barclays Bank International Ltd [1989] IRLR 522, CA.
Ogilvie v Littleboy (1897) 13 TLR 399, CA; *affd* sub nom *Ogilvie v Allen* (1899) 15 TLR 294, HL.
Phillips v Mullings (1871) 7 Ch App 244.
Pilkington's Will Trusts, Pilkington v Pilkington [1959] 2 All ER 623, [1959] Ch 699, [1959] 3 WLR 116; *rvsd* [1961] 2 All ER 330, [1961] Ch 466, [1961] 2 WLR 776, CA; *rvsd in part* sub nom *Pilkington v IRC* [1962] 3 All ER 622, [1964] AC 612, [1962] 3 WLR 1051, HL.
Saunders (Executrix of the estate of Rose Maud Gallie (decd)) v Anglia Building Society (formerly Northampton Town and County Building Society) [1970] 3 All ER 961, [1971] AC 1004, [1970] 3 WLR 1078, HL.
Scroggs v Scroggs (1755) 1 Amb 272, 27 ER 182, (1755) 2 Amb 812, 27 ER 513.
Stannard v Fisons Pension Trust Ltd [1990] 1 PLR 179; *affd* [1992] IRLR 27, [1991] PLR 225, CA.
Tempest v Lord Camoys (1882) 21 Ch D 571, [1881–5] All ER Rep 836, CA.
Topham v Duke of Portland (1869) 5 Ch App 40, CA.
Turner v Turner [1983] 2 All ER 745, [1984] Ch 100, [1983] 3 WLR 896.
Vestey's Settlement, Re, Lloyds Bank Ltd v O'Meara [1950] 2 All ER 891, [1951] Ch 209, CA.
Walker v Armstrong (1856) 8 De GM & G 531, 44 ER 495.

Walton's Settlement, Re, Walton v Peirson [1922] 2 Ch 509, [1922] All ER Rep 439, CA. a

Wolff v Wolff [2004] EWHC 2110 (Ch), [2004] STC 1633, [2004] WTLR 1349.

Claim

The claimants, Sir David Daniel Sieff, Baron Woolfson of Sunningdale and Charles Cayzer, the trustees of a settlement made on 23 August 1971 applied to b the court for a declaration in relation to the effect of an appointment made by the claimants on 8 November 2001 in favour of the Duke of Bedford (then Lord Howland) and an assignment made by him on 20 November to the claimants and David Hamilton Fox as trustees of a settlement made on 26 March 1987. The defendants to the claim were Mr Fox, the Duke of Bedford, John Benjamin Agnew Wallace, a retired trustee of the 1971 settlement and Katya c Scott-Barrett, a potential beneficiary of the 1987 settlement (the fourth defendant) by her litigation friend Karen Diana Scott-Barrett. The facts are set out in the judgment.

Simon Taube QC (instructed by *Herbert Smith*) for the claimants. d
Francis Barlow (instructed by *Herbert Smith*) for Lord Howland.
Mark Herbert QC (instructed by *RadcliffesLeBrasseur*) for the fourth defendant.
Mr Fox and Mr Wallace did not appear.

Cur adv vult e

23 June 2005. The following judgment was delivered.

LLOYD LJ.

[1] This case concerns an appointment made in 2001 under the trusts of a f settlement dated 23 August 1971 and made by the late Marquess of Tavistock, who afterwards became the fourteenth Duke of Bedford. By the combined effect of the appointment and an assignment made a few days later by the Marquess's son, Lord Howland, on the face of them, the property which was the subject of the appointment is now held on the trusts of a later settlement, dated 26 March 1987, g made by the present Duke, the fifteenth, then Lord Howland, who is the second defendant in these proceedings. The property affected by the appointment, if it was valid, is a valuable collection of chattels at Woburn Abbey and a reversionary lease of the Woburn Estate. The question is whether the appointment was valid and effective or not. If it was not, then nothing passed by the assignment. It is not suggested that the appointment could be valid and the assignment invalid. h

[2] The present trustees of the 1971 settlement are the claimants. At the time of the 2001 appointment, the third defendant was also a trustee. The present trustees of the 1987 settlement are the claimants and the first defendant. The fourth defendant is a beneficiary of the 1987 settlement and cannot benefit under the 1971 settlement. She is joined to represent the interests of those who would j benefit if the 2001 appointment and the assignment are valid and effective.

THE FACTS

[3] The trusts arising under the 1971 settlement are complex, as is their history. Not all of this needs to be considered for the purposes of this claim. I will first set out what needs to be said about the family. The thirteenth Duke held the

title from 1953 until his death on 25 October 2002. The Duke's heir is known by courtesy as the Marquess of Tavistock, and the Marquess's heir as Lord Howland. On the death of the thirteenth Duke in 2002, his son succeeded to the title, but he died on 13 June 2003. In turn his son inherited, and holds, the title as the fifteenth Duke. At the time of all relevant dealings, the present Duke was Lord Howland and his father was the Marquess of Tavistock. They are respectively so referred to in the trust documents of the time. For that reason, I will refer to them by those titles in this judgment. The fourth defendant is a daughter of a daughter of Lord Hugh Russell, a younger brother of the thirteenth Duke. She was born on 4 May 1991 and is therefore not of full age.

[4] The 1971 settlement, made by the Marquess of Tavistock, created separate trusts of several different funds, among them the Peerage Fund and the Chattels Fund. The Peerage Fund is governed by cll 11–13, of which cl 11 confers on the trustees a general discretionary power of appointment, but the class for whose benefit the power may be exercised is exclusively male. Similar, but not identical, provisions govern the Chattels Fund, under cl 19. The Peerage Fund included the Woburn Estate (including Woburn Abbey), the London Estate and some chattels. The Chattels Fund included the rest of the settled chattels. Some but not all of the relevant chattels were subject to conditional exemption from estate duty or exempted from capital gains tax. The non-exempt chattels are of great value. The power under cl 11 is exercisable only with the written consent of the Marquess of Tavistock and Lord Howland during their lives.

[5] Between 1971 and 1987 the trustees of the 1971 settlement exercised their powers of appointment on a number of occasions. In 1982 they executed a long lease of the Woburn estate in favour of a nominee of theirs, and then made an appointment of the benefit of the lease on accumulation and maintenance trusts for the male issue of the Marquess of Tavistock.

[6] Lord Howland was due to attain the age of 25 on 30 March 1987. Under the trusts then in effect, he would have attained an interest in possession on that date. If he had died thereafter, while entitled to an interest in possession, there would have been a very large charge to inheritance tax. In order to prevent this risk arising, a series of transactions were undertaken: (i) Lord Howland first created the 1987 settlement, on 26 March 1987; (ii) on the following day the trustees of the 1971 settlement advanced substantial assets to Lord Howland, including the 1982 lease; (iii) he then created a sublease of the private apartments of Woburn Abbey in favour of his parents, the Marquess and Marchioness of Tavistock, for a term of 55 years. This is known as the Abbey sublease. It demises to the tenants not only the private apartments, for their exclusive use, but also other parts of the Abbey, known as the shared areas, in respect of which the landlord reserves rights of access, which are in fact used to allow access for the public as part of the business of opening the Abbey to the public; (iv) on 6 April 1987 Lord Howland then resettled a substantial part of the property which had been advanced to him, on the terms of the 1987 settlement. The property so resettled included the 1982 lease, and some chattels.

[7] The 1987 settlement confers on its trustees a wide power of appointment, exercisable with the consent of Lord Howland while he is alive. The class of objects of this power is wider than under the 1971 settlement, not least because it is not limited to males. It includes all grandchildren and remoter issue of the Marquess of Tavistock, and all other issue of the twelfth Duke living at or born after the date of the settlement, except the thirteenth Duke, the Marquess of Tavistock and Lord Howland, and also spouses or former spouses of any such

issue, other than spouses of the thirteenth Duke, the Marquess of Tavistock and Lord Howland. Subject to any such appointment, the settlement declares trusts for the first or only son of Lord Howland or of other male members of the family, and then for other descendants of the Marquess of Tavistock. At cl 47(c) it has a provision excluding Lord Howland and his wife from any benefit from the settled funds. This is a provision relevant both to income tax and to the then new rules (under the Finance Act 1986) in respect of inheritance tax as regards potentially exempt transfers and reservation of benefit. Clause 1(k) defines 'the excluded persons' as Lord Howland and his wife for the time being. Clause 47(c) is in the following terms:

> 'Notwithstanding anything to the contrary herein expressed or implied: ... (c) No discretion or power conferred on the trustees or any other person by this settlement and no provision of this settlement shall operate so as to cause or permit any part of the income or capital of the trust fund to be lent to or become payable to or applicable for the benefit of any of the excluded persons.'

[8] By virtue of the exercise by the trustees of their powers, the 1987 settlement trust funds are now held on accumulation and maintenance trusts for a class of beneficiaries which includes all descendants of the Marquess of Tavistock born after a given date, and other members of the family, but these trusts are revocable.

[9] So far as concerns the relevant assets which remained in the 1971 settlement after the 1987 operations, most of them were still held on discretionary trusts in 2001. Earlier in 1987 the trustees had appointed the whole body of chattels (those originally held in the Chattels Fund and in the Peerage Fund) on discretionary trusts, but subject to a power to revoke the appointment. In 1992, when the accumulation period under the 1971 settlement was about to expire, the trustees made a revocable appointment of the reversion to the 1982 lease on discretionary trusts.

[10] In the period 1997 to 2000 three outlying parcels of land on the Woburn Estate were appointed out of the 1971 settlement and transferred into the 1987 settlement. The method by which this was done was this. The 1971 trustees made an appointment to Lord Howland contingently on his being alive on a date some weeks in the future. Then Lord Howland, before that date, assigned to the 1987 trustees his contingent interest in the relevant property. Nothing turns on these transactions, but they provided a precedent for what was done later.

[11] Lord Howland married in 2000. It was then decided that his parents should move out of Woburn Abbey and that he and Lady Howland should move in, he buying from his parents, for full value, the residue of the Abbey sublease. This came to pass in 2002, having been the subject of a good deal of planning both from the practical point of view and as regards the necessary legal arrangements. By the end of 2000 the family's advisers were aware of this being intended.

[12] Many of the chattels on display to the public at the Abbey are non-exempt chattels, both in the public areas and in the shared areas. Other non-exempt chattels are kept in the private apartments. Before 2001 the chattels were owned by the 1971 trustees but those that were on display to the public were the subject of a licence, for value, to the 1987 trustees who carried on the business of opening the Abbey to the public.

[13] On 30 November 2000 Mr Fox, the first defendant, who is described as the executive trustee of the Bedford trusts, wrote to Miss Howe of Boodle Hatfield

about the need to consider reservation of benefit issues which might arise from Lord Howland moving into Woburn Abbey. She replied on 23 January 2001. In a postscript she asked whether it was necessary to think about the chattels, which Mr Fox had not mentioned. She said that if the chattels were to remain leased to the 1987 trustees when Lord Howland took over the private apartments, and some of the chattels were housed there, this might constitute a reservation of benefit, and that a licence of any such chattels to Lord Howland might be required. Mr Fox replied on 30 January but did not refer to the chattels, and they were not mentioned again in the dealings between the two, or at all in the preparation for what was done later in the year.

[14] Because the reversion and the non-exempt chattels were held on discretionary trusts, they were prospectively subject to the periodic charge to inheritance tax on 23 August 2001, and would be so at ten-year intervals thereafter. This was not particularly significant as regards the reversion in 2001, because of the low rent payable under the 1982 lease until 2032. It might become more so on later occasions as 2032 approached. The value of the non-exempt chattels, on the other hand, was such that this would be a significant liability in 2001. The trustees and their advisers gave thought to whether anything could and if so should be done to avoid the periodic charge arising. They concluded that nothing should be done before 23 August 2001, but that thought should be given to mitigating the problem for the future. The trustees met on 5 June 2001, Lord Howland being present as usual, and considered the possibility of an appointment of the non-exempt chattels and the reversion to the 1982 lease being made within three months after 23 August 2001 on accumulation and maintenance trusts. If made within that three-month period, no charge to inheritance tax would arise on the property ceasing to be held on the discretionary trusts, and periodic charges would not arise in the future.

[15] Lady Howland was then expecting her first child, Alexandra, who was born on 9 July 2001. She cannot easily benefit from the 1971 settlement, whereas she can under the 1987 settlement. In these circumstances, Lord Howland found the idea of an appointment attractive. The trustees' advisers, Kate Howe of Boodle Hatfield and the first defendant, were asked to consider and advise how best this might be done.

[16] Having considered the problem and the possible courses of action with the first defendant, Kate Howe advised the trustees in a memorandum dated 18 September 2001 of three possible choices, one being to do nothing and to accept the future periodic charges. One course was for the 1971 trustees to use their discretionary powers to create accumulation and maintenance trusts themselves. This would have the disadvantage that Lord Howland's only child then in existence could not benefit, nor could any other granddaughter of the Marquess of Tavistock. If no grandson was born, the trust property would have to go elsewhere in the family. The alternative action was to appoint to Lord Howland, contingently on his being alive at some date in the near future, and for him to resettle the assets before that date to be held on the more flexible accumulation and maintenance trusts of the 1987 settlement, under which his daughter and future granddaughters of the Marquess of Tavistock could benefit. The trustees were advised that, if this were done, there would be a disposal for capital gains tax purposes when the property passed from the 1971 settlement to the 1987 settlement, when Lord Howland survived to the stipulated date, but that hold-over relief would be available, so that capital gains tax would not need to be paid, and that so long as the property passed out of the 1971 settlement within

three months of the date on which the periodic charge arose, there would be no inheritance tax charge at that stage. a

[17] As a further refinement, Miss Howe also suggested the creation of a new reversionary lease of the Woburn Estate, to redistribute the value of the estate between the 1971 trustees, holding the ultimate reversion, and the 1987 trustees, holding the new intermediate lease.

[18] On 25 September 2001, on Miss Howe's instructions, counsel advised in b conference that the course proposed for getting the relevant trust property into the 1987 settlement was valid, sensible and desirable.

[19] On 26 September 2001 the trustees met. Miss Howe and Mr Fox explained the various possible courses of action, but did not propose any others than the three already outlined. The 1971 trustees decided to accept Miss Howe's advice to create a new reversionary lease and to appoint that lease and the c non-exempt chattels to Lord Howland absolutely, subject only to his surviving a short specified period. He would then be able to assign his interest to the 1987 trustees.

[20] As a result, on 8 November 2001, the trustees executed the new reversionary lease, and, with the consent of the Marquess of Tavistock and d Lord Howland, also appointed the benefit of the lease and the non-exempt chattels to Lord Howland absolutely, subject to his living until 21 November 2001. On 20 November 2001 he assigned his contingent interest to the trustees of the 1987 settlement. Accordingly, on 21 November they became entitled to the appointed assets. The terms of the appointment (cl 5) and, in turn, the assignment (cl 2) subjected the appointed assets to any inheritance tax or capital e gains tax which arose on Lord Howland living to the specified date.

[21] Unfortunately, Miss Howe's advice referred to at [16] above was incorrect as to capital gains tax. She also overlooked two other consequences of the proposed transaction.

[22] As regards capital gains tax, in principle the occasion on which a person f becomes absolutely entitled to settled property as against the trustees is one which gives rise to a deemed disposal of the trust property for capital gains tax purposes: see s 71 of the Taxation of Chargeable Gains Act 1992 (TCGA). As between the trustees of the 1987 settlement and those of the 1971 settlement, that is what happened on 21 November 2001. Miss Howe had in mind the provisions g as regards hold-over relief under TCGA s 260. These apply if (relevantly) trustees of a settlement make a disposal within s 260(2). That sub-section applies (again, relevantly) if a disposal is made otherwise than under a bargain at arm's length and is a chargeable transfer within the meaning of the Inheritance Tax Act 1984 (IHTA).

[23] The provisions of the inheritance tax regime which are relevant for h present purposes are those applying to 'relevant property' which means, essentially, property held on discretionary trusts with some exceptions, such as accumulation and maintenance trusts. The non-exempt chattels and the new reversionary lease of the Woburn estate were relevant property for this purpose immediately before the making of the 2001 appointment, which is why they had j been subject to the periodic charge under IHTA s 64. In addition to the periodic charge, applicable if the property was held on discretionary trusts at a ten-year anniversary, the property would be subject to what is known as an exit charge, if and when it ceased to be relevant property, for example because it was appointed to an individual absolutely or for an interest in possession: see IHTA s 65(1). The exit charge is charged at a fraction of the rate at which the property was last

charged under s 64, the fraction increasing according to how many quarters have elapsed since the last periodic charge. However, by s 65(4), sub-s (1) does not apply if the event in question occurs in a quarter beginning with the day on which the settlement commenced or with a ten-year anniversary. Accordingly, there is no charge to inheritance tax on property ceasing to be relevant property within three months after the date on which a periodic charge arose. Of course, Miss Howe was aware of that; it was the basis on which she advised that there would be no charge to inheritance tax. What she overlooked was that, as a consequence of the event not being a chargeable transfer for inheritance tax, the provisions of TCGA s 260 were not satisfied and hold-over relief for capital gains tax was not available.

[24] There may not have been much of a capital gain in respect of the reversion to the Woburn lease, but the evidence shows that there was a very substantial accrued capital gain in respect of the non-exempt chattels. According to the evidence, those chattels are worth of the order of £8m, and the capital gains tax may amount to around £1m.

[25] The other unforeseen consequence arose when Lord Howland moved into Woburn Abbey in 2002, having acquired the Abbey sublease from his parents. Occupying the private apartments and the shared areas, he then had many of the non-exempt chattels around him. They belonged to the 1987 trustees. In those circumstances it could be said that cl 47(c) of the settlement was infringed, because of the benefit derived by Lord Howland and his wife from the use or enjoyment of the non-exempt chattels. More seriously even than this, Lord Howland's assignment of his contingent interest under the 2001 appointment to the 1987 trustees was a gift of property which was a reversionary interest, therefore excluded property, and not a transfer of value. If, however, it was a gift with reservation the provisions of the Finance Act 1986 which introduced potentially exempt transfers would be relevant. Under s 102 of the 1986 Act, if an individual disposes of property by way of gift and, at any time in the relevant period (seven years back from the donor's death, or if less the period between the gift and the death) the property is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise, then, in effect, the running of the seven year period is postponed while the benefit is enjoyed. If the reserved benefit comes to an end before the donor's death, a potentially exempt transfer is treated as occurring at that time, so that all is well if he survives for seven years after that. If it does not come to an end before his death, the property is treated as still part of his estate for inheritance tax purposes. Under para 6 of Sch 20 to the 1986 Act, what would otherwise count as a reserved benefit in relation to land or a chattel, by way of retention or assumption of actual possession of a chattel, is to be disregarded if it is for full consideration in money or money's worth. Accordingly, in order to avoid the risk of a charge to inheritance tax on Lord Howland's death arising on the non-exempt chattels, it would be necessary for him to pay the 1987 trustees full consideration for his possession of the non-exempt chattels in the private apartments and the shared areas. It has been suggested that the annual amount which would have to be paid in order to satisfy this test would be of the order of £40,000, which would of course have to come out of Lord Howland's taxed income. Alternatively, either Lord Howland would have to move out of Woburn Abbey or the non-exempt chattels would have to be moved out of the private apartments and the shared areas. The latter course may not be practicable, and the former is not readily acceptable to the family.

[26] The true position as regards capital gains tax was discovered early in 2002. The 1971 trustees were advised to, and did, seek advice from other solicitors. Their review of the position led to the realisation that there was also the reservation of benefit problem.

[27] Each of the 1971 trustees (including the third defendant who was a trustee at the time of the 2001 appointment but is not now) has made a witness statement in which he says that he was not aware of either the capital gains tax liability or the reservation of benefit problems at the time of the 2001 appointment, and that he would not have concluded that the proposals were for the benefit of Lord Howland, or have executed the appointment, if he had been aware of these problems. Lord Howland himself as he then was (now the fifteenth Duke, the second defendant) has also made a witness statement in which he says that if he had been aware of the problems, as he was not, he would not have given his consent to the 2001 appointment, and he is sure that his late father would not have done either. None of the witnesses was cross-examined, and I have no difficulty in accepting that evidence. What would have been done instead is a different matter, and not straightforward, but it is clear that the position of the relevant individuals—the trustees, the Marquess of Tavistock and Lord Howland—is that they would not have made, or consented to, the 2001 appointment.

[28] Mr Taube QC, for the claimants, submits that the 2001 appointment was not effective, on the basis of a principle sometimes described as the rule in *Re Hastings-Bass* which is derived from the Court of Appeal decision in the case of that name, *Re Hastings-Bass (decd), Hastings v IRC* [1974] 2 All ER 193, [1975] Ch 25, or alternatively because it was made and consented to under a fundamental misapprehension. Mr Barlow, for Lord Howland, supports those submissions. Mr Herbert QC, for the fourth defendant, submits that neither of these propositions justifies setting the appointment aside.

[29] The Inland Revenue declined the opportunity to be a party to these proceedings.

THE RE HASTINGS-BASS PRINCIPLE

[30] Put in general terms, Mr Taube's first proposition is that an exercise by trustees of a discretionary power, for example a power of appointment, is void (or at least voidable) if the trustees failed to take into account considerations that they ought to have taken into account, which may include the fiscal consequences of the appointment, and, if they had taken those considerations fully and properly into account, they would not have made the appointment. Specifically, he submits that: (i) the 1971 trustees failed to take into account (a) the capital gains tax charge on the non-exempt chattels and (b) the impact on Lord Howland, following the expected assignment, of cl 47(c) of the 1987 settlement and the rules about gifts of property subject to reservation of benefit in relation to inheritance tax; (ii) they were under a duty to consider all those matters because they had a major impact on the appointed property and on the beneficiaries of the 1971 settlement, in particular Lord Howland; (iii) if they had been aware of these matters they would not have executed the appointment; and (iv) if this is relevant, the trustees' advisers were at fault in not making the trustees aware of these consequences of the proposed course of action.

[31] Mr Herbert submits that, for the *Re Hastings-Bass* principle to apply, the appointment must have an effect different from that which was intended by the trustees, and that this is limited to the substantive effect under the settlement, and

does not extend to consequential matters such as fiscal charges. He also submits that the 1971 trustees were only under a duty in relation to the trusts and the beneficiaries of the 1971 settlement, and were not bound to consider the position under the 1987 settlement, which only became relevant (however foreseeably) because of the independent act of Lord Howland assigning his contingent interest to the 1987 trustees.

[32] He also submitted that *Re Hastings-Bass* has to be seen in its context, that it is related both to earlier decisions and to cases on equitable relief from the consequences of mistake (the alternative ground relied on by Mr Taube and Mr Barlow) and that the Court of Appeal did not lay down a brand new proposition in that case, unrelated to decisions on other aspects of the law concerning the exercise of powers by trustees.

[33] As a general proposition, English law affords relief against the consequences of a mistake on the part of a person who executes a document as to the nature, terms or effect of that document, but only in circumstances which are quite strictly limited. At common law the defence of non est factum, if established, results in the document being void, and for this reason the doctrine is strictly limited: see *Saunders (Executrix of the estate of Rose Maud Gallie (decd)) v Anglia Building Society (formerly Northampton Town and County Building Society)* [1970] 3 All ER 961, [1971] AC 1004. In that case the document was held to be voidable, having been obtained by fraud, but that meant that the innocent mortgagee's interest in the property was effective despite the fraud; the plaintiff's attempt to recover the property free from the mortgage failed.

[34] In equity, rectification or rescission may be available in cases of mistake, but these are discretionary remedies, granted only on equitable principles, which enable the court to ensure that relief is not granted in circumstances in which it would lead to injustice. Moreover the courts have developed principles which limit the availability of the remedy.

[35] Voluntary dispositions by an individual may be set aside for mistake, or may be rectified, in appropriate circumstances. Rectification of a unilateral instrument may be available if it is shown that, by mistake, it does not accord with the intention of the party making it. The mistake must be either as to the words used or as to their legal effect.

[36] Rescission for mistake is the alternative basis of challenge to the 2001 appointment. Mr Taube and Mr Barlow rely particularly on *Gibbon v Mitchell* [1990] 3 All ER 338, [1990] 1 WLR 1304. In that case a man entitled to a protected life interest under a trust executed a deed by which he was expressed to surrender his life interest in favour of his children, with a view to accelerating their entitlement to capital. Because his life interest was protected, not absolute, this did not have the intended effect, but resulted in a forfeiture and brought discretionary trusts into place. Millett J held that the deed ought to be set aside for mistake. He set out the relevant principle as follows:

> 'In my judgment, these cases show that, wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it.' (See [1990] 3 All ER 338 at 343, [1990] 1 WLR 1304 at 1309).

I will consider the authorities relevant to that proposition later in this judgment.

[37] So far as acts by trustees in the exercise of a discretionary power are concerned, traditionally the courts are reluctant to interfere. It has been said that, when a power has been exercised in good faith and within its terms, the court will not interfere: see *Gisborne v Gisborne* (1877) 2 App Cas 300. This judicial reticence is further emphasised by the well-established entitlement of trustees not to give reasons for their exercise of discretionary distributive powers. That has not been a feature of the recent cases from *Re Hastings-Bass* onwards, as the trustees have been open with the court and the beneficiaries about the circumstances of the appointment or other relevant act. Nevertheless, if the trustees do not vouchsafe their reasons it is the more difficult for a beneficiary to challenge the exercise of their discretions unless a defect is apparent from the documents. In *Tempest v Lord Camoys* (1882) 21 Ch D 571, [1881–5] All ER Rep 836, the court would not override the refusal of one of two trustees to agree with a course of action proposed by the other involving the purchase of particular land and the raising of some of the purchase money on mortgage. Conversely, in *Klug v Klug* [1918] 2 Ch 67 the refusal of one of two trustees (the mother of the relevant beneficiary) to agree to an advance to a beneficiary to provide funds for the payment of legacy duty, which the other trustee, the Public Trustee, considered would be a proper exercise of a power, was overridden where it appeared that the mother's refusal to agree was due to the daughter having married without her consent. The mother's refusal to exercise the power in her daughter's favour was disregarded because of her irrelevant motivation.

[38] There are several different categories of case where an exercise by trustees of a discretionary power may be held to be invalid. (i) There may be a formal or procedural defect, such as the failure to use the stipulated form of document, for example a document under hand instead of a deed, or to obtain a necessary prior consent. (In some such cases, and for the benefit of some interested persons, equity may relieve against such a formal or procedural defect). (ii) The power may have been exercised in a way which it does not authorise, for example with an unauthorised delegation, or by the inclusion of beneficiaries who are not objects of the power. (iii) The exercise may infringe some rule of the general law, such as the rule against perpetuities. (iv) The trustees may have exercised the power for an improper purpose, in cases known as fraud on the power. *Cloutte v Storey* [1911] 1 Ch 18, [1908–10] All ER Rep 1073, among the cases cited to me, is an example of this, where the power was exercised in favour of one of the objects, but under a private arrangement whereby he passed the benefit back to his parents, who had made the appointment. Another example, in a different context, was *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862. I take it that references, for example in *Gisborne v Gisborne*, cited above (and in *Re Hastings-Bass* itself, see [44] below), to good faith are to be understood in this context, so that an exercise which is not in good faith is, or at any rate includes, a case where the exercise is a fraud on the power. (v) The trustees may have been unaware that they had any discretion to exercise: see *Turner v Turner* [1983] 2 All ER 745, [1984] Ch 100, an extreme and highly unusual case on the facts, which has been described as equitable non est factum. (vi) To these categories, of which the first four are clear and well-established, the rule or principle in *Re Hastings-Bass* is said to add a further class of case, namely where the trustees have failed to have regard to some relevant consideration which they ought to have taken into account.

[39] In *Re Hastings-Bass* itself the appointment was held to be valid, despite the fact that it was partly void for perpetuity. In that respect the result differed from the rather similar case of *Re Abrahams' Will Trusts, Caplan v Abrahams* [1967] 2 All ER 1175, [1969] 1 Ch 463, the difference being accounted for by factual differences as regards what was left of the appointment once that which was void had been eliminated.

[40] The earliest case of this kind cited to me was *Re Vestey's Settlement, Lloyds Bank Ltd v O'Meara* [1950] 2 All ER 891, [1951] Ch 209. In that case trustees held property on trust to pay or apply the income to or for the benefit or support of a number of beneficiaries, some of whom were not of full age. The trustees allocated part of the income by declaring it to belong to minor beneficiaries, then stated that none of it was required for their maintenance, and resolved that it should be accumulated under s 31 of the Trustee Act 1925. The Court of Appeal held that s 31 did not apply to these sums, so that they were not to be accumulated. They held that the allocations were validly made as applications of income for the benefit of the minor beneficiaries, and that this was not vitiated by the fact that the trustees had supposed that s 31 would apply so as to enable the income to be accumulated. Lord Evershed MR said ([1950] 2 All ER 891 at 900, [1951] Ch 209 at 220–221):

> 'I do not think it can or ought to be said that if, as I hold, the trustees wrongly thought that s. 31 would operate, then a result is produced which is substantially or essentially different from that which was intended.'

[41] In *Re Pilkington's Will Trusts, Pilkington v Pilkington* [1959] 2 All ER 623, [1959] Ch 699 trustees asked the court whether it was open to them to exercise a power of advancement for the benefit of a very young child beneficiary by transferring part of the fund to the trustees of a separate settlement, at that stage only in draft, to be held on the trusts of that settlement, which contained trusts for her benefit but also for others, and which would delay the moment at which capital would vest in her (if at all) until a later date than would be the position under the original settlement. In the Chancery Division, Danckwerts J held that the proposed advancement would be a proper exercise of the trustees' power. In the Court of Appeal ([1961] 2 All ER 330, [1961] Ch 466), the Inland Revenue, who had obtained permission to intervene, persuaded the court that the proposed advancement was illegitimate, both because a resettlement was not legitimate in itself and because the trusts of the proposed settlement would infringe the rule against perpetuities in relation to property transferred from the original settlement. The first ruling was reversed by the House of Lords and the second affirmed ([1962] 3 All ER 622, [1964] AC 612). Because the trustees had not yet exercised the power of advancement, and the new settlement had not even been created, it remained possible for the perpetuity point to be overcome by suitable redrafting of the proposed settlement. Upjohn LJ referred to the fact that the trustees had not considered whether to exercise their powers in relation to a settlement which would not pose the perpetuity problem, but since they had not yet acted at all, this was a different kind of question from that which arises in cases where the trustees have already acted.

[42] The decision on the perpetuity point caused problems for trustees of other settlements. In *Re Abrahams' Will Trusts* [1967] 2 All ER 1175, [1969] 1 Ch 463, trustees of a 1948 settlement had advanced funds in 1957 by way of a new settlement, the terms of which did not comply with the rule against perpetuities as explained by *Re Pilkington*. Not all the terms of the 1957 settlement would

infringe the rule against perpetuities, but the effect of the rule was extensive. For example a child had a life interest subject to protective trusts. The effect of the rule was that the life interest was valid but that the discretionary trusts arising on forfeiture would be invalid, so that, upon a forfeiture, the property would be held on the trusts of the original 1948 settlement. The argument in favour of holding the advancement wholly void was advanced by the Inland Revenue. Cross J upheld that argument, saying this (see [1967] 2 All ER 1175 at 1191, [1969] 1 Ch 463 at 485):

> 'It may well be that, if the invalidity caused by the operation of the rule against perpetuities is quite small as compared with the parts of the settlement which were unaffected by the rule, the court might be prepared to say that the valid parts of the settlement would survive intact. Thus Sir Raymond Evershed M.R., held in the *Vestey* case ([1950] 2 All ER 891, [1951] Ch 209) that the exercise of the discretion there could be upheld notwithstanding the fact that the trustees were to some extent under a misapprehension as to what its effect would be. Here, however, there is no doubt that the effect of the operation of the rule is wholly to alter the character of the 1957 settlement. In my judgment the result of that must be that there never was a valid exercise by the trustees of the power of advancement.'

[43] *Re Hastings-Bass* [1974] 2 All ER 193, [1975] Ch 25 arose from the same problem, but had a different result. Under a settlement created in 1947 property was settled on Captain Hastings-Bass for life and then for such son of his as should first attain the age of 25 within 21 years after his death. His eldest son, William, was born in 1948. By a further settlement made in 1957 property was settled on William for his life, and then for his children at 21. In 1958 Captain Hastings-Bass exercised a power of appointment under the 1947 settlement in favour of William subject to his attaining the age of 25. Later in 1958 the trustees of the 1947 settlement exercised their statutory power of advancement in favour of William by transferring the fund to the trustees of the 1957 settlement, to be held on the trusts of the latter settlement. Captain Hastings-Bass died in 1964. The decision of the House of Lords in *Re Pilkington* showed that, contrary to the position as it had previously been assumed, the advancement in 1958 on the trusts of the 1957 settlement was void for perpetuity as regards interests arising on or after the death of William, because he was not a life in being at the date of the 1947 settlement. The question arose, for estate duty purposes, whether this meant that not even a life interest had been created in favour of William. The trustees of the 1947 settlement brought proceedings against the Commissioners of Inland Revenue to have the question decided. Plowman J held that the trustees' act was substantially or essentially different in its result from that which the trustees had intended, and, following the decision of Cross J in *Re Abrahams' Will Trusts* [1967] 2 All ER 1175, [1969] 1 Ch 463, that the relevant power had therefore not been effectively exercised, not even to the extent of a life interest. The trustees appealed.

[44] The Court of Appeal found that the object of saving estate duty was a primary consideration in the minds of the trustees when they exercised the power of advancement, and that to the extent that the advancement could be effective, notwithstanding the rule against perpetuities, it was so plainly for William's benefit that the trustees, if they had realised the effect of the rule, could not have thought that the invalidity of the ulterior trusts would render the exercise

something that was other than for William's benefit. They held that the trustees believed themselves to be exercising, of their own choice, a discretion under s 32 of the 1925 Act, and doing it because they considered that to do so would benefit William. They observed that, if trustees intend to make an advancement by way of sub-settlement, they must apply their minds to the question whether the sub-settlement as a whole will be for the benefit of the person to be advanced. If the true effect of the exercise were such that it could not reasonably be regarded as beneficial to the person to be advanced, then the exercise cannot stand, because it would not be within the powers under s 32. 'In any other case', they said, 'the advancement should ... be permitted to take effect in the manner and to the extent that it is capable of doing so': see [1974] 2 All ER 193 at 203, [1975] Ch 25 at 41. They distinguished *Re Abrahams' Will Trusts* on the basis that the attenuated benefits that could have taken effect in that case might not have been capable of being regarded as beneficial to the beneficiary to be advanced. They summarised their conclusion on this aspect of the case in the following terms ([1974] 2 All ER 193 at 203, [1975] Ch 25 at 41):

> 'Where by the terms of a trust (as under s 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.'

[45] They held that the advancement was effective, even though limited to the life interest in favour of William.

[46] The statement set out at [44], above, is in negative form. A positive formulation was first put forward by Warner J in *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587. That case concerned the exercise by pension trustees of a power to amend the rules applying to the pension scheme. In most respects no issue arose as to the terms of the amended rules, but the amendments did change the position as regards the allocation of any surplus in a winding-up, which had been at the disposition of the trustees, but which, after the amendments, was to be decided on by the company. The evidence was that the trustees were unaware of this particular point in the new rules. The judge held that the discretion conferred on the company was fiduciary. Nevertheless, the representatives of employees and pensioners argued that the power of amendment had not been validly exercised to the extent of the change in the power over any surplus, and relied on *Re Hastings-Bass* as authority for this. At the outset of the passage in his judgment in which he deals with the submissions on this point, Warner J set out the proposition as the positive converse of what the Court of Appeal had said in *Re Hastings-Bass* itself, as follows (see [1991] 2 All ER 513 at 552–553, [1990] 1 WLR 1587 at 1621):

> 'Where a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account.'

[47] He then considered the submissions made to him, as to whether there was any such rule, and if so what it amounted to. He held that such a rule did

exist, and was not limited to cases of invalidity for, so to speak, external reasons (such as the rule against perpetuities), and that it could invalidate part only of a disposition in an appropriate case. He then said this (see [1991] 2 All ER 513 at 555, [1990] 1 WLR 1587 at 1624):

> 'I have come to the conclusion that there is a principle which may be labelled "the rule in *Hastings-Bass*". I do not think that the application of that principle is confined, as Mr Nugee suggested, to cases where an exercise by trustees of a discretion vested in them is partially ineffective because of some rule of law or because of some limit on their discretion which they overlooked. If, as I believe, the reason for the application of the principle is the failure of the trustees to take into account considerations that they ought to have taken into account, it cannot matter whether that failure is due to their having overlooked (or to their legal advisers having overlooked) some relevant rule of law or limit on their discretion, or is due to some other cause. It is not enough, however, for the principle to apply that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of it, they would not have acted as they did.'

[48] Applying these principles to the facts, the judge said that three questions arose: (1) What were the trustees under a duty to consider? (2) Did they fail to consider it? (3) If so, what would they have done if they had considered it? Having reviewed the evidence, and in the light of his finding that the company's power over surplus was fiduciary, he held that the new rules were not in any respect invalidated under the rule in *Hastings-Bass*.

[49] Mr Herbert pointed out that Warner J's positive formulation in the *Mettoy Pension Trustees* case omitted one element in the principle, namely that which the Court of Appeal in *Re Hastings-Bass* expressed in the words 'notwithstanding that it does not have the full effect which he intended'. He submitted that, accepting that there is a positive principle established by the *Mettoy Pension Trustees* case, its expression ought to include words corresponding to those. Of course, those words referred to the invalidating effect of the rule against perpetuities, which cut down to the life interest in favour of William the effect which the advancement could have. There is no difficulty in principle in adapting that phrase to the facts of other types of case. In the *Mettoy Pension Trustees* case itself, for example, where the trustees did not appreciate that the amended rules would alter the powers of distribution in relation to surplus, the phrase used in the Court of Appeal does not fit literally. It could easily be adapted to cover that sort of case as well as a *Re Hastings-Bass* type of case, for example, using words such as 'notwithstanding that its effect is different from that which he intended'. In the light of that, (and expanding it to cover expressly a point which would no doubt be implied) what one might call the *Mettoy* formulation of the principle could be fully expressed as follows:

> 'Where a trustee acts under a discretion given to him by the terms of the trust, but the effect of the exercise is different from that which he intended, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to have taken into account.'

[50] Warner J delivered that judgment in December 1989. In July 1990 he gave judgment in another case in which *Re Hastings-Bass*, and what he had said about it in the *Mettoy Pension Trustees* case, were relied on: *Stannard v Fisons Pension Trust Ltd* [1990] 1 PLR 179. That case concerned the amount to be transferred from one pension scheme to another upon the sale by Fisons of part of its business to a third party. The purchaser (in effect) claimed that the amount which had been paid was inadequate. One of the arguments in favour of not ordering an additional payment was based on the *Re Hastings-Bass* principle, to the extent of submitting that unless that principle were satisfied, the trustees' decision as to the amount to be transferred should not be disturbed. The judge distinguished *Re Hastings-Bass* and the *Mettoy Pension Trustees* case on a number of grounds. In particular (at 212 (para 183)) he pointed out that those cases had concerned the voluntary exercise by trustees of a discretion, whereas in *Stannard*'s case the trustees were under an obligation to exercise their discretion at a particular time and after fulfilling a given condition, and he had found that they had not complied with that obligation, so that the question was how their failure to perform that obligation should be remedied.

[51] Fisons appealed unsuccessfully to the Court of Appeal (see [1992] IRLR 27, [1991] PLR 225). Dillon LJ, with whom Ralph Gibson LJ agreed, decided the case on the basis of legal principles set out in another Court of Appeal case: *Kerr v British Leyland (Staff) Trustees Ltd* (1986) [2001] WTLR 1071. He held that the trustees' decision was vitiated by the fact that they were not, at the relevant moment, properly informed as to the value of the fund and the implications of its value in relation to future contributions, and that if they had been properly informed as to those matters it might materially have affected their decision. He also said that he had no difficulty reconciling the judgment in *Kerr*'s case with that in *Re Hastings-Bass* but he did not elaborate on that point. Staughton LJ agreed in the result but for somewhat different reasons, and did not find it necessary to refer to either *Kerr*'s case or *Re Hastings-Bass*.

[52] Mr Herbert submitted to me that *Kerr*'s case and *Stannard*'s case are in a different and distinct line of authority from *Re Hastings-Bass*, because they are concerned with circumstances in which the trustees are under an obligation to act, whereas *Re Hastings-Bass* concerned a voluntary exercise of a discretion, as did the *Mettoy Pension Trustees* case. Other cases in the same line as *Kerr v British Leyland (Staff) Trustees Ltd* and *Stannard v Fisons Pension Trust Ltd* include *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522 and *Harris v Lord Shuttleworth* [1994] ICR 991. He submitted, on this basis, that the proposition that the matter overlooked 'might' have led the trustees to act differently cannot properly be transferred from the *Kerr v British Leyland (Staff) Trustees Ltd* line of cases to the *Re Hastings-Bass* principle, both because of this distinction and because it is inconsistent with the Court of Appeal's judgment in *Re Hastings-Bass* itself.

[53] The issue in *Kerr*'s case was whether a member of a pension scheme was entitled to an incapacity payment or, more exactly, whether the trustees' decision that he was not so entitled was valid and effective. The judge had held that the decision made by the trustees was based on inadequate and misleading information as to Mr Kerr's state of health, due to failures of communication and misunderstandings. The Court of Appeal agreed that this vitiated the decision. Fox LJ said ([2001] WTLR 1071 at 1079):

'If the board had appreciated that aspect of the case I think that it might materially have affected their decision and that they might well have concluded that the proper course was to defer a decision until more was known about the effect which the remedial steps were having upon Mr Kerr.'

[54] The Court of Appeal allowed the appeal, but only because the judge had considered that the court could itself decide that Mr Kerr was entitled to the incapacity payment. The Court of Appeal upheld his order that the decision taken was of no effect, and directed the trustee board to reconsider the claim.

[55] *Kerr v British Leyland (Staff) Trustees Ltd* is thus a rather different kind of case, where the trustees are the arbiters of a beneficiary's entitlement to a particular benefit under the rules of the pension scheme, and that entitlement is derived not from pure bounty, as would be the case in a family trust, but from the contract of employment. In those circumstances, and given the inadequate information provided to the trustees on which to take their decision, it seems to me logical that a relatively low threshold of relevance ('might') should have been adopted by the court as the test of whether the deficiency of information entitles the beneficiary to have his case, in effect, reconsidered. *Mihlenstedt v Barclays Bank International Ltd* was a similar case, though there the decision lay with the employer, not the trustees, and the claim failed on the facts. *Harris v Lord Shuttleworth* was also a similar type of case.

[56] Likewise in *Stannard*'s case the trustees were under an obligation to act, by appropriating an amount to be applied for the benefit of the transferring employees, though they had to decide, after consulting the actuary, what amount should be appropriated, as being the amount which they decided to be just and equitable. Although on its facts *Stannard v Fisons Pension Trust Ltd* is a different kind of case from *Kerr v British Leyland (Staff) Trustees Ltd*, it seems to me that the analogy is fair. Both were pension cases, so that the rights of the members or beneficiaries arose in the context of the contract of employment. Both were cases in which the trustees were under a duty to act, though with some freedom as to how they proceeded. It is true that even outside this type of case, if trustees have a discretionary power, they are under obligations in relation to it, including to consider from time to time whether to exercise it, and if they do decide to exercise it they are under duties in respect of that process, but it seems to me that there is a real distinction between such a case (which *Re Abrahams' Will Trusts, Re Hastings-Bass* and the present case are) and cases such as *Kerr*'s case and *Stannard*'s case where the trustees are under a duty to act, not merely a duty to consider from time to time whether to act. I consider, therefore, that Mr Herbert's submissions in this respect are well founded.

[57] Since the decisions in the *Mettoy Pension Trustees* case and *Stannard*'s case, the *Re Hastings-Bass* principle has been applied in a number of cases, especially in the last five years, in which the principle has been stated in different terms. Some disquiet has been expressed both judicially (by Park J in *Breadner v Granville-Grossman* [2000] 4 All ER 705 at 722, [2001] Ch 523 at 543 (para 61)) and extra-judicially (see Sir Robert Walker 'The Limits of the Principle in *Re Hastings-Bass*' [2002] Private Client Business 226, and see also Underhill and Hayton *Law Relating to Trusts and Trustees* (16th edn, 2003) pp 694–699) as to the ease with which the principle may allow the court to set aside what appear to be valid exercises of a trustee's discretion.

[58] The precise formulation of the principle may be of greater significance in cases other than this one. Mr Herbert submits that the right version is that set out at [49] above. For his part Mr Taube is content to proceed on that basis, the evidence showing, as he submits, that it is satisfied if put in that way. Nevertheless Mr Taube relies on some of the recent cases as showing that among the relevant considerations to which trustees must have regard are the tax consequences of the exercise of their discretion.

[59] The first of the recent cases is *Green v Cobham* [2002] STC 820, [2000] WTLR 1101, decided by Jonathan Parker J. This concerned a trust created under the will of a resident of the British Virgin Islands (BVI). Among the trust assets were the whole of the issued shares in a company with substantial reserves of retained profits, which the trustees wished to distribute to the beneficiaries in a tax-efficient way. They decided to do this by way of, first, an appointment on the trusts of the will trust, and then the creation by the will trustees of two sub-settlements for different beneficiaries. Deeds of appointment were executed to this effect on 12 November 1990. The effect of these dispositions, under United Kingdom capital gains tax law, was that the trusts of the will and the two sub-settlements constituted a single composite settlement with a single body of trustees, consisting of all the trustees of each of the three trusts, numbering ten in all. No thought had been given to this point by anyone concerned (see [2002] STC 820 at 824–825, [2000] WTLR 1101 at 1107). At the time of the appointments, six of these ten were, or fell to be treated as, resident in the BVI, and the other four were resident in the United Kingdom. On that basis the body of the trustees of the composite settlement was deemed not to be resident or ordinarily resident in the United Kingdom: TCGA s 69(1). Three of the trustees were only treated as BVI resident because they were solicitors or accountants who were carrying on a business which included the management of trusts and were trustees of the relevant trust in the course of that business: see TCGA s 69(2). One of these trustees, M, a solicitor, (one of the trustees of a sub-settlement for a particular minor beneficiary, C) retired from practice on 31 December 1990 but did not retire as trustee at the same time, nor was any other trustee appointed at that time to whom this special treatment applied. The consequence was that there was no longer a majority of trustees of the composite settlement who were, or were treated as, non-resident, and the United Kingdom resident trustees of each settlement became liable for capital gains tax on disposals by the will trustees and by the company.

[60] The trustees sought to have the appointment by the will trustees on the sub-settlement for the benefit of C declared void on the *Re Hastings-Bass* principle, on the basis that the will trustees had given no thought to the capital gains tax consequences of the appointments. All parties supported the application though counsel for C presented arguments to the contrary to assist the court. Applying the formulation used by the Court of Appeal in *Re Hastings-Bass* itself, the judge held that the appointment by the will trustees on the trusts of the sub-settlement for C was void. He held that the will trustees ought to have directed their minds to the capital gains tax consequences of the proposed appointment, and that if they had done so, they would not have made an appointment which gave rise to any significant risk that the will trust might thereafter become a United Kingdom resident trust for capital gains tax purposes. It had been submitted to him that the problem arose not from the terms of the appointment itself but from the failure to replace M as a trustee on his retirement from practice. He rejected that distinction, holding that the feature of the appointment which the trustees should

have been aware of and which, if they had known of it, would have led them to act otherwise, was that the status of the will trust as an offshore settlement became dependent on the composition of the body of trustees of the sub-settlements, over which the will trustees had no control.

[61] The judge did not use Warner J's formulation in the *Mettoy Pension Trustees* case, though he referred to the passage which I have quoted at [47] above. He used instead the Court of Appeal's negative formulation from *Re Hastings-Bass* itself. He did not, in applying it, expressly pose the question whether the exercise of the discretion did 'not have the full effect which he intended'. It was not suggested that there was any mistake or unintended feature of the terms of the trusts themselves. Plainly there was an unintended effect as regards the fiscal effects of the operation on the will trust itself. It seems to me clear that the judge had this aspect of the principle well in mind in his judgment. He was satisfied that the principle did apply on the facts and he therefore declared the deed of appointment by the will trustees to be void.

[62] The principle was next considered by Park J in *Breadner v Granville-Grossman* [2000] 4 All ER 705, [2001] Ch 523. In that case the exercise of a power of appointment by deed in 1989 was invalid because it was made one day too late. The judge declined to extend the principle so as to treat the appointment as having been made on the previous day, when it would have been effective. The principle was also relied on (unsuccessfully) with a view to having set aside the exercise of a power of appointment in 1976, by which the power which had been exercised, albeit ineffectively, in 1989, was created. The deed of appointment in 1976 created a power of appointment and set up trusts in default of appointment. The latter trusts went beyond the terms of the power which was then being exercised in one respect, by including as beneficiaries children of the settlor or his brother adopted before a closing date. Adopted children were not within the terms of the original power, and it was accepted that if any child had been adopted by either man, that child could not have taken any benefit under the default trusts. In fact no such adoption took place. Park J held that the mere inclusion of adopted children did not invalidate the exercise of the power in 1976. If such a child had been adopted, that event would have reduced the shares of the other children who were entitled to take, but the share which would otherwise have gone to the adopted child would instead have been held on the discretionary trusts of the original settlement.

[63] On that basis, a further argument was mounted, to the effect that the 1976 appointment had not been effective for inheritance tax purposes as it had been intended, despite the fact that no-one had spotted the point for more than 20 years and the Inland Revenue had accepted the 1976 deed as effective at the time, and that therefore the appointment should be declared void under the *Re Hastings-Bass* principle. The judge rejected the submission. He said this about it (see [2000] 4 All ER 705 at 731–732, [2001] Ch 523 at 552–553):

> '94. I am not prepared to conclude that the *Re Hastings-Bass (decd)* principle can have such an extreme and surprising result. The argument that, because of the reference to future adopted children, the appointment was not a para 15 appointment, might be seen now to have had some technical force, but it had no merits of a more general nature. It was certainly abstruse and recondite. Those who advised on the 1976 appointment when it was made certainly did not think of the argument, nor did the Revenue when the documents were presented to them.

Twenty-two years went by without anyone suggesting that there was anything wrong with the appointment and I cannot put out of my mind the difficulties which would arise at this late stage if the argument was to be raised and acted upon. I referred earlier to the analogy between the principle in *Re Hastings-Bass (decd)* and the law concerning judicial review of exercises by public bodies of statutory powers. In judicial review there are tight time limits within which a challenge to some action by a public body must be brought. It would be astonishing, and to my mind unacceptable, for the emergent *Re Hastings-Bass (decd)* principle to be capable of being invoked in an attempt to upset some action by trustees which may have been taken decades ago (as in this case), and on the basis of which many intervening decisions and actions have been taken.

95. Mr Warren refers to the decision of Jonathan Parker J in [*Green v Cobham* [2002] STC 820] the recent case in which an apparently valid appointment of new trustees of a sub-trust was held to have been ineffective because of the unappreciated capital gains tax consequences which it would have had. I do not say that I disagree with the decision, but I would accept Mr Green's comment to the effect that, despite *Green's* case, there must be limits to how far the courts will allow the principle in *Re Hastings-Bass (decd)* to rescue trustees from the consequences of their tax planning misjudgments. I do not feel impelled to suggest precisely where the dividing line lies between a case like *Green's* case, where the court will hold an appointment by trustees to have been invalid, and a case like this one, where in my judgment the court will not. I point out, however, that in *Green's* case the capital gains tax consequences of the appointment, if it stood, were most serious, and were appreciated at an early date after the appointment had been made. In this case, even if it had occurred to the advisers of the trustees in 1976, rather than in 1998 (when Mr Warren and his colleague wrote their opinion), that the 1976 appointment, once executed, might not have been a valid para 15 appointment after all, no serious CTT consequences would have followed. It is true that the trust fund would still have been potentially subject to the CTT rules for discretionary trusts, not the more favourable rules applicable to accumulation and maintenance trusts within para 15. But no CTT liability would have been incurred yet, and the appointment could have been modified so as to comply with para 15 thereafter. This could have been done before 1 April 1997 at the cost of an exit charge only marginally greater than that which the trustees had expected to pay (and on the actual facts did pay) by reason of the 1976 appointment itself.'

[64] He rejected the submission that the 1976 appointment should be declared invalid.

[65] In point of time the next case in which *Re Hastings-Bass* was cited was a pension case, *AMP (UK) plc v Barker* [2001] PLR 77. Pension fund trustees had amended the rules of the scheme so as to increase the benefits of those who left service early as a result of incapacity. They overlooked that fact that the scheme rules linked the benefit of early leavers generally to those of members retiring early on grounds of incapacity. When this was realised, less than two years after the amendment, a further amendment was effected, removing the link for the future, but proceedings were nevertheless brought to eliminate the link altogether. The claim relied on rectification, alternatively on the proposition that the employer's consent was vitiated by mistake and thirdly on the *Re*

Hastings-Bass principle. Lawrence Collins J upheld the claim to rectification. He dealt shortly with the other arguments which were not necessary to his decision. He said that he would, if necessary, have set the employer's consent aside for mistake or have held the exercise of the trustees' power of amendment void on the *Re Hastings-Bass* principle. He reviewed a number of the cases on the *Re Hastings-Bass* principle, and also *Kerr*'s case. He did not draw the distinction which Mr Herbert submits should be drawn, between cases of a voluntary exercise of a discretion and cases where the trustees are obliged to act. Perhaps for that reason he indicated that he would have been bound to apply the 'might', rather than the 'would', test, though either would have been satisfied on the facts before him.

[66] *Green v Cobham* was followed by Patten J in *Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] STC 1344, another case concerning a family trust. In that case trustees had had advice as to a scheme for avoiding a substantial charge to capital gains tax on underlying trust assets, which required certain steps to be taken before the end of the current tax year, and others not until after the beginning of the next. Despite clear advice as to the timing, the trustees took all the relevant steps before the end of the tax year, thereby giving rise to a large charge to capital gains tax on the settlor, with a possible right of recovery against the trust property. The judge was satisfied that, if the trustees had been aware of the fiscal consequences of what they were doing, they would not have taken one of the steps in the sequence until on or after 6 April, instead of doing everything on 3 April. He held, on the basis of *Green v Cobham*, that trustees when exercising powers of appointment are bound to have regard to the fiscal consequences of their actions, and that if it can be shown that, had they considered those consequences properly, they would not have proceeded as they did, the appointment should be declared void as an invalid exercise of the power of appointment. He observed that the time might come when the limits of the *Re Hastings-Bass* principle fall to be determined by a higher court, but as regards the relevance of fiscal consequences he said this (see [2001] STC 1344 at 1353–1354):

> 'The financial consequences for the beneficiaries of any intended exercise of a fiduciary power cannot be assessed without reference to their fiscal implications. The two seem to me inseparable. Therefore if the effect of an intended appointment is likely to be to expose the fund or its beneficiaries to a significant charge to tax that is something which the trustees have an obligation to consider when deciding whether it is proper to proceed with the appointment. Once relevance is established then a failure to take those matters into account must vitiate the exercise of the power unless (as in *Hastings-Bass* itself) it is clear that on a proper consideration of all relevant matters the decision would still have been the same.'

[67] The *Re Hastings-Bass* principle next fell to be considered in another pensions case, *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317. In that case, as in *AMP (UK) Ltd v Barker*, the discussion of *Re Hastings-Bass* was unnecessary for the decision, in this instance because the judge held that the rules had not been changed in the way that was said, if it had been done, to have been void under *Re Hastings-Bass*. Etherton J nevertheless discussed *Re Hastings-Bass* in the light of subsequent authority. He summarised the principle, on the basis of *Stannard*'s case and *AMP (UK) Ltd v Barker*, as being that a decision of trustees to exercise a discretion will be void if (a) the trustees have failed to take into account a material consideration, and (b) that consideration might materially have

affected their decision. It seems to me that this is not a correct formulation of the principle.

[68] Next in time came a family trust case, in which the *Re Hastings-Bass* principle was the basis of the judge's decision: *Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch), [2003] 1 All ER 763, [2003] Ch 409. In this case, a settlor had created a trust in the Isle of Man under which he had a life interest subject to an overriding power of appointment. He expressed the wish that the trustees should exercise that power in respect of 40% of the trust property to create discretionary trusts for the benefit of his two sons, to the exclusion of any benefit for himself and his wife. By some mistake or misunderstanding, the trustees thought that his wish was that the trusts should be created in respect of 60% of the fund. They acted accordingly in April 1992. The error was soon discovered but the settlor, without legal advice, decided at that time not to do anything about it. Again in 1994 he thought about it but did not take legal advice and took no further steps. In 2001 the trustees received legal advice that the appointment was open to challenge, and the settlor decided that the point should be tested in proceedings.

[69] Lightman J had cited to him all the cases that I have mentioned, and Sir Robert Walker's article mentioned at [57] above. He held that the principle did apply to the exercise of the power of appointment, but that it rendered the appointment voidable, not void. He left over for further argument the question whether it should be avoided. One of the striking consequences, if he had held the appointment void, would have been that any sums distributed pursuant to the discretionary trusts in favour of the sons since the appointment would have been repayable (subject to possible defences of change of position) even though the grounds for challenging the appointment had been known since August 1992, and decisions had been taken in 1992 and 1994 not to do anything about it. It is understandable that the judge should have been attracted by an argument which gave the court a degree of control over whether, and perhaps if so on what basis or terms, the appointment should be set aside. He took it that none of that would be possible if the appointment were void (see [2003] 1 All ER 763 at [23], [2003] Ch 409 at [23]).

[70] The judge said that the principle had only been changed significantly in one respect in the course of the sequence of judicial decisions, namely by the use of the 'might' test in *Stannard's* case, but that it was unnecessary to consider which test was correct, since on the facts of the case the 'would' test would be satisfied. He rejected the submission that the mistake must have been as to something fundamental, in favour of the conventional test, that the unconsidered relevant consideration would (or might) have affected the trustees' decision.

[71] He did hold that it is relevant to consider how the mistake arose. The settlor's contention was that the fact of a mistake was enough, regardless of how it came to be made. The judge held that the principle is based on the proposition that the trustees have acted in breach of duty by failing to take into account a relevant consideration, or taking into account an irrelevant consideration. Accordingly, if they have acted without any breach of duty, having identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the decision cannot be impugned merely because, without any fault on the part of the trustees (or of any person acting on behalf of the trustees), some information relied on turns out to be inaccurate.

[72] His decision that the defective appointment was voidable rather than void is consistent with this last point; he said that it accorded with ordinary principles of equity that a decision challenged on grounds of breach of fiduciary duty is voidable, not void.

[73] The next, and most recent, case in which the *Re Hastings-Bass* principle has been considered is *Burrell v Burrell* [2005] EWHC (Ch) 245, [2005] All ER (D) 351 (Feb), again a family trust case, and one where the mistake was as to the fiscal consequences of the appointment. Trustees held property on trusts under which a young man had an interest in possession but they had an overriding power of appointment exercisable on or after his nineteenth birthday. They were asked to consider exercising it before the declaration of a dividend by a company some of whose shares were comprised in the trust property, which was expected to happen three days after the birthday. They exercised the power by appointing the shares in the company on discretionary trusts. The shares were of a nature such as to qualify for business property relief for inheritance tax. However, a condition of the application of that relief was overlooked, namely that the transferor (in this case, the person entitled to the interest in possession) had to have held the shares for at least two years before the transfer, whereas he had only held them for one year. Accordingly, the appointment gave rise to a substantial charge to inheritance tax.

[74] The trustees brought the proceedings to have the appointment set aside. They said, and Mann J accepted, that they had executed the appointment under a mistaken belief as to its tax consequences, and that if they had known what those consequences would be they would not have executed it. All parties before the court supported the application. As in the present case the Inland Revenue had declined the invitation to take part in the proceedings. Most, if not all, of the cases which I have mentioned were cited to the judge. He held that the trustees ought to have borne the fiscal consequences of the appointment in mind, that they did not give full and proper consideration to those consequences, and that if they had done so they would not have acted as they did. Because of Lightman J's decision in *Re Barr's Settlement Trusts* the judge considered whether the trustees or their advisers or agents were in breach of duty, and held that both the trustees and their solicitors were. Accordingly he held that the deed should be set aside, it being unnecessary for him to decide between 'would' and 'might', and between void and voidable.

[75] It is apparent from this survey that the cases have come a long way from the propositions discussed in *Re Vestey's Settlement* and *Re Abrahams' Will Trusts*. In those cases the criterion was said to be whether the partial invalidity imposed externally by the rule against perpetuities, as explained in *Pilkington*'s case, or by the non-application of s 31 in *Re Vestey*'s *Settlement*, rendered the effect of the trustees' act substantially or essentially different from that which was intended. *Re Hastings-Bass* was the same kind of case. I have already suggested, at [49] above, a reframing of the *Mettoy* version of the *Re Hastings-Bass* statement of principle. The question whether the difference in effect has to be substantial in order for the principle to apply comes into the test as part of the process of answering the question whether, if the trustees had been aware of the true position, they would not have acted as they did.

[76] One element introduced in the *Re Hastings-Bass* formulation is whether the trustees took into account matters which they ought not to have done, or failed to take into account matters which they ought to have. This is reminiscent of public law and the *Wednesbury* test (*Associated Provincial Picture Houses Ltd v*

Wednesbury Corporation [1947] 2 All ER 680, [1948] 1 KB 223), though that case does not seem to have been cited in *Re Hastings-Bass* itself. That is now established as a relevant test in relation to the exercise of a discretion by trustees, as a result of *Edge v Pensions Ombudsman* [1999] 4 All ER 546, [2000] Ch 602. In that case the Court of Appeal, affirming the decision of Sir Richard Scott V-C ([1998] 2 All ER 547, [1998] Ch 512), and following earlier decisions of the Court of Appeal including *Harris v Lord Shuttleworth* (cited above, at [52]), held that trustees to whom the exercise of a discretionary power is entrusted were under a duty to exercise that power (if they chose to exercise it) only for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant (see [1999] 4 All ER 546 at 567, [2000] Ch 602 at 627). The introduction into trust law of what might seem to be a public law concept has been criticised, at any rate in relation to private family trusts as distinct from pension funds (see *Underhill and Hayton* p 696), but it seems to me that this formulation respects the traditional view, that it is for the trustees to exercise the power, and to decide whether or not to do so (unless they have an obligation to do so, as in *Kerr v British Leyland (Staff) Trustees Ltd* or *Stannard v Fisons Pension Trust Ltd* type cases), and is at the same time consistent with the cases about fraud on the power or other examples of caprice or bad faith, such as *Cloutte v Storey* [1911] 1 Ch 18, [1908–10] All ER Rep 1073 or *Klug v Klug* [1918] 2 Ch 67. In those cases the defaulting trustee was motivated by irrelevant considerations in deciding whether or not to exercise the power, and if so how: the advantage of a non-object in cases such as *Cloutte v Storey* (or *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862) or an irrelevant consideration in relation to an object in *Klug*'s case.

[77] It seems to me that, for the purposes of a case where the trustees are not under a duty to act, the relevant test is still that stated in *Re Hastings-Bass*, namely whether, if they had not misunderstood the effect that their actual exercise of the discretionary power would have, they *would* have acted differently. In my judgment that is correct both on authority, starting with *Re Hastings-Bass* itself, and on principle. Only in a case where the beneficiary is entitled to require the trustees to act, such as *Kerr*'s case or *Stannard*'s case, should it suffice to vitiate the trustees' decision to show that they *might* have acted differently. The word 'might' has been used, as matter of decision, only in those two cases. In two cases it has been said (not as a matter of decision) that the 'might' test applies to a voluntary exercise of a power: *AMP (UK) Ltd v Barker* [2001] PLR 7 and *Hearn v Younger* [2002] WTLR 1317. I respectfully disagree with those observations, having had the benefit of what may have been fuller, and were no doubt different, submissions on the point. If an act by trustees is set aside, where the trustees have acted under an obligation, then the beneficiaries can require the trustees to start again, on the correct basis. It seems to me that the lower test of 'might' is appropriate in such cases (see [55] above). If the trustees' act was voluntary, so that they cannot be compelled to act again if the act is set aside, the more demanding test of 'would' is justified in order to decide whether the trustees' act can be set aside. (*Re Vestey*'s *Settlement* was a case where the trustees were under a duty to act, but the test applied there was expressed in different and more general terms.)

[78] Another unresolved question on the cases is whether, if the trustees' exercise is vitiated on this principle, the result is that the trustees' act is void or voidable. Lightman J in *Re Barr*'s *Settlement Trusts* held that it was voidable, and adjourned the question whether it should be avoided. In *Re Abrahams' Will Trusts*

Cross J held that the defective appointment in that case was void. Since it was the Inland Revenue that sought this result, it was only on the basis of it being void that the submission could have been accepted. That body would not have standing to seek to have a voidable act set aside. If the exercise of a power is vitiated by the doctrine of fraud on a power, the result appears to be that the exercise is declared void: see *Topham v Duke of Portland* (1869) 5 Ch App 40, and the form of order made in that case, printed in *Seton's Judgments and Orders* (7th edn) vol 2 p 1672, and see also *Cloutte v Storey*. This may be because the appointment is treated as having been, in effect, to a non-object, and plainly a direct appointment to such a person would be void. On the other hand, if, as Warner J held in the *Mettoy Pension Trustees* case, the principle could result in part of a document being set aside but not the rest, the process would come close to rectification, and it would be difficult to say that a part of it was altogether void. He did not have to consider that aspect, since on the facts he held that no part was to be set aside.

[79] Lightman J held that the exercise was voidable, rather than void, because its being set aside resulted from a breach of the trustees' duty. Some acts of trustees which are set aside for breach of duty are voidable; they will not be set aside if no-one with the right to do so applies for that remedy, and such an application may be defeated on discretionary and equitable grounds which would not be available if the disposition was void, such as affirmation or laches. It is also fair to say (as Lightman J clearly bore in mind, and as Park J mentioned in *Breadner*'s case) that if the consequence of the doctrine is that the exercise is void, this might have dramatic and potentially unfair disruptive consequences for the trustees and the beneficiaries. To hold that the defect makes the appointment voidable, rather than void, is therefore attractive.

[80] Nevertheless it seems to be questionable whether the application of the doctrine should be regarded as depending on a breach of duty, and whether its consequences should be aligned with those of a breach of trust. It seems to me that it would have been hard to say that the trustees who made the advancement which was held to be completely ineffective in *Re Abrahams' Will Trusts* acted in breach of their duty. What was wrong with their act was the application of the rule against perpetuities in a way quite different from that which seems to have been regarded as normal and legitimate at the time, and which was held valid by Danckwerts J at first instance in *Pilkington*'s case.

[81] Taking together, first, the fact that only if the exercise was void could the Inland Revenue have succeeded in having the advancement set aside in *Re Abrahams' Will Trusts* (and, at first instance, in *Re Hastings-Bass* itself) and, secondly, the difficulty of showing that in either of those cases there was any breach of the trustees' duty, it seems to me that Lightman J's conclusion that the appointment was voidable is open to doubt, as also is his introduction of a factor, not previously mentioned in the cases, that the trustees or their advisers or agents must have been at fault in some way for the principle to apply. I respectfully agree with him that the application of the principle is of potentially worrying breadth if it cannot be confined or controlled by reference to equitable principles, and that it would be more satisfactory if substantial delay in raising the point, with knowledge of the problem (as in the case before him), could be treated as relevant to the grant or withholding of relief. Mr Taube submitted that, because the remedy lay in equity, and the grant of a declaration is discretionary, matters affecting the conscience of the parties, including laches or acquiescence, could be taken into account by the court in deciding what, if any, relief to grant, even if,

on the true analysis, an appointment which is vitiated by the *Re Hastings-Bass* principle is void, not merely voidable.

[82] I do not need to decide between 'void' and 'voidable' in order to decide this case: all counsel agreed that nothing turned on that distinction in this instance. It seems to me, however, that on authority, the main ways at present open to the court to control the application of the principle are: (a) to insist on a stringent application of the tests as they have been laid down, (b) to take a reasonable and not over-exigent view of what it is that the trustees ought to have taken into account, and (c) to adopt a critical approach to contentions that the trustees would have acted differently if they had realised the true position, perhaps especially so in cases (unlike the present) where it is in the interests of all who are before the court that the appointment should be set aside. As Park J said in *Breadner's* case ([2000] 4 All ER 705 at 722, [2001] Ch 523 at 543 (para 61)):

> 'It cannot be right that whenever trustees do something which they later regret and think that they ought not to have done, they can say that they never did it in the first place.'

[83] The position would also be more flexible if equitable considerations can be taken into account in deciding whether or not to grant any and if so what relief. The court's task might be easier in some cases if the Inland Revenue did not always decline the invitation to take part in cases of this kind, but there are no doubt policy reasons of one kind or another for that attitude, of which the court is not aware.

[84] Mr Herbert submits that it is not enough to bring the principle into play that the trustees be mistaken as to the fiscal effects of the transaction, and that the mistake must be as to the substantive legal effect of the appointment or other act, as in *Re Abrahams' Will Trusts*, *Re Hastings-Bass* and the *Mettoy Pension Trustees* case, or as to a matter of fact, such as the true nature of the settlor's wishes in *Re Barr's Settlement Trusts*. He submits that this follows from the formulation of the rule by reference to the effect of the exercise being different from that which the trustees intended. He says that the 'effect' in this context excludes consequential matters such as tax liabilities. He relies for this on an analogy with *Gibbon v Mitchell* [1990] 3 All ER 338, [1990] 1 WLR 1304and other cases about mistake by an individual donor.

[85] He submits that, in cases concerning the setting aside of dispositions by individuals for mistake, fiscal consequences have never been held to be a sufficient or relevant reason. I will deal with those cases later in this judgment, but it seems to me that there are at least two significant differences. First, trustees are dealing with assets which are not their own, and in relation to which they owe duties to beneficiaries, whereas individual beneficial owners owe no legal duty to anyone else as to how they deal with their own assets. Secondly, the fiscal treatment of trust property is much more complex than that applying to disposals by individuals. I do not accept that, even if fiscal consequences are irrelevant as regards cases of mistakes by individual donors, that is a sufficient reason for regarding them as irrelevant to the application of the *Re Hastings-Bass* principle.

[86] Mr Herbert's submission has to be seen in context with the question what are the considerations which trustees ought to take into account. It seems to me that, for this submission to be right, logically he would have to submit that an accurate appreciation of fiscal consequences is not among them. This would be a very difficult proposition to advance, at any rate in relation to a private trust:

pension trusts or charitable trusts may be different in this respect, being largely tax-exempt. I agree with the passage quoted at [66] above from the judgment of Patten J in *Abacus Trust Co (Isle of Man) Ltd v NSPCC*. In the circumstances of a substantial private trust such as the 1971 settlement, the fact is that trustees do have regard to the fiscal treatment of the trust property, as it is or would be according to whether they do nothing, or act in one or another of various ways that may be open to them, and they are right to do so. It does not follow that they need to know every detail of the tax consequences of acting as they propose, or, by comparison, of not taking that action, or taking other action that may be open to them. Being unaware of some subtle, and perhaps unforeseeable, detail of the tax consequences may not result in their decision being held to be vitiated by the *Re Hastings-Bass* principle. There might be scope for argument as to whether the provisions of United Kingdom capital gains tax law about the treatment of several settlements, with different trustees, as one composite settlement, and about the treatment of professional trustees as resident or non-resident, held to be relevant in *Green v Cobham*, might have been regarded as too subtle and arcane for the BVI based trustees of the will trust to have been obliged to take them into account. Park J clearly considered that the 'abstruse and recondite' technical defect of the 1976 appointment in *Breadner*'s case was not a point which could bring the principle into play (see [63] above). If the discrepancy between the intended and actual fiscal consequences were the result of a later court decision by which the position was held to be otherwise than had previously been supposed, it would be very surprising if that change could have the effect of invalidating acts by trustees done on the basis of the previous understanding of the position. But I have no doubt that fiscal consequences may be relevant considerations which the trustees ought to take into account, and that a material difference between the intended and actual fiscal consequences of the act may be sufficient to bring the principle into play.

[87] Mr Herbert also submitted that the trustees of the 1971 settlement owe duties only to their own beneficiaries and in relation to their own trust fund, and that consequences for them are what has to be taken into account, not consequences in the context of the 1987 settlement of which, in their capacity as 1971 trustees, they know nothing. Why, he asked rhetorically, should the 1971 trustees be expected to have regard to the terms of cl 47(c) of the 1987 settlement, even though there is a comparable but different provision in the 1971 settlement? Given that Lord Howland's assignment to the trustees of the 1987 settlement, though foreseen, was his own voluntary act, as was his later move into Woburn Abbey, why (he asked) should it be for the 1971 trustees, rather than for Lord Howland and the 1987 trustees, to consider the pros and cons of that assignment, and the move to the Abbey? He also pointed out that the capital gains tax charge was imposed on the assets the subject of the appointment and in turn the assignment, so as to be borne by the 1987 trustees, and submitted that this feature takes this consequence outside the scope of what it was the duty of the 1971 trustees to take into consideration.

[88] He elaborated this submission by reference to the duty of the 1971 trustees, and by inviting the court to consider to whom this duty is owed. He pointed out that neither the beneficiaries nor the trustees of the 1987 settlement could sue the 1971 trustees for any breach of duty. While Lord Howland could do so, as a beneficiary of the 1971 settlement himself, Mr Herbert submits that he could not succeed because his personal loss, if any, would have

arisen from his own independent acts, namely assigning his contingent interest to the 1987 settlement trustees and moving into the Abbey.

[89] I cannot accept Mr Herbert's proposition that, because the 1971 trustees' appointment was on terms that passed the burden of any capital gains tax, with the appointed assets, to Lord Howland, therefore they were not under a duty to consider what the fiscal results of the transaction would be. The corollary of his proposition seems to be that fiscal results were an irrelevant consideration which they ought not to have taken into account, so that, if they did think about them, the appointment might have been at risk of being set aside on that ground instead, depending on whether thinking about it made any difference to what they decided to do. The fact is that they did consider that question, albeit on the basis of inaccurate advice. They were, in my judgment, bound to do so, because the power of appointment was exercisable for the benefit of beneficiaries and whether, and if so to what extent, a particular appointment, as opposed to any other, or doing nothing, would be for the benefit of a beneficiary would be very much affected by its fiscal treatment. Their duty in this respect was not in any way affected by the fact that, for good reason, they chose to throw the risk of capital gains tax on the appointed assets.

[90] If one looks at the appointment by itself, and thinking only of the non-exempt chattels, the effect of the 1971 trustees making the appointment as and when they did was to give Lord Howland a contingent interest in the chattels, which were of great value, but to do so in a way which would result in a liability to capital gains tax of an estimated £1m arising and being charged on the chattels. By contrast, as I understand it, if they had specified, say, 30 November 2001 as the date to which Lord Howland had to survive to get an absolute interest in the chattels, there would have been no capital gains tax charge, so that he would have been better off by £1m in that respect, although there would have been an exit charge to inheritance tax by reference to the value of the chattels, to be set off against the capital gains tax avoided. Subject to that calculation, or to an equivalent calculation in relation to any other possible course of action, it is likely to have been clear whether it would be more for the benefit of Lord Howland to make the appointment that was actually made, or to do the same by reference to a later date, or to do something else entirely, or nothing. In my judgment, therefore, it is clear that the 1971 trustees were under a duty to consider the fiscal treatment resulting from the appointment which they were considering making, at least as regards the charge to capital gains tax which would arise and would have to be borne, under the terms of the appointment, by the appointed chattels, and thus in effect by Lord Howland. Correspondingly, the fact that the fiscal consequences of the appointment in this respect were materially different from those which they thought would follow is a matter which is sufficient for the *Re Hastings-Bass* principle to apply.

[91] I see more force in Mr Herbert's submission that the other unforeseen and undesirable tax consequences of the series of transactions are outside the scope of the matters which the 1971 trustees as such were required to take into consideration. In a sense this is a somewhat artificial distinction, because the 1971 trustees, the 1987 trustees and Lord Howland were all considering the same proposals at the same time, and with the benefit of the same advice. The 1971 trustees knew what was intended at each stage of the sequence of transactions, but their involvement, strictly speaking, was only in relation to the appointment. They could see that it was expected that the chattels would pass via Lord Howland to the 1987 trustees, who were already responsible for the

business of opening the Abbey to the public, but this depended both on Lord Howland (and the Marquess of Tavistock) consenting to the appointment and on Lord Howland then assigning his contingent interest to the 1987 trustees. They knew that it was intended that Lord Howland would move into the Abbey, but that in turn depended on other arrangements being made to which they would not be parties.

[92] I am inclined to think that Mr Herbert is right in his submission that the adverse consequences as regards inheritance tax and as regards cl 47(c) of the 1987 settlement were not matters within the proper ambit of the considerations to be taken into account by the 1971 trustees in deciding whether or not to make the appointment in favour of Lord Howland. They were certainly matters which Lord Howland could and would properly bear in mind in deciding whether to give his consent (and the same, no doubt, goes for the Marquess of Tavistock as well), and they were highly relevant for the 1987 trustees to take into account in deciding whether to enter into the transactions by accepting the assignment from Lord Howland. But it seems to me that these points were strictly foreign to the deliberations of the 1971 trustees as such.

[93] To draw that distinction, however, makes no difference to the result. The 1971 trustees have all said in evidence that they would not have agreed to make the appointment if they had been aware of the tax disadvantages. Although they do not differentiate between one and another of the tax problems, it seems to me clear that if they had been aware of the capital gains tax charge alone that would have been sufficient to deter them from making the appointment. Accordingly I accept that, if they had known that to make the appointment they did would give rise to the capital gains tax charge on the non-exempt chattels, they would not have made the appointment. Lord Howland has said in terms that either the capital gains tax or the other tax problems would have led him to refuse his consent to the appointment. He says that the same would have been true of the Marquess of Tavistock. He also says that because of the other problems he would not, in any event, have entered into the assignment to the 1987 trustees. I accept his evidence in all these three respects. For these reasons I am satisfied that, if the correct advice had been given to the 1971 and 1987 trustees and to Lord Howland, the 2001 appointment and assignment would not have been made.

MISTAKE

[94] The other ground relied on by Mr Taube and Mr Barlow for having the appointment and the assignment set aside is mistake. Mr Herbert's submissions interwove both lines of authority and I have therefore had to consider the cases in this area in order to come to a conclusion about the *Re Hastings-Bass* principle. Mr Herbert submits that it would be odd for the rules as regards setting aside an instrument because of a mistake or misunderstanding to differ significantly as between one jurisdiction and another, unless there are objective reasons why they should according to the different circumstances that may be relevant. I note that many of the cases cited to me were relied on before Warner J in the *Mettoy Pension Trustees* case and were distinguished by him on grounds with which I respectfully agree: see [1991] 2 All ER 513 at 553–555, [1990] 1 WLR at 1622–1624.

[95] Mr Taube and Mr Barlow rely first on the decision of Millett J in *Gibbon v Mitchell* which I have described and from which I have quoted at [36]. The judge said that, for a mistake to justify a voluntary disposition being set aside, it must be as to the effect of the transaction itself and not merely as to its consequences

or the advantages to be gained by entering into it. That distinction may be difficult to apply. Mr Herbert submits that it rules out of account a mistake as to the fiscal treatment or consequences of the disposition. Although the disposition in that case was made in the context of tax planning, the mistake had nothing to do with tax, but was as to the substantive effect of the disposition itself.

[96] The case was followed by Davis J in *Anker-Petersen v Christensen* [2002] WTLR 313, and by Mann J in *Wolff v Wolff* [2004] EWHC 2110 (Ch), [2004] STC 1633. In each of those cases the mistake was as to the nature of the transaction, not as to its tax effects although, again, the transactions were undertaken in the context of advice about tax planning.

[97] I was also shown some older cases analogous to these, which I will mention before reverting to the recent cases. Some of those cited to me were more in the nature of rectification cases, where the document executed had gone beyond the instructions given to the draftsman as to the effect to be achieved, and the true effect had not been explained, the court holding that the deed should take effect only to the extent intended: *Meadows v Meadows* (1853) 16 Beav 401, and *Walker v Armstrong* (1856) 8 De GM & G 531, 44 ER 495. In *Re Walton's Settlement, Walton v Peirson* [1922] 2 Ch 509, [1922] All ER Rep 439, by contrast, the solicitor had also gone beyond his instructions, but in this case by adopting the wrong method of achieving his client's intentions. Here, the intended effect could not be salvaged and the entire document was set aside. The recent case of *Wolff v Wolff* is somewhat similar on the facts, except that the solicitor seems to have had no understanding of what he was setting out to do, and the documents which he drafted were altogether inept for any purpose.

[98] In *Phillips v Mullings* (1871) 7 Ch App 244 and in *Ogilvie v Littleboy* (reported at (1897) 13 TLR 399 in the Court of Appeal and as *Ogilvie v Allen* (1899) 15 TLR 294 in the House of Lords) the dispositions were held to be fully effective. In *Phillips v Mullings*, the transaction challenged was the settlement by an improvident young man of £1,000 out of his inheritance of £3,000. On the facts it was clear that the settlor had understood the effect of what he was doing, and he had been properly advised about the terms of the settlement.

[99] In *Ogilvie v Littleboy*, the plaintiff, a widow, had executed deeds founding two charities and devoting to them a considerable part of the large fortune which she had inherited from her husband, but later brought proceedings to set the deeds aside asserting that she had not been fully and properly advised and had not fairly understood the nature and effect of the documents. The action was dismissed by Byrne J and appeals were dismissed by the Court of Appeal and the House of Lords. In the Court of Appeal, Lindley LJ said this (see (1897) 13 TLR 399 at 400):

> 'Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor. It has been contended that even where all those elements are absent the burden in equity is on the donee to show that the donor knew what he was doing and was under no mistake as to the effect of any legal instrument which he may have signed. Passages were cited from judgments of Lord Romilly and Vice-Chancellor Stuart in support of this contention; but their observations must be understood as having reference to the cases before them, and are far

too wide if meant to express a general principle of equity applicable to gifts unaccompanied by any of those circumstances of suspicion to which we have alluded. This was pointed out by Lord Justice Kay in *Henry v. Armstrong* (1881) 18 Ch. D., 668. In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.'

[100] In the House of Lords, Lord Halsbury LC referred to 'circumstances when misunderstanding on both sides may render it unjust to the giver that the gift should be retained', but agreed entirely with the judgment of Lindley LJ, as also did Lord Macnaghten. That case, therefore, sets out a broad principle of injustice as the test for setting aside a voluntary disposition, in the absence of any circumstances of suspicion such as Lindley LJ mentioned. Possibly because of its not being reported in the Law Reports, the case was not cited in the later cases to which I have been referred.

[101] In 1909 two cases were decided in which a deed of appointment and a deed of gift respectively were set aside on grounds of mistake. In the first, *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476, the plaintiff, a widow, had a power of appointment in favour of her two daughters. She exercised that power in favour of the younger daughter on her getting married. She wanted to ensure equality between the two daughters. She therefore exercised the power to the same extent in favour of her elder daughter. She had, however, entirely forgotten that, years before, she and her husband had already exercised the power in favour of the elder daughter. The result of the three exercises of the power was to produce inequality and to dispose of more than the amount of the fund available. Eve J held that the last appointment had been made under a serious mistake as to the facts, namely as to the existing position as regards interests under the trusts by virtue of the exercise of the power of appointment, and that it ought to be set aside. Although he did not refer to the formula used by Lindley LJ in *Ogilvie*'s case, it seems to me that he would not have had any difficulty in finding that the circumstances were such that it would be unjust for the donee to retain the benefit of the appointment.

[102] In the other case, *Ellis v Ellis* (1909) 26 TLR 166, Warrington J set aside a deed of gift as having been made under a mistake as to its effect. The gift was by a husband to his wife, intending it to be her absolute property, and overlooking that fact that it was caught by a covenant to settle after-acquired property in the marriage settlement, so that it would take effect as a gift to trustees to be held on trust for the wife for life, then for the husband for life, and then for the children of the marriage. The husband knew of the settlement, and knew it contained a covenant to settle after-acquired property but did not think that the covenant applied to a gift from him. The gift was set aside as having been made under a mistake of fact.

[103] I have referred already to *Gibbon v Mitchell*, decided in 1990: see [36] above, where the basis for the decision is set out. That was another case of a mistake as to the effect of the disposition, through a misunderstanding as to the nature of the donor's interest.

[104] In *Anker-Petersen v Christenson* [2002] WTLR 313 beneficiaries were entitled under trusts to life interests, with capital then going to their issue as they might appoint and in default to their children. As part of a tax-planning exercise in connection with a variation of the trusts under the Variation of Trusts

Act 1958, and effecting the export of the trusts, each assigned contingent interests in capital to the trustees of 'intermediate' trusts, under which they were then resettled by the trustees on trusts which had been described to the beneficiaries (and to the court) as 'similar to' or 'corresponding to' the existing trusts, but which differed in respects which the judge described as fundamental, in particular that their life interest was subject to an overriding discretion for the trustees to appoint capital and income, and to accumulate income. The terms of these new trusts were not shown or explained to the beneficiaries. Davis J held that the assignments should be set aside, because the assignor in each case was ignorant of the true effect of the trusts on which the trustees were intending to resettle the fund, having been misled as to their terms. The judge referred to the distinction drawn by Millett J between effects and consequences, treating fiscal matters as consequences, and therefore outside the scope of the principle (see 330–331). His judgment therefore supports the proposition that a mistake as to tax liabilities is not a sufficient basis for setting aside a voluntary disposition by an individual. He mentions the possibility of dealings by trustees being in a different position in this respect.

[105] It is fair to say that, in that case, the effect of the assignments as such was not misunderstood. The mistake was as to the next stage in the process, when the trustees resettled the trust property. That is an indirect effect, but one which it would have been difficult to ignore except on a very formalistic approach. It seems to me that it is clearly in line with *Ellis v Ellis* where, again, the gift to the wife was understood and the mistake was as to the impact on that gift of the marriage settlement. Of course, that settlement already existed, unlike the resettlements in *Anker-Petersen*'s case, but it seems to me that both these cases justify a view of the effects of the disposition as not being limited to direct effects.

[106] Clearly there is a jurisdiction in equity to set aside a voluntary disposition for mistake (as there is also to rectify such an instrument to accord with the donor's true intentions: *Re Butlin's Settlement Trust, Butlin v Butlin* [1976] 2 All ER 483, [1976] Ch 251). The mistake must be as to the effect of the disposition. The discrepancy may arise from a legal defect in the disposition itself (as in *Gibbon v Mitchell*) or from a mistake of fact as to the position under the relevant trusts (as in *Lady Hood of Avalon v Mackinnon*) or as to the effect of the disposition in the hands of the donee (*Ellis v Ellis*). It may arise from a misunderstanding of the nature of the trusts which would affect the property after the disposition, due to a failure on the part of the advisers to explain the position properly (*Anker-Petersen*'s case). According to *Gibbon v Mitchell* the mistake must be as to the effect of the disposition, and a mistake as to its consequences is not sufficient. If that is the correct test, Davis J's comment that the fiscal consequences of the transaction are not relevant is probably right, and a misunderstanding as to those would not justify setting the disposition aside. According to *Ogilvie v Littleboy* the test is more general, namely whether the donor or settlor 'was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him'. That formula might allow fiscal consequences to be taken into account, if they were sufficiently serious. There is no case concerning a disposal by an individual of his or her own property which has turned on the relevance, or otherwise, of tax consequences. In *Gibbon v Mitchell* the mistake as to the legal effect of the deed did mean that it had different tax consequences, but this would not have sufficed for Millett J to have set it aside in the absence of the mistake as to legal effect.

[107] There are cases of rectification where fiscal effects have been central to the case, such as *Burroughes v Abbott* [1922] 1 Ch 86, [1921] All ER Rep 709, and *Jervis v Howle* [1936] 3 All ER 193, [1937] Ch 67, where an agreement that A should pay to B a sum which B would receive without any deduction for tax, expressed, ineffectively, as being payment 'free of tax', were held to be rectifiable so as to use an effective phrase such as 'such a sum as after deduction of the income tax at the standard rate for the time being will leave' the agreed amount. I do not regard those as demonstrating that tax consequences are relevant to dealings by individuals. In those cases the tax point was at the centre of the mistake as to the effect of the agreement. It is not comparable to a disposition where there was no mistake as to its legal effect as a matter of property interests, but it gave rise to unforeseen fiscal liabilities.

[108] The cases about mistake on the part of an individual dealing with his own property have developed along different lines from the cases concerning acts by trustees, no doubt because of the different facts involved. There is an understandable common theme of restricting the circumstances in which an apparently valid disposition can be set aside. Otherwise, however, I do not find it useful to draw analogies between the two types of case. The different circumstances of individual donors and trustees respectively, and the different situations in which they may come to make a disposition which is later challenged, seem to me to be sufficient to explain and to justify the existence of different rules as to the relevance of a mistake as to the effect of the disposition to whether it is vitiated by the mistake. For that reason, as mentioned at [85] above, I reject the argument that, assuming tax consequences to be irrelevant in the case of a challenge to a disposition by an individual of his own property, they are also irrelevant in the case of an exercise of a power by trustees. I do not propose to go further into the question whether it is right that a mistake as to fiscal consequences is always irrelevant to a challenge to a voluntary disposition by an individual. It is unnecessary for my decision in the case, and I have already said quite enough about points which do not strictly arise on the facts of this case. Of course, even if tax consequences are irrelevant, one respect in which Lord Howland did not understand the effect of assigning the non-exempt chattels to the 1987 trustees was not to do with tax, but to do with the terms of the settlement itself, namely the impact of cl 47(c). That point seems to make the case somewhat similar to *Ellis v Ellis*.

[109] Counsel also cited to me one case on the borderline between dealings by individuals and by trustees: *Scroggs v Scroggs* (1755) 1 Amb 272, 27 ER 182 and (1755) 2 Amb 812, 27 ER 513 (a fuller report), decided by Lord Hardwicke LC. There a father had a life interest under a trust, and a power to appoint capital as between his children exercisable with the consent of the trustees. He had two sons, and favoured the younger, on irrational grounds. He wished to appoint the whole capital to his younger son. He obtained the consent of the sole trustee to this appointment on the basis of what were held to be misrepresentations as to the character and conduct of the elder son. The Lord Chancellor held that the appointment must be set aside, the consent of the trustee having been obtained in that improper manner.

[110] Lawrence Collins J said in *AMP (UK) Ltd v Barker* [2001] PLR 77 at 94–95 (para 82) that, if necessary, he would have held that NPI's consent to the rule change was vitiated on the same basis, having cited *Lady Hood of Avalon v Mackinnon* and *Gibbon v Mitchell*.

[111] Mr Taube and Mr Barlow relied on *Scroggs v Scroggs* for the same purpose, to show that Lord Howland's consent to the 2001 appointment should be regarded as vitiated by its having been given on a false basis as to the effect of the intended dealings, resulting from the erroneous and incomplete advice as to tax consequences, erroneous as regards capital gains tax and incomplete by not referring to the tax and other problems that would result from Lord Howland's intended occupation of the premises in which some of the chattels are kept. His consent to the appointment was only given on the basis that he would himself immediately assign his contingent interest to the 1987 trustees. The problems which that gives rise to, because of his occupation of the demised part of the Abbey where some of the chattels are kept, were highly relevant to his decision whether or not to make the assignment, and therefore also to his decision whether or not to agree to the appointment. From his point of view (even if not from the point of the view of the 1971 trustees) the sequence of dispositions had to be viewed and assessed as a whole, not merely stage by stage.

[112] Of course, *Scroggs v Scroggs* was the converse of this case, in one sense, in that there the power was given to a beneficiary, and was not a fiduciary power, whereas the requirement of consent was vested in trustees. Here the power was exercisable by trustees, and a beneficiary (Lord Howland) had a non-fiduciary ability to give or withhold consent, as did the settlor, the Marquess of Tavistock. Apart from the fact that the exercise of the power itself in the present case is subject to duties which did not apply directly to the father's power in *Scroggs v Scroggs*, it does not seem to me that this reversal of roles makes a difference to the question whether the consent was vitiated in the circumstances. *AMP (UK) Ltd v Barker* was similar to this case in this respect, since the trustees had the power and NPI's consent was required as employer.

CONCLUSIONS

[113] It seems to me that it is right to focus on the 2001 appointment, both as regards the trustees' decision to make the appointment and as regards the decision by Lord Howland (and the Marquess of Tavistock) to consent to it being made. Of course, from Lord Howland's point of view, it has to be seen in the context of what he intended to do next, namely to assign his interest to the 1987 trustees. If the appointment is invalid, however, it matters not what the position would have been in respect of the assignment as such, because there would have been nothing to pass under the assignment.

[114] Looking at the appointment, therefore, it seems to me that, on the part of the trustees, it is vitiated by the failure of the trustees to take into account the true consequences of the appointment as regards capital gains tax, which they failed to take account of because they had been wrongly advised. In my judgment the consequences of the appointment as regards tax (in particular inheritance tax and capital gains tax) were matters which the trustees were under a duty to consider, which they did in fact consider, and to which they failed to give proper consideration because they were provided by their advisers with wrong advice on the point. I find that, if they had had the correct advice, they would not have made the 2001 appointment. Applying the *Mettoy* test as I have reformulated it above (at [49]) I find that the effect of the trustees' exercise of their discretion was different from that which they intended, that they failed to take into account considerations which they ought to have taken into account, and that they would not have acted as they did had they known the correct position

as regards the charge to capital gains tax which would result from the appointment. a

[115] I also hold that Lord Howland gave his consent to the appointment on a false basis, because he misunderstood the consequences of the appointment as regards both capital gains tax and inheritance tax. He also misunderstood the position as regards the impact on him of his intended occupation of the private and shared parts of the Abbey, containing a large number of the non-exempt b chattels. In my judgment that was something which he was entitled to take into account, even though it was strictly foreign to the deliberations of the 1971 trustees. He thought that he knew the position, having had the advice to which I have referred above (at [16]), but in fact he did not because the advice was incorrect and incomplete.

[116] This is not a case of deliberate misrepresentation for an improper c purpose, as in *Scroggs v Scroggs*. It is a case of a highly material mistake resulting, on the part of the person whose consent is required, from inadequate information and misunderstanding, as in *AMP (UK) Ltd v Barker*. I need not, and do not, decide anything as regards the relevance or otherwise of tax consequences to dispositions by individuals of their own property, because Lord Howland was not d disposing of his own property when he consented to the making of the 2001 appointment. Directly, he was doing the opposite, since by the appointment the property would become his, rather than cease to be his. But it seems to me that his mistakes as to the tax consequences, both as regards capital gains tax following from the appointment, and as regards inheritance tax because of the reservation of benefit, and his ignorance of the implications of cl 47(c) of e the 1987 settlement, are sufficient to vitiate the giving of Lord Howland's consent, and the same is no doubt true of that of the Marquess of Tavistock.

[117] Accordingly, for those reasons I hold that the 2001 appointment ought to be set aside and declared to be of no effect.

[118] I am most grateful to counsel for their careful, learned and focussed f submissions, with which they sought to guide me through a problematic and developing area of law towards the conclusions that they respectively advocated. I know that this topic has been the subject of a great deal of debate outside court as well as in the decided cases which I have mentioned. This judgment, given upon the last case that I heard as Vice-Chancellor of the County Palatine of Lancaster, will no doubt be grist to the mill of the commentators. I cannot g resolve the outstanding issues as a matter of decision; that is a task which remains to the Court of Appeal in a case raising the points on the facts, as and when an interested party takes such a case to that court.

[119] I will, however, summarise the *Re Hastings-Bass* principle as I see it, as follows: (i) The best formulation of the principle seems to me to be this. Where h trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations j which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account. (ii) I have expanded the formula from that set out at [49] above to include expressly the proposition that the trustees are not acting under an obligation, so as to distinguish cases such as *Kerr v British Leyland (Staff) Trustees Ltd* and *Stannard v Fisons Pension Trust Ltd*. It is only in cases, such as those, where the trustees are

obliged to act, that the 'might' test applies. *Stannard*'s case should not be treated as applying or endorsing the *Re Hastings-Bass* principle, but as being in the same line as cases such as *Kerr*'s case. (iii) It does not seem to me that the principle applies only in cases where there has been a breach of duty by the trustees, or by their advisers or agents, despite what Lightman J said in *Re Barr's Settlement Trusts*. (iv) His conclusion that, if the principle is satisfied, the act in question is voidable rather than void is attractive, but seems to me to require further consideration, in the light of earlier authority. (v) I am in no doubt that, as a general proposition, fiscal consequences are among the matters which may be relevant for the purposes of the principle. (vi) There are limits to what trustees have to consider in such a situation. In the present case the 1971 trustees, when deciding whether or not to make the appointment, did not have to take into account points arising only from the terms of the 1987 settlement and the proposed occupation of the demised part of the Abbey by Lord Howland. (vii) Lord Howland himself was entitled to have regard to those matters, and his mistake as to those consequences is relevant to the setting aside of his consent, but this is not an application of the *Re Hastings-Bass* principle, which only applies to acts of fiduciaries. Rather it is in the same line of authority as *Scroggs v Scroggs* and Lawrence Collins J's obiter indication in *AMP (UK) Ltd v Barker*.

[**120**] Tempting as it might have been, in the interests of the clarification of the law, to produce a situation in which the Court of Appeal would have to consider the scope of the *Re Hastings-Bass* principle, by dismissing this claim, in my judgment the claimants are justified in their assertion that the 2001 appointment should be set aside, because of the mistake of the 1971 trustees and because of the mistaken basis on which consent was given to the 2001 appointment by the Marquess of Tavistock and by Lord Howland, and I will so declare.

Order accordingly.

Victoria Ellis Barrister.

Re Kilnoore Ltd (in liquidation) Unidare plc v Cohen and another

[2005] EWHC 1410 (Ch)

CHANCERY DIVISION

LEWISON J

29, 30 JUNE, 1 JULY 2005

Company – Shares – Voting power – Bare trust – Statutory provision treating person as having control of company if 'entitled to exercise' third or more of voting 'power' – Whether bare trustee of shares entitled to exercise voting power – Insolvency Act 1986, s 435(10)(b).

The claimant was the sole owner of UH Ltd, a company which was the majority shareholder in another company (the company). The claimant, which was the guarantor of the company's obligations under a lease, decided to sell its shareholding in the company, but the prospective purchaser did not have the money to pay for the shares. It was therefore planned that the company would borrow the money itself and then lend it to the purchaser so that it could pay the claimant. The latter stipulated for a debenture over the company's assets to secure its right to an indemnity from the company in respect of any payment that it was called upon to make under the guarantee, and also to secure the deferred consideration for the sale of the shares. When the claimant and the purchaser entered into the share purchase agreement, UH Ltd granted a power of attorney to secure the purchaser's interest in the shares. By its terms, (i) the purchaser was appointed attorney to exercise all rights, powers and privileges attaching to the shares, including power to direct the exercise of any voting rights; (ii) the purchaser was entitled to exercise its powers as attorney in its absolute discretion; (iii) UH Ltd undertook not to exercise any right, power or privilege attaching to the shares without the consent of the purchaser; and (iv) UH Ltd declared that it held the shares on trust for the purchaser. Later that day, the debenture was executed. At that point, UH Ltd remained the registered shareholder, but was a bare trustee of the shares. The company went into administration just under two years later. Relying on the debenture, the claimant put in a claim that it was a secured creditor of the company. The administrators rejected that claim, concluding that the debenture was invalid because the claimant had been connected with the company when the debenture had been created. In subsequent proceedings, the primary issue was whether the claimant had indeed been so connected. That question in turn depended on whether UH Ltd had been associated with the company when the debenture had been created and, ultimately, on whether, at that time, it had had 'control' of the company within the meaning of s 435(10)[a] of the Insolvency Act 1986. Under para (b) of that provision, a person was to be taken as having such control if, inter alia, he was 'entitled' to 'exercise', or 'control' the exercise of, one-third or more of the voting 'power' at any general meeting of the company. The administrators contended that, as registered shareholder, UH Ltd been entitled, so far as the company was

a Section 435(10) is set out at [31], below

concerned, to cast the votes attached to the shares, and that accordingly it had had control of the company when the debenture was created, notwithstanding the power of attorney and the declaration of trust. The court was therefore required to determine whether a bare trustee of shares, such as UH Ltd, could be regarded as being entitled to exercise the voting power attached to those shares.

Held – For the purposes of s 435(10)(b) of the 1986 Act, a bare trustee of shares was not a person entitled to exercise the voting power attached to those shares. The verb 'entitled' governed both the exercise of voting power and the control of voting power. In looking at *control* of voting power, the word 'entitled' had to mean 'entitled as between the registered shareholder and the controller of the voting power'. That being so, why should the word 'entitled', in its application to the *exercise* of voting power, be construed as meaning 'as between the registered shareholder and the company'? Moreover, s 435 referred not to 'voting rights', as did certain provisions of the Companies Act 1985, but to 'voting power'. The word 'rights' naturally directed attention to legal rights. The word 'power', by contrast, gave the court some encouragement to look at the economic reality of the case. A registered shareholder who held his shares on a bare trust under which he was required to cast his vote in accordance with the directions of the beneficial owner might be said to have voting rights, but could not be said in any real sense to have voting power. In the instant case, it was the purchaser's voice which would have been heard if, after the declaration of trust, UH Ltd would have cast the votes attached to the shares registered in its name at a general meeting of the company. Consequently, following the execution of the declaration of trust, UH Ltd was not to be regarded, for the purposes of s 435(10)(b) of the 1986 Act, as being entitled to exercise the voting power of those shares. Since such a person was bound to act in accordance with the directions of the beneficial owner, he did not control their voting power either. Thus UH Ltd had not been associated with the company when the debenture was executed, and accordingly the claimant had not been connected with the company at that time. It followed that the debenture was valid, and the claimant was therefore a secured creditor (see [58]–[60], [80], below).

IRC v J Bibby & Sons Ltd [1945] 1 All ER 667 distinguished.

Notes

For meaning of 'connected persons' and 'associates', see 7(3) *Halsbury's Laws* (4th edn) (2004 reissue) para 5.

For the Insolvency Act, s 435, see 4 *Halsbury's Statutes* (4th edn) (2004 reissue) 435.

Cases referred to in judgment

Berendsen (S) Ltd v IRC [1957] 2 All ER 612, [1958] Ch 1, [1957] 3 WLR 164, CA.

British American Tobacco Co Ltd v IRC, IRC v FA Clark & Son Ltd [1941] 2 All ER 651, [1941] 2 KB 270, CA.

Eaglehill Ltd v J Needham Builders Ltd [1972] 3 All ER 895, [1973] AC 992, [1972] 3 WLR 789, HL.

Gartside v Silkstone and Dodworth Coal and Iron Co (1882) 21 Ch D 762.

IRC v J Bibby & Sons Ltd [1945] 1 All ER 667, HL; *affg* [1944] 1 All ER 548, CA.

IRC v Silverts Ltd [1951] 1 All ER 703, [1951] Ch 521, CA.

Michaels v Harley House (Marylebone) Ltd [1999] 1 All ER 356, [2000] Ch 104, [1999] 3 WLR 229, CA.

Park Air Services plc, Re, Christopher Moran Holdings Ltd v Bairstow [2000] 1 All ER 673, [2000] 2 AC 172, [1999] 2 WLR 395, HL.

Philip Morris Products Inc v Rothmans International Enterprises Ltd [2000] All ER (D) 1007.

Puddephatt v Leith [1916] 1 Ch 200.

Claim

In proceedings brought by the claimant, Unidare plc, against the defendants, Malcolm Cohen and Dermot Power, the liquidators (formerly the administrators) of Kilnoore Ltd, the court was required to determine the validity of a debenture over Kilnoore's assets executed on 31 January 2002 in favour of Unidare. The facts are set out in the judgment.

Raquel Agnello (instructed by *Stephenson Harwood*) for Unidare.

Marcia Shekerdemian (instructed by *Olswang*) for the administrators/liquidators.

Cur adv vult

1 July 2005. The following judgment was delivered.

LEWISON J.

	Para
Introduction	[1]
Background	[4]
The documentation	[8]
The share purchase agreement	[8]
The stock transfer form	[9]
The power of attorney and declaration of trust	[10]
The board meeting	[11]
The debenture	[14]
Effect of the transaction	[21]
The legislation	[24]
Trust	[33]
Unidare	[34]
Associates' associates	[35]

a Control [36]

Liquidation and disclaimer [61]

Paragraph 83 [64]

b The administrator's thinking [68]

Did paragraph 83 apply? [71]

Acting unfairly [76]

c Result [80]

INTRODUCTION

[1] The issue in this case is whether Unidare plc (Unidare) is a secured creditor d of Kilnoore Ltd (the company). The company went into administration on 7 January 2004. Unidare relies on a debenture dated 31 January 2002. The administrators rejected its claim to be a secure creditor on the ground that the debenture was invalid as a result of the operation of s 245 of the Insolvency Act 1986. They did so on the basis of the legal advice they had received, including advice from counsel. The administrators also rejected the value that Unidare e placed on its claim to have suffered loss, as a result of the disclaimer by the company of its obligations as tenant under a lease, in relation to which Unidare was the guarantor.

[2] The administrators say that the debenture is invalid because: (i) Unidare gave no relevant consideration for the debenture and (ii) at the time when it was f created Unidare was connected with the company.

[3] Having rejected the claim, the administrators decided to place the company into liquidation in reliance on para 83 of Sch B1 to the 1986 Act. Unidare says that they were not entitled to do that because: (i) there was an issue whether the debenture was or was not valid, and the administrators should have obtained the court's ruling on that issue; and (ii) there was also a dispute about g the value of Unidare's claim, on which the administrators should (at least) have obtained professional valuation advice, rather than evaluating the claim themselves.

BACKGROUND

h [4] Unidare is a public company listed on the Irish and London Stock Exchanges. Its business currently consists of the distribution of industrial products and the manufacture of domestic water heaters. Before the transactions that give rise to the current dispute it was the sole owner of a company called Unidare Holdings Ltd (Holdings). Holdings was the majority shareholder in the j company, which carried on the business of the distribution of welding products and equipment. It held 80% of the shares. The remaining 20% were held by a Swiss company, which was part of the Air Liquide group. (I have simplified the corporate structure, but that does not matter for present purposes.)

[5] The company's business was carried on from a sales office in London and a warehouse in Glossop. The warehouse was held under a lease originally granted in January 2000 (but surrendered and regranted in March 2000). The

company was the tenant under the lease and the regranted lease; and Unidare was its guarantor under both. In addition to having guaranteed payment of the company's rent, and performance of its obligations under the lease, Unidare had also covenanted to take a new lease in the event of a disclaimer by the tenant. When the lease was granted the reversion belonged to a company within the Unidare group. But it was sold to an outsider in March 2000.

[6] In the middle of 2001 Unidare conducted a strategic review of its operations. It decided to sell its shareholding in the company. The prospective buyer was a consortium led by Mr John Garland, who had been the managing director of Unidare's welding division (which included the company) until 1997. He and the consortium formed a new company called Kozo Ltd (Kozo) as the vehicle for the acquisition. The agreed purchase price was the company's net asset value, less a discount of £400,000. Unidare tried to persuade Air Liquide to take on the liability under the guarantee of the lease in place of Unidare; but without success. The purchasers were either unwilling to act as guarantors, or were unacceptable to the landlord. So Unidare decided that it had no choice but to sell the company and remain liable under the guarantee.

[7] However, Kozo did not have the money to pay for the shares. So the plan was for the company to borrow the money itself, secured on its own assets under a debenture in favour of Lloyds TSB; and then to lend the money to Kozo so that Kozo could pay Unidare. This required going through the procedure (known as the 'whitewash' procedure) described in ss 155–158 of the Companies Act 1985. The sum ultimately payable to Unidare was of the order of £2·3m, of which £1·5m was payable on completion of the transaction; and the remainder in deferred payments. Because Unidare was to remain liable under the guarantee, it also stipulated for a debenture to secure its right to an indemnity from the company in respect of any payment that it was actually called upon to make under the guarantee; and also to secure the deferred consideration for the sale of the shares.

THE DOCUMENTATION

The share purchase agreement

[8] The share purchase agreement was dated 31 January 2002. It was in fact signed the day before, and held in escrow until the following day. The relevant provisions were: (i) Clause 2.1 which contained the agreement by Unidare to procure the sale of and by Kozo to purchase Holdings' shares in the company; (ii) Clause 3.1 which provided for completion of the agreement to take place immediately after execution of the agreement; (iii) Clause 3.2 which described the documents that Unidare was to deliver to Kozo on completion. These included an irrevocable power to attorney appointing Kozo to be Unidare's attorney in respect of the shares, pending stamping and registration of the transfers; (iv) Clause 3.4 which required Kozo to procure the execution of certain documents by the company immediately after a meeting of the board of directors of the company. These documents included the debenture; (v) Clause 3.5 which required Unidare to procure a meeting of the board of directors of the company at which the share transfers would be approved, and Kozo's nominees were appointed to the board in place of the existing board.

The stock transfer form

[9] This was also signed on behalf of Unidare on 30 January but also dated 31 January 2002. It was delivered to the board meeting contemplated by cl 3.5 of the share purchase agreement. However, it was not stamped until August 2002.

The power of attorney and declaration of trust

[10] The power of attorney was also dated 31 January 2002. Although the share purchase agreement contemplated a power of attorney given by Unidare, in fact it was given by Holdings (which was the registered shareholder). It was granted to secure Kozo's interest in the shares. Clause 1 appointed Kozo as Holdings' attorney to exercise all rights powers and privileges attaching to the shares, including power to direct the exercise of any voting rights. It was entitled to exercise its powers as attorney in its absolute discretion. By cl 2 Holdings undertook not to exercise any right, power or privilege attaching to the shares without Kozo's consent. By cl 6 Holdings declared that it held the shares on trust for Kozo. The trust thus declared was, in my judgment, a bare trust.

THE BOARD MEETING

[11] The minutes of the board meeting are dated 30 January 2002. However, Mr Egan, the solicitor handling the transaction, says that this was a mistake; and that the board meeting in fact took place on the following day, 31 January 2002. At the meeting: (i) the directors of the company resigned and Kozo's nominees were appointed as directors. The meeting then continued with the new directors; (ii) the funding documents (including the debenture in favour of Unidare) were produced; (iii) the board considered the requirements of the whitewash procedure.

[12] At this point the meeting adjourned for the necessary statutory declarations to be made as required by the whitewash procedure.

[13] When the meeting reconvened, it adjourned again to allow the members of the company to approve special resolutions for the entry into the various funding documents. The special resolution was signed by Kozo on behalf of Holdings, in reliance on the power of attorney. The meeting then reconvened yet again and approved the funding documents, which included the debenture. Having resolved to enter into these documents, the share transfers were then produced to the meeting and approved, subject to stamping.

The debenture

[14] The debenture is also dated 31 January 2002. Recital 3 states: 'The execution and delivery of this Deed is a condition precedent to Completion of the Share Purchase Agreement.'

[15] The operative part of the debenture states that it is made: 'in consideration of the premises and of Unidare proceeding to Completion of the Share Sale Agreement.'

[16] Clause 1 of the debenture expresses the consideration in the same way. Clause 1 continues with covenants by the company that Kozo would pay the consideration due under the share sale agreement.

[17] Clause 2 recites that: 'In consideration of Unidare having entered into the Lease' the company would perform and observe the tenant's covenants; and would indemnify Unidare against any failure to do so.

[18] Mr Egan says that the debenture was one of the last two documents to be executed; and that it was not executed until after the whitewash procedure had been completed. Mr Egan's evidence was not challenged.

[19] Nevertheless, there was some debate about the precise order of events on 31 January 2002; and the precise order in which documents were signed. Ms Shekerdemien, who appeared for the liquidators, relied on linguistic clues within the documents themselves. However, the minutes of the meeting are themselves evidence that the documents were signed in the order in which they were intended to be signed. Moreover, it seems to me that where parties to a transaction involving the execution of multiple documents intend them to be executed in a particular order which is necessary to give effect to the intended transaction, the court should be ready to presume that they were executed in the correct order to give effect to the transaction (compare *Gartside v Silkstone and Dodworth Coal and Iron Co* (1882) 21 Ch D 762; *Eaglehill Ltd v J Needham Builders Ltd* [1972] 3 All ER 895 at 905, [1973] AC 992 at 1011).

[20] I find, therefore, that the power of attorney (containing the declaration of trust) was executed before the debenture. There was also a faint suggestion (based on the company's annual return) that Kozo was registered as the shareholder on 31 January 2002. However, it is plain that the stock transfer was not stamped until August 2002; that the board's resolution to approve the share transfer was conditional on stamping; and that if Kozo had been registered on 31 January 2002 it would have conflicted with the resolution. Mr Egan's evidence was that the share transfer was not registered until after the special resolutions were signed; and it is unlikely that it was registered between the signing of the resolutions and the execution of the debenture. Moreover, the share certificate recording Holdings' shareholding was still in Holdings' possession a few days later. I find, despite the company's annual return, that Holdings remained the registered shareholder until after execution of the debenture.

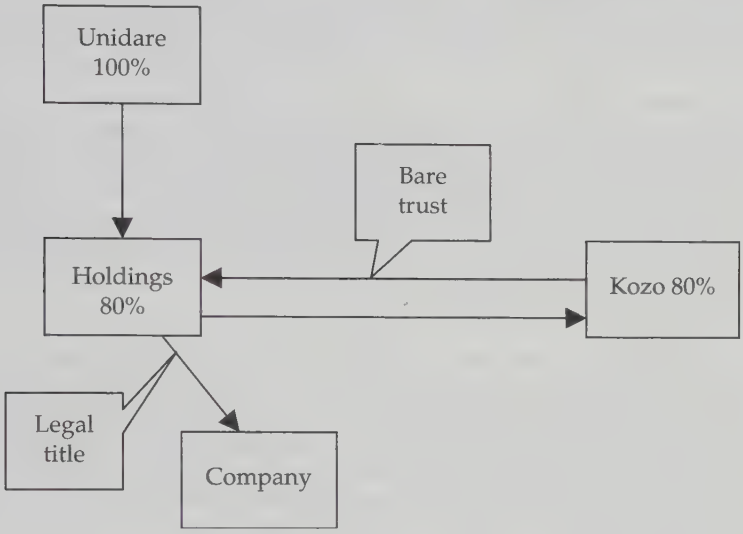
EFFECT OF THE TRANSACTION

[21] Thus although Holdings remained the registered shareholder as regards 80% of the shares in the company, in my judgment it held them on a bare trust for Kozo; and Kozo was entitled to act in Holdings' name in its absolute discretion. Holdings had also agreed not to exercise any powers in relation to the shares without Kozo's consent.

[22] Before the transactions the corporate structure looked like this:



[23] After the transactions the corporate structure looked like this:



THE LEGISLATION

[24] Section 245(2) of the 1986 Act provides:

> 'Subject as follows, a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of—(a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge, (b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after the creation of the charge, of any debt of the company, ...'

[25] Section 245(3) provides:

> 'Subject to the next subsection, the time at which a floating charge is created by a company is a relevant time for the purposes of this section if the charge is created—(a) in the case of a charge which is created in favour of a person who is connected with the company, at a time in the period of 2 years ending with the onset of insolvency, (b) in the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of insolvency, ...'

[26] It is common ground that the debenture in this case was created more than 12 months before the onset of insolvency. Thus the definitions of 'a person who is connected with the company' are critical.

[27] Section 249 says:

> 'For the purposes of any provision in this Group of Parts, a person is connected with a company if—(a) he is a director or shadow director of the company or an associate of such a director or shadow director, or (b) he is an

associate of the company; and "associate" has the meaning given by section 435 in Part XVIII of this Act.' a

[28] Who is an associate is governed by s 435. The particular subsections on which argument has concentrated are sub-ss (5), (6), (7) and (10). Subsection (5) provides:

'A person in his capacity as trustee of a trust other than—(a) a trust arising under any of the second Group of Parts or the Bankruptcy (Scotland) Act 1985, or (b) a pension scheme or an employees' share scheme (within the meaning of the Companies Act), is an associate of another person if the beneficiaries of the trust include, or the terms of the trust confer a power that may be exercised for the benefit of, that other person or an associate of that other person.' b c

[29] Subsection (6) provides:

'A company is an associate of another company—(a) if the same person has control of both, or a person has control of one and persons who are his associates, or he and persons who are his associates, have control of the other, or (b) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.' d

[30] Subsection (7) provides: e

'A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it.'

[31] Subsection (10) provides: f

'For the purposes of this section a person is to be taken as having control of a company if—(a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or (b) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or of another company which has control of it; and where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company.' g

[32] It follows from these definitions that the debenture will be invalid (except to the extent provided for in s 245(2)) if Unidare was 'connected with' the company at the time when the debenture was created. This, in turn, depends on whether Unidare had 'control' of the company at that time. That, therefore, is the critical issue. h

TRUST

[33] Following the execution of the power of attorney, Holdings held its shares in the company on trust for Kozo. Consequently, applying s 435(5), Holdings was associated with Kozo. j

UNIDARE

[34] Unidare, as owner of the whole of the share capital in Holdings, was entitled to exercise all the voting rights at a general meeting of Holdings. It is not

a question whether Unidare could direct Holdings how to exercise its own voting rights in relation to the company. In my judgment the general meeting of which the subsection speaks is a hypothetical general meeting, and is simply part of a formula for determining who has control of a company. Since Unidare controlled Holdings, it was associated with Holdings.

ASSOCIATES' ASSOCIATES

[35] What has been established thus far is that Unidare was an associate of Holdings; and Holdings was an associate of Kozo. But s 435 does not contain any general provision enabling the aggregation of different associates. Thus if A is associated with B, and B is associated with C, it does not follow that A is also associated with C. This can only be achieved by applying the somewhat convoluted provisions of sub-s (6). It is common ground that they do not apply to this case; so that, mercifully, I do not need to attempt to expound them.

CONTROL

[36] The first argument that the administrators advance is that the directors of the company were 'accustomed to act' on the directions of Unidare. In so far as the allegation is directed at the action of the new board in approving the debenture and resolving that the company should enter into it, I do not see how the completion of a single transaction on a single day (which was itself the very day on which the board were appointed) can amount to being 'accustomed' to act. Inherent in the notion of being accustomed to act on someone's instruction is conduct over a period of time. In so far as the allegations directed at the old board, there is no evidence that they acted on anyone's instructions or at anyone's direction. The mere fact that the old board shared directors with other companies of which Unidare was the ultimate parent does not lead to the conclusion that they failed to exercise their powers as directors of the company in good faith, in the company's interests and as the result of independent decisions made by them.

[37] The real focus of the attack, however, concentrated on the position of Holdings as shareholder. The rival arguments, in a nutshell, are these. Unidare submits that as a result of the agreement for sale and purchase of the shares, and the declaration of trust, Holdings was no more than a bare trustee of the shares for Kozo. Moreover, it had agreed not to exercise any of the powers attached to the shares (including voting rights) without Kozo's consent. If and in so far as voting was in issue, Holdings had to act in accordance with Kozo's wishes. It cannot, therefore, be said that, in any meaningful sense, Holdings was entitled to exercise or control the exercise of any voting power in the company. The liquidators submit that the share sale agreement and the power of attorney are irrelevant. Holdings remained the registered shareholder. So far as the company was concerned, it was entitled to cast the votes attached to the shares. The company's register of shareholders cannot record the existence of any trust of the shares; so that legal title to the shares is what counts. If this means that two (or more) people satisfy the definition of control in relation to the same block of shares (the legal owner and the beneficial owner or owners) that serves the policy of the 1986 Act. If Parliament wished to exclude nominee and fiduciary shareholders from the definition of those having 'control' of a company, a means was readily to hand, as is shown by the analogous provisions of s 736A(5) and (6) of the 1985 Act.

[38] Ms Agnello, who appeared for Unidare, submitted that the mischief against which s 435(10) was directed was that a person could so arrange a company's affairs as to benefit himself in preference to the other creditors of the company. Thus s 435(10) should be construed as applying to the person who 'pulled the company's strings'. She pointed to the words of s 435(10)(a) with its clear reference to the concept of 'shadow directorship'; and also to the reference in s 435(10)(b) to a person entitled to 'control' the exercise of voting power. She pointed out that s 435(10) eschews reference to the legal ownership or title to shares; and said that it did so deliberately. The aim of the subsection was to look through the legal niceties and get at the reality of power and control.

[39] Ms Agnello took me to the decision of the Court of Appeal in *Michaels v Harley House (Marylebone) Ltd* [1999] 1 All ER 356, [2000] Ch 104. That was a case in which the issue was whether a company which was a vendor of shares under an uncompleted contract for the sale of shares was a member of the same group of companies as the company whose shares were being sold. I did not find that decision of assistance for two reasons. First, the court was concerned with the detailed construction of the provisions of s 736A of the 1985 Act. Unlike s 435 of the 1986 Act, s 736A makes express provision for how to treat shares held in a fiduciary capacity and shares held by A as nominee for B. Second, the court's analysis was directed at the position of a vendor under an uncompleted contract for sale. In the present case, not only is there a contract; there is also an express declaration of trust.

[40] Ms Agnello also relied on the decision of Evans-Lombe J in *Philip Morris Products Inc v Rothmans International Enterprises Ltd* [2000] All ER (D) 1007. The issue in that case was whether there was 'a change in control' of one of two corporate partners within the meaning of the partnership agreement. There was an elaborate definition of 'change of control' which incorporated parts of the City Code of Takeovers and Mergers. The judge said:

> 'It seems to me that these three cases in the Court of Appeal point to the conclusion that a party (A) may exercise control over the voting rights appurtenant to shares not only in the circumstances where the party (B) on the register can be demonstrated to be a trustee or bare nominee of the entire interest in the shares for A. Such control can exist in a situation where B is not shown to be such nominee or trustee but it is demonstrated that he has been shorn of any economic interest in the shares which has passed to A. In those circumstances a court would intervene to prevent B from exercising any powers, such as voting, which spring from his bare legal ownership of the shares, which exercise was inconsistent with or injured the owner of the economic interests in the shares. A will, in fact, be in a position to control B's voting rights in respect of the shares. Each case, however, will turn on its own facts. It will be a question of assessing the extent of the interest retained by the registered holder of the shares.'

[41] Again, I did not find this case of assistance. I do not doubt that if B holds shares on a bare trust for A, A can be regarded as being entitled to 'control' the exercise of voting rights. Similarly, if B has passed all his economic interest to A, A can also be regarded as being able to control the voting rights. So, in this example A would fall within the definition in s 435(10)(b). But that is not the question. The question is not whether A is *included* in the definition. Plainly he is. The question is whether B (the registered shareholder) is *excluded* from it. The

answer to that question is not dependent on who is entitled to *control* the exercise of voting rights. It depends on who is entitled to *exercise* voting rights.

[42] Ms Shekerdemian submitted that whether a person was entitled to exercise voting rights depended on the terms of the company's articles of association and the register of members. The company was not affected by any contractual restrictions affecting a member's right to vote; and was not affected by any trust of the shares. As far as the company was concerned, the register (in some cases modified by the company's articles of association) determined who was entitled to exercise voting rights; and the company was not entitled to look behind the register.

[43] Ms Shekerdemian drew my attention to a number of cases in which the court considered different forms of statutory definition. In many of these cases (including *Michaels v Harley House (Marylebone) Ltd* [1999] 1 All ER 356, [2000] Ch 104) the legislation dealt expressly with the position of one who held shares in a fiduciary capacity. She submitted, therefore, that where Parliament intended to make an exception for registered shareholders who held shares in a fiduciary capacity, it knew how to do so; and often did just that. However, s 435 of the 1986 Act did not contain any such provision. Parliament must therefore be taken to have intended to apply the law as applicable to statutes without any such special provision; and in accordance with the ordinary principles of company law.

[44] In this connection, Ms Shekerdemian relied in particular on *IRC v J Bibby & Sons Ltd* [1945] 1 All ER 667. The issue in that case was whether shares in a company held by directors as trustees could be aggregated with shares held by them beneficially for the purpose of determining whether the directors had 'a controlling interest' in the company. Lord Russell of Killowen said (at 669):

> 'When the section speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words "controlling interest" is not the extent to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding up, but the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. In other words, the test which is to exclude a company's business from subsect (9)(*a*) and include it in (9)(*b*), is the voting power of its directors, not their beneficial interest in the company. For the purpose of such a test the fact that a vote-carrying share is vested in a director as trustee seems immaterial. The power is there, and though it be exercised in breach of trust or even in breach of an injunction, the vote would be validly cast *vis-a-vis* the company, and the resolution until rescinded would be binding on it.'

[45] Lords Porter and Simonds agreed with Lord Russell.

[46] Lord Macmillan said (at 670–671):

> 'The question whether the directors of the respondent company have the control of it by their voting power as shareholders must in my view be determined by the memorandum and articles of the company and by the register of shareholders. By the constitution of the company, as I have already mentioned, the voting power is vested in the ordinary shareholders and the register shows that the directors hold a majority of these shares ... So far as the company is concerned the relation between such of its shareholders as happen to be trustees and their beneficiaries is *res inter alios*.

It may be that a trustee shareholder may, as between himself and his *cestuis que trust*, be under a duty to exercise his vote in a particular manner, or a shareholder may be bound under contract to vote in a particular way (cf *Puddephatt v Leith* ([1916] 1 Ch 200)). But with such restrictions the company has nothing to do. It must accept and act upon the shareholder's vote notwithstanding that it may be given contrary to some duty which he owes to outsiders. The remedy for such breach lies elsewhere.'

[47] Lord Porter said (at 672):

'The phrase is a composite one and the combination means no more than that the directors must have an interest such as enables them to control the activities of the company: it does not require some personal financial interest on their part which control enables them to exploit. It may be that trustees can ultimately be brought to book for activities which would not lay a beneficial owner open to attack or complaint. Nevertheless for good or ill the trustee like the beneficial owner controls, though if his powers be wrongly exercised they may in some way or other be capable of being challenged.'

[48] Lord Simonds said (at 672–673):

'What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry a resolution at a general meeting of the company. Can the directors of the respondent company by the exercise of their voting rights carry such a resolution? Yes: for they are the registered holders of more than half the ordinary shares of the company. Therefore they have a controlling interest in the company ... Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognised in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be.'

[49] When the same case was in the Court of Appeal ([1944] 1 All ER 548) Lord Greene MR had delivered the judgment of the court. He also held that a registered shareholder who held shares as a trustee was entitled to vote the shares. But he made an (obiter) exception in the case of a bare trustee. As regards a bare trustee he said (at 550):

'The case of a bare trustee is not, of course, before us. But it seems to us that, in such a case, the control would naturally be said to be in the beneficial owner and not in the trustee; so that, if the shares carried more than half the voting power and the beneficial owner was director, he would properly be described as having a controlling interest in the company.'

[50] However, in the House of Lords, Lords Russell, Wright and Porter reserved their opinion on the question of a bare trustee; and Lord Simonds was openly sceptical about the correctness of the observations of the Court of Appeal on that point.

[51] In *IRC v Silverts Ltd* [1951] 1 All ER 703, [1951] Ch 521 shares in a company were held by a bank as custodian trustee of a trust. Two of the directors of the

company were the managing trustees of the trust. The Court of Appeal held that there was a difference (although a fine one) between a bare trustee and a custodian trustee, because the latter (unlike the former) was not obliged to act on the directions of another if to do so would amount to a breach of trust. Lord Evershed MR, who gave the judgment of the court, said ([1951] 1 All ER 703 at 708, [1951] Ch 521 at 530–531):

> '... where the registered shareholder is a bare trustee in the sense of being a mere name or "dummy" for the true owner, we should feel strongly inclined to answer the question reserved by House in the *Bibby* case in the same way as Lord Greene, M.R. In the present case, however—perhaps fortunately—the answer would not, on an appeal to common sense, appear so clearly ... In our judgment, the *ratio decidendi* in *Bibby's* case is that, in accordance with well-established principles relating to limited companies, a question of the rights of members *vis-a-vis* the corporation (such as that of voting control under its regulations) is to be determined by reference, and by reference only, to the share register beyond which it is not (save possibly in the case of mere "nominee" shareholders) permissible to look; and not that, in the case of a trust, the powers and discretions of exercising votes in regard to shares must be treated as reposing in the trustees without regard to the terms of the trust or the right of beneficiaries to direct such exercise. Thus, if (because the shares were registered in the names of "nominees" or "bare trustees" or otherwise) it were in any circumstances permissible to look beyond the share register, we do not think the speeches in the *Bibby* case would prevent inquiry being made whether those individuals to whom the nominee shareholders were answerable were themselves obliged by contract or otherwise to give directions in accordance with instructions received from some third party.'

[52] Clearly the Court of Appeal in *IRC v Silverts Ltd* did not regard themselves as bound by the decision of the House of Lords in *IRC v J Bibby & Sons Ltd* [1945] 1 All ER 667 to hold that a bare trustee should be treated in the same way as other trustees.

[53] In *S Berendsen Ltd v IRC* [1957] 2 All ER 612, [1958] Ch 1, the registered shareholder was itself a company. The Court of Appeal held that in such circumstances, it was permissible to 'ask, since the company cannot speak, whose is the voice that you hear'. In the course of his judgment Lord Evershed MR considered the earlier case of *British American Tobacco Co Ltd v IRC, IRC v FA Clark & Son Ltd* [1941] 2 All ER 651, [1941] 2 KB 270. In that case three trustees held shares in company A. They agreed to sell their shares to company B. The directors of company A held all the shares in company B. The question was whether company A was controlled by its directors. The Court of Appeal held that since the registered shareholders in company A held their shares on a bare trust for company B, the trustees' shares in company A must be treated as being under the control of the shareholders of company B, ie the directors of company A. The explanation of that case gives some force, in my judgment, to the argument that a bare trust is not subject to the general rule laid down in *IRC v J Bibby & Sons Ltd* in the House of Lords.

[54] What I derive from these cases is that: (i) in the vast majority of cases, whether a person is entitled to exercise voting rights is to be determined simply by looking at the register of shareholders and the company's articles of association; (ii) in such cases, it is not permissible to look outside those materials

and to inquire whether there are contractual or fiduciary restraints, as between the registered shareholder and others, which inhibit him in exercising those rights; (iii) in general there is no warrant for distinguishing between different degrees of trusteeship; (iv) the Court of Appeal has expressed the view that where the question is whether a person has a controlling interest in a company an exception may be made in the case of a bare trustee (or nominee or 'dummy'). In such a case control resides in the beneficial owner to the exclusion of the trustee; (v) in the case of a shareholder which is itself a corporation, in determining how its voting rights as shareholders are exercised it is permissible to look outside the register of shareholders and inquire whose voice is heard when its votes are cast.

[55] Since I have held that, following execution of the power of attorney, Holdings held its shares in the company on a bare trust for Kozo, the question left open by the House of Lords must be decided.

[56] There is very little guidance to be gained from the words of the section itself. It can be said that Parliament did consider the question of trusts; because it expressly legislated for trustees in s 435(5). Yet it did not carry that through into s 435(10). That is some indication that s 435(10) is intended to refer to the legal right, as against the company, to exercise voting powers. Ms Agnello naturally concentrated on the reference to 'control' in s 435(10)(b). The question of control (as opposed to exercise) of voting rights must stem from a relationship between the registered shareholder and someone who is not the company. In order to determine whether such a person has control over voting rights, it is necessary to look outside the register of members and the articles of association of the company. Likewise, if the question is whether someone is accustomed to act on the instructions or directions of another, it is necessary to examine facts which go beyond those materials, and which may, indeed, have left no paper trail. So the 'clean cut' to which Lord Simonds referred in *IRC v J Bibby & Sons Ltd* is not present. To my mind this greatly weakens the force of the argument based on *IRC v J Bibby & Sons Ltd* in the House of Lords.

[57] Ms Shekerdemian also referred to the policy underlying the enactment of s 435 and stressed its importance in the scheme of the insolvency regime. She showed me extracts from the Cork Report on *Insolvency Law and Practice* (Cmnd 8558) which underlined the importance of making special provision for connected persons. However, the members of the Cork Committee took the view (in relation to companies) that ownership of more than half the equity share capital would be required before a person should be regarded as connected with a company. This proportion was not translated into s 435 as enacted. Ms Shekerdemian also postulated hypothetical circumstances (related to the provisions in the 1986 Act about preferences) in which she said that it would be absurd if a shareholder in a company were not regarded as connected with the company even though he held his shares on a bare trust. My impression was that it must have taken a good deal of ingenuity to work out Ms Shekerdemian's hypothetical example, and that it was not one that is likely to be encountered in anything but an exceptional case. In most cases, the conclusion that a person is connected with a company has the effect of extending (retrospectively from the onset of insolvency) the period during which transactions are liable to be set aside or avoided. This element of retrospective operation does not point to a need to construe the definition as widely as possible. Moreover, although I see the force of the argument that whereas s 736A of the 1985 Act deals expressly with shares held by nominees, and s 435 of the 1986 Act does not, I cannot discern any cogent policy reason for concluding that Parliament must have intended that bare

trustees would be treated as connected with companies in which they are registered shareholders. Ms Shekerdemian accepts that if the share transfer had been registered in the company's statutory books before execution of the debenture then her argument that Unidare was connected with the company would have been unsustainable. It is clear to me that, by the time that the debenture was executed, Unidare and Holdings had done everything in their power to divest Holdings of its ownership of the shares in the company. The share transfer had been approved by the board of the company. The formal process of registration of Kozo as the new shareholder was not within the power of Unidare or Holdings. If the happenstance that registration did not take place before the grant of the debenture was to lead to the conclusion that, for that reason alone, Unidare was connected with the company when the debenture was granted, that would seem to me to be a triumph of formalism.

[58] The phrase I have to construe in s 435(10)(b) is a typically compressed piece of draftsmanship. The verb 'entitled' governs both the exercise of voting power and the control of voting power. In looking at control of voting power, the word 'entitled' must, in my judgment, mean 'entitled as between the registered shareholder and the controller of the voting power'. Why, then, should the word 'entitled' in its application to the exercise of voting power be construed as meaning 'as between the registered shareholder and the company'? There is a further slight clue to the meaning of s 435. Unlike s 736 and s 736A of the 1985 Act, which refer to 'voting rights', s 435 refers to 'voting power'. The word 'rights' naturally directs attention to legal rights, especially since s 736A(2) goes on to explain that voting rights means 'rights conferred on shareholders in respect of their shares'. The word 'power', by contrast, gives me some encouragement to look to the economic reality of the case. A registered shareholder who holds his shares on a bare trust under which he is required to cast his vote in accordance with the directions of the beneficial owner might be said to have voting rights, but I do not consider that in any real sense he can be said to have voting power. The Court of Appeal, in two cases I have mentioned (*Bibby*'s and *IRC v Silverts Ltd* [1951] 1 All ER 703, [1951] Ch 521), were clearly impressed by the appeal to the common sense and economic reality of the case of a bare trustee. I do not consider that the wording of s 435 compels me to take a different view. In addition Holdings was a corporate shareholder. If I ask whose voice would be heard if, after the declaration of trust, Holdings were to cast the votes attached to the shares registered in its name at a general meeting of the company, the only answer, in my judgment, is Kozo's.

[59] I hold, therefore, that following the execution of the declaration of trust Holdings is not to be regarded, for the purposes of s 435(10)(b) of the 1986 Act, as being entitled to exercise the voting power of those shares. Since such a person is bound to act in accordance with the directions of the beneficial owner, he does not control their voting power either. Thus Holdings was not associated with the company when the debenture was executed.

[60] It follows, therefore, that at the time the debenture was executed, Unidare was not connected with the company either; and that, consequently, the debenture is valid. Unidare is, therefore, a secured creditor.

LIQUIDATION AND DISCLAIMER

[61] As I have said, on 9 February 2005 the administrators rejected Unidare's claim that its debenture was valid. In the light of my decision they were wrong to have done so. On 10 February Unidare notified the administrators that Unidare

had a claim (said to have been calculated in accordance with the methodology expounded in *Re Park Air Services plc, Christopher Moran Holdings Ltd v Bairstow* [2000] 1 All ER 673, [2000] 2 AC 172) 'in excess of £2 million'. Unidare's proof of debt claims a contingent debt of £2,111,250. The administrators rejected this debt. Mr Cohen, one of the joint administrators, says that he has been advised that, based on certain assumptions, Unidare's claim cannot exceed £1·48m (which was the minimum amount available for distribution to creditors).

[62] On 11 February 2005 the administrators gave notice under para 83 of Sch B1 to the 1986 Act. This had the effect, once the notice was registered by the registrar of companies, of converting the administration into a creditors' voluntary winding up.

[63] On 23 February 2005 the liquidators disclaimed the lease. In consequence the landlord called upon Unidare to take up a new lease, in accordance with its covenant to do so. The new lease was granted to Unidare on 5 May 2005.

PARAGRAPH 83

[64] Paragraph 83 of Sch B1 to the 1986 Act applies where—

> 'the administrator of a company thinks—(a) that the total amount which each secured creditor of the company is likely to receive has been paid to him or set aside for him, and (b) that a distribution will be made to unsecured creditors of the company (if there are any).'

[65] Ms Agnello accepts that the only way in which the administrators' decision can be challenged is under para 74 of Sch B1, which provides:

> '(1) A creditor or member of a company in administration may apply to the court claiming that—(a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or (b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).'

[66] The court has wide powers on the hearing of such an application. It is, in my judgment, clear that there must be a causative link between the action that is alleged to be unfair and the harm to the creditor's interests that is alleged.

[67] In addition an administrator may be liable for misfeasance on an application under para 75 of Sch B1.

THE ADMINISTRATOR'S THINKING

[68] Mr Cohen explained that when he decided to invoke the procedure under para 83, he had rejected Unidare's claim to have a valid security. He therefore thought that Unidare's claim was an unsecured claim. Unsecured claims topped £5m; and he had £1·48m in hand. He therefore thought that a distribution would be made to unsecured creditors. The only other potentially secured creditor (the bank) had been repaid in full. However, he thought that any final adjudication of Unidare's claim to a valid security would be made by the liquidators, once the company had gone into liquidation. He also thought that Unidare's claim was greatly exaggerated. On the basis of his own experience he thought that the property could be re-let within two years. He had advice from his retained agents that the rent payable was the market rent; and he used his own experience to assess a reasonable discount rate for early payment. On that basis, he concluded that Unidare's claim was likely to be in the region of £250,000.

[69] Although the various reports to creditors consistently said that he was unable to quantify the dividend 'if any' that would be paid to unsecured creditors, this merely reflected his caution as a prudent and experienced licensed insolvency practitioner, who did not want to raise false hopes among the creditors.

[70] I accept Mr Cohen's evidence about his thought process.

DID PARAGRAPH 83 APPLY?

[71] Reading para 83 literally, Mr Cohen did think that the only secured creditor (the bank) had been repaid; and that there would be a dividend payable to creditors. Thus, on the face of it, para 83 applied. Ms Agnello submitted that the administrator's conclusion must be based on reasonable grounds; or at least not be one which no reasonable administrator could have reached. I do not consider that para 83 should be interpreted in this way. I accept that the process of thinking involves a rational thought process, and in that sense must be reasonable; but I do not accept that what the administrator thinks is subject to any form of test by reference to an objective standard.

[72] Assuming that my conclusion on the validity of the debenture is right, Mr Cohen was wrong to reject Unidare's claim to be secured. However, in rejecting the validity of the debenture, Mr Cohen relied on the legal advice he was given. Ms Shekerdemian's excellent argument demonstrates that the legal advice that Mr Cohen received (even though I disagree with it) was not unreasonable. So in my judgment it can fairly be concluded that Mr Cohen formed his opinion on that point on reasonable grounds.

[73] Ms Agnello submitted that in his assessment of the quantum of Unidare's claim, Mr Cohen ought not to have relied on his own experience in concluding that Unidare's claim was exaggerated. He ought to have consulted an expert valuer in forming a view on how long it would take to re-let the property, and whether the rent was a market rent. I accept Mr Cohen's evidence that his own assessment (with the aid of his retained agents) of Unidare's claim was that it was worth in the region of £250,000; and that he had £1·48m in hand. In those circumstances I do not consider that I can castigate as unreasonable the thought process which said that even if he was wrong in his assessment of the quantum of Unidare's claim there was still a very comfortable margin of error before the prospect of a dividend to unsecured creditors was jeopardised. It is also worth noting that Unidare does not appear to have quantified its own claim with the aid of any expert valuer.

[74] Accordingly, even if (as Ms Agnello submitted) the administrator's thinking must be based on reasonable grounds, I hold that it was.

[75] Accordingly para 83 applied, and the company was validly put into liquidation.

ACTING UNFAIRLY

[76] Unidare's complaint is that the administrator rejected its claim to be a secured creditor, without submitting the dispute to the adjudication of the court. Thus Unidare was deprived of an opportunity to vote at creditors' meetings. There is no doubt that the administrator had power to apply to the court for directions. But a power is not a duty; and a failure to exercise a power is not necessarily unfair. Mr Cohen's view was that the validity of the debenture would be determined in the winding up; and that even if it was valid, there was enough money in hand to satisfy whatever was the proper amount of Unidare's claim. Moreover, if an administrator rejects a claim, the aggrieved creditor is entitled to

appeal to the court either under r 2.39(2) or r 2.78(1) of the Insolvency Rules 1986, SI 1986/1925. So an aggrieved creditor is not without a remedy. a

[77] I am not persuaded that this decision was unfair, or that it has adversely harmed Unidare's interests. Unidare retains its security, and is entitled to recoup itself out of the moneys held by the liquidators. The issue of the validity of the debenture would have to be decided one way or another, and I cannot see that it has been any more expensive or more difficult to decide it in the context of a liquidation than it would have been if it had been decided in the context of an administration. b

[78] The question whether any conduct of the administrators has harmed Unidare can, I think, be tested as follows. Assume first that Unidare was a secured creditor (as I have held it is). Mr Cohen was therefore wrong in rejecting Unidare's claim to be a secure creditor. Accordingly, Unidare was not entitled to vote at any meeting, except in respect of such part of the claim as was unsecured. So no harm to Unidare's interests has been caused, because as things have turned out, it was not entitled to vote anyway. Now assume the alternative situation: that Unidare was an unsecured creditor. On this hypothesis, Mr Cohen was right in rejecting Unidare's claim to be a secured creditor. So Unidare was entitled to vote at the meeting. Why did it not vote? The reason it did not was because it wished to maintain its claim to security. So the cause of Unidare's failure to vote was not anything that Mr Cohen did, but Unidare's disagreement with his decision. c d

[79] Ms Shekerdemian also argued that if it was doubtful whether Unidare was secured or unsecured, then the administrator could have counted its vote under r 2.39(3) of the 1986 rules. This rule allows the chairman of a creditors' meeting to mark a vote as 'objected to' if he is unsure whether to admit or reject a claim, but nevertheless allow it to be cast. I need not express a view about this. e

RESULT

[80] I will declare that the debenture is not avoided by s 245; and I will dismiss the application under para 74. f

Order accordingly.

Neneh Munu Barrister.

R (on the application of W) v Metropolitan Police Commissioner and another (Secretary of State for the Home Department, interested party)

[2005] EWHC 1586 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
BROOKE LJ AND MITTING J
26, 27 MAY, 20 JULY 2005

Police – Powers – Anti-social behaviour – Authorised dispersal – Power to remove person under 16 from dispersal area to his place of residence – Whether power to remove coercive – Anti-social Behaviour Act 2003, s 30(6).

Section 30(6)[a] of the Anti-social Behaviour Act 2003, which provides that if between the hours of 9 pm and 6 am, a constable in uniform finds a person in any public place in the relevant locality who he has reasonable grounds for believing (a) is under the age of 16, and (b) is not under the effective control of a parent or a responsible person aged 18 or over, he may remove the person to the person's place of residence unless he has reasonable grounds for believing that the person would, if removed to that place, be likely to suffer significant harm, does not confer on a constable in uniform or a community support officer any power to use force in removing a person to his place of residence under the powers conferred by that subsection. The power to remove is permissive, not coercive. The long-standing and clear presumption that Parliament does not intend to authorise tortious conduct except by express provision applies. The subsection merely confers an express power to use police resources to take such a young person home if he is willing to be taken home (see [32]–[35], below).

Notes

For anti-social behaviour in a public place, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 153B.

For the Anti-social Behaviour Act 2003, s 30, see 12 *Halsbury's Statutes* (Current Statutes Service) 125.

Cases referred to in judgment

B (a minor) v DPP [2000] 1 All ER 833, [2000] 2 AC 428, [2000] 2 WLR 452, HL.
Morris v Beardmore [1980] 2 All ER 753, [1981] AC 446, [1980] 3 WLR 283, HL.
R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2002] UKHL 21, [2002] 3 All ER 1, [2003] 1 AC 563, [2002] 2 WLR 1299.

Application for judicial review

W, a person under the age of 16, applied for judicial review of the authorisation given to the police by the Metropolitan Police Commissioner (the first defendant) with the consent of Richmond-upon-Thames London Borough Council (the

a Section 30, so far as material, is set out at [2], below

second defendant) to remove persons under the age of 16 from dispersal areas in Richmond town centre and Ashburnham Road, Ham between the second week of June 2004 and 29 October 2004 and between 4 December 2004 and 4 January 2005 respectively. The Secretary of State for the Home Department appeared as an interested party. The facts are set out in the judgment of the court.

Javan Herberg and *Victoria Windle* (instructed by *Liberty*) for the claimant.
Sam Grodzinski (instructed by *Directorate of Legal Services, Metropolitan Police* and *Legal Services, Richmond LBC*) for the defendants.
Timothy Otty (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

20 July 2005. The following judgment of the court was delivered.

BROOKE LJ.

[1] This is an application by W, who at the material time was 14 years old, for judicial review of the authorisation given to the police by the first defendant, the Metropolitan Police Commissioner (the commissioner), with the consent of the second defendant, the London Borough of Richmond-upon-Thames (the council), to remove persons under the age of 16 from the dispersal areas in Richmond town centre and Ashburnham Road, Ham between the second week of June and 29 October 2004 and between 4 December 2004 and 4 January 2005 respectively. Although the periods for which these authorisations were in place are now long since past, and although W was not in fact removed by the police from either area, the application raises issues of general importance about the powers of police and community support officers (CSOs) in relation to children and young persons under the age of 16 when authorisations of this kind are given under s 30 of the Anti-social Behaviour Act 2003.

[2] This section, which is at the beginning of Pt 4 of that Act (entitled 'Dispersal of Groups etc'), provides, so far as is material, that:

> '(1) This section applies where a relevant officer has reasonable grounds for believing—(a) that any members of the public have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of two or more persons in public places in any locality in his police area (the "relevant locality"), and (b) that anti-social behaviour is a significant and persistent problem in the relevant locality.
>
> (2) The relevant officer may give an authorisation that the powers conferred on a constable in uniform by subsections (3) to (6) are to be exercisable for a period specified in the authorisation which does not exceed 6 months.
>
> (3) Subsection (4) applies if a constable in uniform has reasonable grounds for believing that the presence or behaviour of a group of two or more persons in any public place in the relevant locality has resulted, or is likely to result, in any members of the public being intimidated, harassed, alarmed or distressed.
>
> (4) The constable may give one or more of the following directions, namely—(a) a direction requiring the persons in the group to disperse (either immediately or by such time as he may specify and in such way as he may

specify), (b) a direction requiring any of those persons whose place of residence is not within the relevant locality to leave the relevant locality or any part of the relevant locality (either immediately or by such time as he may specify and in such way as he may specify), and (c) a direction prohibiting any of those persons whose place of residence is not within the relevant locality from returning to the relevant locality or any part of the relevant locality for such period (not exceeding 24 hours) from the giving of the direction as he may specify ...

(6) If, between the hours of 9 pm and 6 am, a constable in uniform finds a person in any public place in the relevant locality who he has reasonable grounds for believing—(a) is under the age of 16, and (b) is not under the effective control of a parent or a responsible person aged 18 or over, he may remove the person to the person's place of residence unless he has reasonable grounds for believing that the person would, if removed to that place, be likely to suffer significant harm.'

[3] Section 31 of the 2003 Act prescribes the formalities for a s 30(2) authorisation (s 31(1)), which may not be given without the consent of the local authority (s 31(2)), and must be given appropriate publicity (s 31(3)). Section 32(2) and (3) create criminal sanctions and a power of arrest in order to give teeth to a s 30(4) direction. Section 32(4) provides that: 'Where the power under section 30(6) is exercised, any local authority whose area includes the whole or part of the relevant locality must be notified of that fact.'

[4] Section 33 gives authority to CSOs to exercise the powers given to constables in uniform by s 30(3)–(6). Section 34(1) gives the Secretary of State power to issue a code of practice about the giving or withdrawal of authorisations under s 30 and the exercise of powers conferred by s 30(3)–(6). He has not yet exercised that power. Section 36 contains definitions of the phrases 'anti-social behaviour' and 'public place' for the purposes of Pt 4 of the 2003 Act.

[5] No issue arises in these proceedings about the appropriateness of the designation of the dispersal areas in Richmond town centre and Ham on the grounds set out in s 30(1) of the 2003 Act. So far as Richmond town centre was concerned, the problem identified by Supt Channer, who as Superintendent (Operations) for Richmond Borough was responsible for the day-to-day running of Richmond police station in the spring and summer of 2004, was that large numbers of people, often fuelled by binge drinking, became involved in incidents of low level anti-social behaviour. This, he said, created a major issue for the local community. Richmond railway station enjoys both a direct mainline train service from Waterloo and also District Line connections from central London, and on Friday and Saturday nights thousands of people were coming to Richmond to drink. They traditionally congregated in the town centre, on Richmond Green and on the riverside. The authorisation was originally planned to run from the beginning of June to the end of October because the number of 'non-seated drinkers' increased considerably during the summer period. There was considered to be no need to extend it into the winter months.

[6] The problem in Ham was limited to the Ashburnham Road area. Police records for the months of August to October 2004 showed that of the 95 reported acts of disturbance in a public place in Ham in those three months, 31 of them related to that area. There were also 14 reports of graffiti and 53 entries relating to criminal damage to vehicles. Superintendent Davis, who took over responsibility as Superintendent (Operations) for Richmond Borough in

November 2004, concluded from extensive local consultations that the s 30(1) criteria were satisfied, and he decided, with the council's consent, to make a s 30(2) authorisation for one month, so as to cover the period of the school holidays and the Christmas and New Year period. The effectiveness of the authorisation would then be reviewed. Chief Inspector Phipps, who led the Richmond Borough Community and Partnership Unit at that time, has told us that in Ham the problems were mainly caused by young people who lived locally.

[7] The evidence shows that the designation of these two dispersal areas was very popular with local people. Superintendent Davis told the court that the police received very supportive emails and letters, including one which said what a change it was to get up in the morning and find that the local bus stop had not been vandalised.

[8] As we have said, the only issue that arises in these proceedings relates to the meaning of the powers conferred by s 30(6) (for which see [2], above). The language of 'removal' appears to have been 'borrowed' from s 46 of the Children Act 1989, which provides, so far as is material, that:

> '(1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may—(a) remove the child to suitable accommodation and keep him there; or (b) take such steps as are reasonable to ensure that the child's removal from any hospital, or other place, in which he is then being accommodated is prevented.
>
> (2) For the purposes of this Act, a child with respect to whom a constable has exercised his powers under this section is referred to as having been taken into police protection.
>
> (3) As soon as is reasonably practicable after taking a child into police protection, the constable concerned shall—(a) inform the local authority within whose area the child was found of the steps that have been, and are proposed to be, taken with respect to the child under this section and the reasons for taking them; (b) give details to the authority within whose areas the child is ordinarily resident ("the appropriate authority") of the place at which the child is being accommodated; (c) inform the child (if he appears capable of understanding)—(i) of the steps that have been taken with respect to him under this section and of the reasons for taking them; and (ii) of the further steps that may be taken with respect to him under this section; (d) take such steps as are reasonably practicable to discover the wishes and feelings of the child; (e) secure that the case is inquired into by an officer designated for the purposes of this section by the chief officer of the police area concerned; and (f) where the child was taken into police protection by being removed to accommodation which is not provided—(i) by or on behalf of a local authority; or (ii) as a refuge, in compliance with the requirements of section 51, secure that he is moved to accommodation which is so provided.'

[9] It is unnecessary for present purposes to set out the provisions contained in s 46(4)–(11). They are far more detailed than anything that appears in Pt 4 of the 2003 Act which gives no guidance at all as to what is supposed to happen if a constable in uniform or a CSO 'removes' a person under the age of 16 from a dispersal area to his/her place of residence only to find that there is nobody there, and that it is bolted and barred.

[10] In the absence of the code of guidance which Parliament empowered the Secretary of State to issue, it is hardly surprising that there was a good deal of

confusion at first about the meaning and effect of the s 30(6) powers. For example, after Insp Mullins, the Community Inspector for Richmond, had addressed a consultation meeting in the Vestry Hall at Richmond on 4 May 2004, the minute of the meeting, which appeared on the council's website, attributed these words to him:

> 'Work was also taking place to prevent under 16s from causing problems, and the police would now be challenging any under 16s out at night (between 9 pm and 2 am) and taking them home to their parents. Parents would be written to and confronted, and if the situation continued, would be shown video footage of their children's bad behaviour. This was a priority for the whole Borough.'

[11] Inspector Mullins has told the court that this minute is not a complete and exact record of what he said. He says:

> 'In addition to the dispersal power, the authorisation gives the power to police to remove under 16 year olds to their home during specified hours. I explained this to the meeting. I considered that under 16s out late at night were vulnerable and it would be the duty of patrolling officers to consider whether there was a duty of care and the need to return the youngsters home. I note that the report has recorded ... that the power could be exercised between 9 pm and 2 am whereas in fact the legislation provides between 9 pm and 6 am. I am not sure whether this is a simple error or whether some confusion has crept in as a result of another concept. Certainly, I know from experience that a lot of the problems on patrol arise between 9 pm and 2 am and I might have commented upon this. There are particular problems at this time between Thursdays and Saturdays, when groups congregate and there is under age drinking and graffiti. I understood the legislation. The report indicates that police will now be challenging any under 16s etc. This comment should be read in the context of the previous paragraph of the report where I describe the legislation as "allowing the police" (not "requiring the police") to act. I envisaged that when the authorisation came into effect, it would be likely that under 16s out between 9 pm and 6 am would be approached by uniformed officers and communicated with. I would expect an explanation to be given about the designated area. I would expect under 16s to be taken home only if the circumstances justified it because of their vulnerability or because they were causing trouble. One factor would be that the local officers would tend to know local youngsters and it might be a matter of concern only if they were repeatedly out late. I did not say that all under 16s would be taken home. In taking a young person home, there are resource implications in that the officer involved is diverted from other activities. We would have to rely on already stretched limited resources.'

[12] The public notices used by the Richmond police for both dispersal areas were based on text provided by a small team in the Metropolitan Police Safer Neighbourhoods unit. After giving details of the location of the dispersal area and the directions which constables or police CSOs might give, the notice continued:

> '**If you are under 16** you are not allowed to be here between the hours of 9 pm and 6 am unless you are under the effective control of a parent or

responsible person over the age of 18. You may be removed to your home or place of safety if more appropriate.' a

When it was pointed out to the unit that this language was misleading, a revised form of notice was issued which substituted the words 'you may not be allowed' for the words 'you are not allowed'.

[13] Superintendent Channer says that the local police foresaw that they would b use their s 30(6) powers 'where the individual was vulnerable, eg drinking alcohol'. They never foresaw taking young persons under 16 home from a dispersal area simply because they were found there between 9 pm and 6 am, and they would not have had the resources to do this. Chief Inspector Phipps suggested that the exercise of a s 30(6) discretion might depend on how young the child in question was, how late at night it was, whether the child was particularly vulnerable or in c distress, and whether violent or other anti-social behaviour was taking place around him/her. During the five months for which the Richmond town centre authorisation was in force, the police only exercised their s 30(6) powers on one occasion, when a boy of 13 was found at about 10.30 pm in the company of a group of young men between the ages of 16 and 18 who were carrying alcohol and d shouting and swearing. Sergeant Beazley, who was a member of the Richmond Police Safer Neighbourhood team, took the boy back to his home in Ealing. He told the court that the child would have been removed anyway despite the s 30(6) power because he needed to be removed to a place of safety.

[14] He added that children were only removed if there was a likelihood of e significant harm to them. This restriction on the s 30(6) power is nowhere in the language of that subsection (which refers only to the risk of significant harm at the young person's place of residence).

[15] In the Ashburnham Road area two children under the age of 16 were spoken to by the police during the authorisation period and advised to go home, but no under 16s were actually removed under s 30(6) powers. f

[16] W lives with his parents in Ashburnham Road. He first became aware of the existence of the Richmond town centre dispersal area when he visited shops in Richmond with a school friend on 22 June 2004 as they were returning home from a school visit to central London. A policeman seemed to be watching them while they were shopping, and when he followed them out of the shop and g towards the river W decided to confront him. According to W, the 'policeman', who turned out to be a CSO, explained to them that they were in a dispersal area and that he thought they had been acting suspiciously. He gave them a piece of paper which contained a map of the dispersal area, and told them about the effect of the police's s 30(4) powers.

[17] The CSO concerned in the incident made a witness statement that night, h after W's father had complained to the police about the way his son had been treated. This statement gives a much fuller account of what happened, but we can confine ourselves for present purposes to the officer's comment that he formed the impression that both boys were good boys and were merely behaving unusually. He felt he should advise them that if they 'acted the goat' too much, j people could get the wrong impression.

[18] W said he was extremely distressed at being told off. When he got home and told his father what had happened, they saw a reference to s 30 of the 2003 Act in the paper W had been given. They then learned that the existence of the dispersal area not only conferred the s 30(4) powers W had been told about but that it also allowed the police to take under 16s back to their homes if they were out after

9 pm without a responsible adult, even if they had not done anything wrong. After his experience on 22 June, W did not feel he could be out in Richmond town centre any more in the evenings without his parents: he could not even meet his friends or go to the cinema because he might be picked up by a policeman or a CSO, and he did not want the ignominy of being taken home by the police.

[19] His father contacted a solicitor at Liberty, and because that organisation had been concerned about curfew powers for a long time it decided to support this legal challenge. During the pre-action exchanges the commissioner's Director of Legal Services told Liberty that he considered that s 30(6) conferred on the police the power to use reasonable force when removing a young person under the age of 16 to his place of residence. When these proceedings were instituted on 23 September 2004 they were concerned only with the dispersal area in Richmond. They were later enlarged to embrace the Ashburnham Road dispersal area, too.

[20] W's evidence was based on the premise that s 30(6) gave the police the power to use reasonable force to remove him to his home from a dispersal area against his will. He expressed concern that the police might use their power at any time, and he objected to the constraints that this fear imposed on the way he lived his life, particularly as he lived in the Ashburnham Road dispersal area. He felt unable, for example, to take a bus home after 9 pm when he went to band practice in Kingston, and he had to rely on someone else to give him a lift home. This embarrassed him, because he felt he was old enough to be independent. He also felt unable to go out to the local Tesco store for his parents after 9 pm, for fear that the police might decide that he ought not to be out so late, and that they should take him home. In the week after the Ashburnham Road dispersal area came into effect he felt uncomfortable walking the short distance back to his home from a friend's house after 9.30 pm, and he did not stop worrying about the possibility of being picked up by the police until he got inside the front door of his house.

[21] As is now customary on these occasions we were treated by counsel to scholarly expositions of convention law (the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950, TS 71 (1953); Cmnd 8969)). It is often forgotten, however, that English common lawyers contributed to the drafting of the convention, and the resolution of points of statutory interpretation in cases like this can very often be achieved without any need to refer to Strasbourg law at all. After all, all of us have the right to walk the streets without interference from police constables or CSOs unless they possess common law or statutory powers to stop us. There is no relevant common law power, and s 30(6) of the 2003 Act does not create an express power to use force. The question then remains: does the power to use force exist by necessary implication? For the difficulties in establishing a necessary implication see Lord Nicholls in *B (a minor) v DPP* [2000] 1 All ER 833 at 839, [2000] 2 AC 428 at 464:

> '"Necessary implication" connotes an implication which is compellingly clear. Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.'

[22] See also *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21 at [45], [2002] 3 All ER 1 at [45], [2003] 1 AC 563, per Lord Hobhouse of Woodborough:

> 'It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in *[B (A Minor) v DPP]* [2000] 1 All ER 833 at 855, [2002] 2 AC 428 at 481. A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.'

[23] The central issue we have to determine in this case is therefore whether the power to 'remove' a person to his place of residence if he is believed on reasonable grounds to be under the age of 16 and not under the effective control of a parent or responsible person aged 18 or over, is permissive or coercive. If it is permissive, no question of any wrongful act or any infringement of his convention rights (as set out in Sch 1 to the Human Rights Act 1998) can arise.

[24] Mr Otty, who appeared for the Secretary of State, submitted that the power is coercive and that it does permit a child to be removed to his home against his wishes, and, if necessary, by the use of reasonable physical force. He argued that the draftsman deliberately chose to use the same word 'remove' as appears in s 46 of the 1989 Act. Because, in that section, the power is clearly coercive, he said that it must also be coercive when found in s 30(6) of the 2003 Act.

[25] An elementary canon of construction is that a word takes colour from its context. The context of s 46 of the 1989 Act is demonstrated by its heading: 'Removal and accommodation of children by police in cases of emergency'. Section 2(1) of the Child Abduction Act 1984, which creates the offence of child abduction by a person other than a parent or guardian etc, prohibits the taking or detention of a child under 16, so as to remove or keep him from the lawful control of any person having lawful control of him 'without lawful authority or reasonable excuse'. Section 46 of the 1989 Act provides lawful authority to a constable to do what is otherwise prohibited by s 2(1) of the 1984 Act where he 'has reasonable cause to believe that a child would otherwise be likely to suffer significant harm'.

[26] The power to 'remove' in s 46 is clearly both permissive and coercive. It does not merely make lawful what might otherwise be unlawful. It also permits a constable to 'remove' a child from the control of his parents or guardian. If the parents or guardian resist, it is plain that, to avoid a breach of the peace, reasonable physical force may be used to effect the removal. Further, in relation to the child, the police can 'keep' him in suitable accommodation for up to 72 hours, for his own protection. This power can clearly be exercised whether or not the child consents and in relation to the child himself it is therefore also coercive.

[27] In this context, we accept that Parliament intended that, in relation to the child as well as the parents or guardian, the power to 'remove' also included by necessary implication the power to use reasonable force to 'remove' a child to suitable accommodation, even against his will.

[28] The context in which 'remove' is used in s 30(6) of the 2003 Act is completely different, except that it is also exercisable in relation to a child. There is no question of removing the child from his parents or guardian. On the contrary, the power may not be exercised if he is under the effective control of a parent or responsible person. The exercise of the power is not restricted to cases of emergency. It is exercisable whenever a person who is believed on reasonable grounds to be under 16 years of age is found between the hours of 9 pm and 6 am in a dispersal area and the criteria set out in s 30(6)(b) are fulfilled. There is no need for the constable (or CSO) to be satisfied that the child would otherwise be likely to suffer significant harm. It follows that the fact that the word 'remove' is used in each section cannot possibly be determinative of its meaning when found in s 30(6).

[29] There are two factors which suggest that Parliament may have intended to create a coercive power. The first is that one of the ordinary meanings of the word 'remove' is to 'carry away' or 'take away'. In the case of a child, this may require physical effort. In the event of resistance on the part of the child, it may also require physical force. However, this is not the only possible meaning of the word 'remove'. In the Home Office circular 4/2004 which accompanied the bringing into force of Pt 4 of 2003 Act on 20 January 2004 the author referred to the power as a power to 'return' (see paras 17–20 of the circular), and this is a word which in ordinary language does not carry with it the implication of the use of physical force.

[30] The second factor is the statutory context. Part 4 of the 2003 Act is intended to give police officers enhanced powers to minimise anti-social behaviour in defined areas. If Parliament were to be taken to have regarded all children found in such areas between the relevant hours as potential sources of anti-social behaviour, a coercive power to remove them might be a natural corollary. However, to attribute such an intention to Parliament would be to assume that it ignored this country's international obligations to treat each child as an autonomous human being.

[31] We are not willing to attribute such an intention to Parliament. Furthermore, if the author of the Home Office circular accurately reflects the thinking of his department, that was not the intention of the promoting department, either. The circular identifies the need to protect a child from the undesirable influence and example of older peers. The fulfilment of such a purpose does not necessarily imply the need for a coercive power. If Parliament considered that such a power was needed, it should have said so, and identified the circumstances in which it intended the power to be exercised.

[32] Against those factors, which point, weakly and ambiguously at best, in favour of a coercive power, there are some clear indications that Parliament intended the power to be permissive only. Part 4 does not make it an offence for a child to be in a dispersal area between the stated hours. There is, accordingly, no power for a constable to arrest a child who is found there. There is no power for a constable to require the child to give his name and address. Without it, unless the constable already knows the child's place of residence, the power, even if coercive, could not be exercised. There are no ancillary powers to deal with circumstances which could often be expected to arise: for example, if the child

was removed home, but could not gain admission, the constable is not authorised to take him elsewhere for his own safety unless the conditions in s 46 of the 1989 Act are satisfied, and then only under that statutory power. There is no provision equivalent to s 117 of the Police and Criminal Evidence Act 1984, which confers on a constable the power to use reasonable force, if necessary, to exercise a power conferred by that Act, except where a provision of that Act provides that the power may only be exercised with the consent of some person other than a police officer.

[33] But above all, there is the long-standing and clear presumption that Parliament does not intend to authorise tortious conduct except by express provision (see *Morris v Beardmore* [1980] 2 All ER 753 at 757, 761–762, 763, [1981] AC 446 at 455, 461, 463, per Lord Diplock, Lord Edmund-Davies and Lord Scarman, respectively). Section 30(6) contains no such express provision.

[34] For those reasons, we are entirely satisfied that the power to remove in s 30(6) is permissive, not coercive. It therefore confers no power on the police or a CSO to interfere with the movements of someone under the age of 16 who is conducting himself lawfully within a dispersal area between the hours of 9 pm and 6 am. Such a person is just as susceptible as anyone else to being made the subject of a s 30(4) direction. Section 30(6) merely confers on the police a very welcome express power to use police resources to take such a person home if he is willing to be taken home.

[35] For these reasons we would grant this application. Although we are willing to hear counsel as to the form of order we should make, it appears to us at present that it would be sufficient to make a declaration to the effect that s 30(6) of the 2003 Act does not confer on a constable in uniform or a police CSO any power to use force in removing a person to his place of residence under the powers conferred by that subsection.

Application allowed.

Dilys Tausz Barrister.

Government of Germany v Kleinschmidt and another

[2005] EWHC 1373 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
SEDLEY LJ AND BEATSON J
12 MAY, 29 JUNE 2005

Extradition – Extradition request and certificate – Service – Time of service – Responsibility for service – Extradition Act 2003, ss 70(9), 78(4)(c).

The government of Germany sought the extradition of the defendants. The relevant Order in Council designated Germany as a category 2 territory under the Extradition Act 2003. Section 70[a] of the 2003 Act required the Secretary of State to issue a certificate under that section if he received a valid request for the extradition to a category 2 territory of a person who was in the United Kingdom and under s 70(9) if a certificate was issued the Secretary of State had to send the request, the certificate and a copy of any relevant Order in Council to the 'appropriate judge' who was to conduct the extradition hearing. The Secretary of State issued the certificate and complied with s 70(9). The hearing date was fixed. The Crown Prosecution Service (CPS) served the defendants with a copies of the extradition request and the Secretary of State's certificate but not with a copy of the relevant Order in Council. Section 78(4)(c)[b] required the judge at the extradition hearing to decide whether copies of the documents sent to the judge by the Secretary of State had been served on the person appearing or brought before him and s 78(6) provided that if the judge decided any of the questions in sub-s (4) in the negative 'he must order the person's discharge'. At the extradition hearing, the defendants' solicitor stated that they had not been served with the Order in Council. The judge rejected the submission of the federal government that it was possible to cure that failure. He held that s 78(4)(c) of the 2003 Act required the documents listed in s 70(9) to be served upon the persons against whom proceedings were brought by the requesting state rather than by the court and that such service had to be complied with prior to the extradition hearing. He accordingly discharged the defendants. The federal government appealed. The court considered (i) whether ss 70(9) and 78(4) of the 2003 Act required the judge at the extradition hearing to be satisfied that the documents sent to him by the Secretary of State had been served on the person whose extradition was requested prior to the commencement of the extradition hearing; and (ii) whose responsibility it was to serve the person whose extradition was requested.

Held – (1) It was not too late, as a matter of law, to effect service for the purposes of s 70(9) of the 2003 Act at the extradition hearing. Section 78(4)(c) did not

a Section 70, so far as material, provides: '(9) If a certificate is issued under this section the Secretary of State must send these documents to the appropriate judge—(a) the request; (b) the certificate; (c) a copy of any relevant Order in Council.'

b Section 78, so far as material, provides: '(4) ... the judge ... must decide whether ... (c) copies of the documents sent to the judge by the Secretary of State have been served on the person ... (6) If the judge decides any of the questions in subsection (4) in the negative he must order the person's discharge ...'

require service prior to the commencement of the hearing and such a requirement should not be read into the section. Where service at the hearing was undertaken or proposed the judge could grant an adjournment if the interests of justice required it. If late service would cause prejudice, it could be addressed either by not granting the requesting state an adjournment to enable service to be effected or, if sought, by granting the defendant an adjournment to enable him to consider the impact of the document on his position. In the instant case, the defendants had not been prejudiced. They and their solicitors knew or should have known which Order in Council was relevant to their case some weeks before the hearing (see [21]–[34], [54], below); *R (Kashamu) v Governor of Brixton Prison, R (Kashamu) v Bow Street Magistrates' Court, R (Makhlulif) v Bow Street Magistrates' Court* [2002] QB 887 applied.

(2) Although the statute did not specify who was to effect service of the documents referred to in s 78(4)(c) normally the CPS would do so. Neither the provisions of the 2003 Act nor practice in extradition proceedings supported the proposition that the responsibility for serving the documents lay on the Secretary of State or the court. Moreover, the Secretary of State often forwarded a copy of the documents sent by him to the appropriate judge to the CPS. Even if that were not the case, the CPS with its statutory role in the extradition process and consequent expertise and experience in acting as the solicitor for requesting states, would know or would have the means of knowing which Order in Council was relevant. Accordingly, the appeal would be allowed (see [39], [43], [48]–[51], [55], below).

Notes

For extradition request and certificate, and for initial stages of extradition hearing, see Supp to 17(2) *Halsbury's Laws* (4th edn reissue) paras 1448, 1455.

For the Extradition Act 2003, ss 70, 78, see 18 *Halsbury's Statutes* (4th edn) (2005 reissue) 863, 870.

Cases referred to in judgments

Cartwright v Superintendent of HM Prison [2004] UKPC 10, [2004] 3 LRC 151, [2004] 1 WLR 902.

Hughes (Inspector of Taxes) v Viner [1985] 3 All ER 40.

Ismail, Re [1998] 3 All ER 1007, [1999] 1 AC 320, [1998] 3 WLR 495, HL.

R (Kashamu) v Governor of Brixton Prison, R (Kashamu) v Bow Street Magistrates' Court, R (Makhlulif) v Bow Street Magistrates' Court [2001] EWHC Admin 980, [2002] QB 887, [2002] 2 WLR 907, DC.

R (on the application of Waldon) v Highbury Corner Magistrates Court; R (on the application of Stern) v Highbury Corner Magistrates Court [2003] EWHC 708 (Admin).

R v Aberdare Justices, ex p DPP (1990) 155 JP 324, DC.

R v Dudley Magistrates' Court, ex p Hollis, Hollis v Dudley Metropolitan BC, Probert v Dudley Metropolitan BC [1998] 1 All ER 759, [1999] 1 WLR 642, DC.

R v Governor of Brixton Prison, ex p Servini [1914] 1 KB 77, DC.

R v Hereford Magistrates' Court, ex p Rowlands, R v Hereford Magistrates' Court, ex p Ingram, R v Harrow Youth Court, ex p Prussia [1998] QB 110, [1997] 2 WLR 854, DC.

R v Immigration Appeal Tribunal, ex p Jeyeanthan, Ravichandran v Secretary of State for the Home Dept [1999] 3 All ER 231, [2000] 1 WLR 354, CA.

R v Sekhon, R v McFaul, R v Knights [2002] EWCA Crim 2954, [2003] 3 All ER 508, [2003] 1 WLR 1655.
Rydqvist v Secretary of State for Work and Pensions [2002] EWCA Civ 947, [2002] 1 WLR 3343.

Cases referred to in skéleton arguments

A-G's Ref (No 3 of 1999) [2001] 1 All ER 577, [2001] 2 AC 91, [2001] 2 WLR 56, HL.
Blackpool Corp v Locker [1948] 1 All ER 85, [1948] 1 KB 349, CA.
Evans, Re [1994] Crim LR 593, DC.
Hewlings v McLean Homes East Anglia Ltd [2001] 2 All ER 281, DC.
Howard v Secretary of State for the Environment [1975] 1 QB 235, [1974] 1 All ER 644, [1974] 2 WLR 459, CA.
Kay Green v Twinsectra Ltd [1996] 4 All ER 546, [1996] 1 WLR 1587, CA.
Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731, CA
R v Edwards (1975) 62 Cr App R 166, CA.
R v Farooki (1983) 77 Cr App R 257, CA.
R v Soffe (1982) 75 Cr App R 133, CA.
R v Spring Hill Prison Governor, ex p Sohi [1988] 1 All ER 424, [1988] 1 WLR 596, DC.
R v Urbanowski [1976] 1 All ER 679, [1976] 1 WLR 455, CA
R v Weir [2001] 2 All ER 216, [2001] 1 WLR 421, HL.

Appeal

The government of the Federal Republic of Germany appealed under s 105 of the Extradition Act 2003 from the decision of District Judge Anthony Evans in the Bow Street Magistrates' Court on 2 March 2005 discharging Roland Kleinschmidt and Laura Dewar under s 78(4)(c), (6) of the 2003 Act, they being the defendants in extradition proceedings brought by the federal government.

Mark Summers (instructed by the *Crown Prosecution Service*) for the appellant.
Campaspe Lloyd-Jacob (instructed by *Whitelock & Storr*) for the respondents.

Cur adv vult

29 June 2005. The following judgments were delivered.

BEATSON J.

[1] This is an appeal brought by the government of the Federal Republic of Germany under s 105 of the Extradition Act 2003 against the decision of District Judge Anthony Evans sitting at Bow Street Magistrates' Court on 2 March 2005 to discharge Roland Kleinschmidt and Laura Dewar, the respondents in extradition proceedings conducted against them by the government of the Federal Republic. The issue is whether ss 70(9) and 78(4) of the Extradition Act 2003 require the judge at the extradition hearing to be satisfied that the documents sent to him by the Secretary of State have been served on the person whose extradition is requested prior to the commencement of the extradition hearing. In this case the relevant Order in Council had not been served prior to the hearing. The 2003 Act does not expressly state by whom or by when service is to be effected. The learned district judge held that the statute requires service prior to the extradition hearing and stated that the statute did not make service the responsibility of the court. It is implicit in his decision that it is

not possible to cure any failure to serve documents once the hearing has commenced.

[2] Before the learned district judge and in this appeal the appellant submitted that it is ultimately the court's responsibility and not that of the requesting state or its solicitor to serve the documents on the person whose extradition is requested. This issue involves consideration of the respective responsibilities of the Secretary of State, the court conducting the extradition hearing, and the Crown Prosecution Service. The Crown Prosecution Service acts as a private solicitor on behalf of the requesting state in extradition proceedings unless the requesting state wishes to instruct other solicitors. Its role has been put on a statutory footing by s 190 of the 2003 Act. The question of responsibility for service is understandably of importance to the Crown Prosecution Service, and it is unfortunate that the 2003 Act does not specify who is to effect service. Raising it in the present case may, however, have deflected attention from the central point that arose at the extradition hearing. The outcome of that hearing and of this appeal do not necessarily turn on whose responsibility it is to effect service on the person whose extradition is sought. This is because, whoever has that responsibility, if the statute requires service to be made prior to the commencement of the extradition hearing, unless the requirement that there be such service or the timing of such service is not mandatory, the district judge was required to discharge the respondents and this appeal must fail. If, however, service at the hearing is sufficient, the question who may or must effect such service arises.

[3] In support of the federal government's appeal, Rosemary Fernandes, a solicitor employed by the Crown Prosecution Service, has made two witness statements, one on 10 March, when this appeal was launched, and the second on 6 May 2005. Her first statement sets out the facts and charges underlying the federal government's request for the respondents' extradition and what occurred prior to and at the extradition hearing. The extradition hearing bundle and a manuscript note of the extradition hearing as recorded by the clerk of the court are exhibited to this statement. The manuscript note is not easy to read and there was no typescript available at the hearing of the appeal. Nor had those representing the appellant taken steps to ascertain whether the district judge considered the note accurately summarised the proceedings before him. At the hearing the court requested that a typescript of the note approved by the district judge as accurate be provided and this has been done. Paragraph 5.12 of the practice direction to CPR Pt 52 states that a note of a judgment in the lower court should be submitted for approval to the judge whose decision is being appealed. This should have been followed. Where, as in this case, a manuscript note is, as it may be for understandable reasons, difficult to read, a typescript should be produced. In her second witness statement Ms Fernandes states she received a copy of the relevant Order in Council, the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/3334, from the Secretary of State on 5 May 2005 and served it on the respondents' solicitors on 6 May. The Order in Council is exhibited to this statement.

[4] I turn to the factual background and the statutory framework. The charges against Mr Kleinschmidt and Ms Dewar are that they were members of an advanced fee fraud through a company called Allied Guarantee Company which they established for the purpose of committing the fraud. Although the company's offices were at an address in Chislehurst, Kent, the prosecution claim that the company was in fact operating in Kappeln in Schleswig-Holstein in

Germany. Mr Kleinschmidt is alleged to have entered into contracts and correspondence with the customers on behalf of the company and to have directed the transfer of proceeds of the alleged fraud from a bank account of another person alleged to be involved in the conspiracy, Mr Fricke. Mr Fricke had been a lawyer until he was disbarred. It is alleged that he acted for the company as a 'solicitor' employed by 'Gelt Solicitors'. Ms Dewar is Kleinschmidt's companion and variously described as managing director of the company and trustee and secretary of Gelt Solicitors. It is alleged that she engaged in correspondence on behalf of Gelt in that capacity and that accounts registered in her name at the Halifax and HSBC in Bromley, Kent received the proceeds of the fraud.

[5] The 2003 Act designates requesting countries as either category 1 or category 2 territories. Part 2 of the Act (ss 69–141) contains the provisions governing extradition to category 2 territories. The current designation of category 2 territories is contained in the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/3334 (hereafter SI 2003/3334) as amended by the Extradition Act 2003 (Amendment to Designations) Order 2004, SI 2004/1898 and the 2003 Act (Amendment to Designations) Order 2005, SI 2005/365. At the time of the present request, Order in Council SI 2003/3334 designated the Federal Republic of Germany as a category 2 territory. By s 70(1) of the Extradition Act 2003, 'the Secretary of State must issue a certificate under this section if he receives a valid request for the extradition to a category 2 territory of a person who is in the United Kingdom'. By s 70(9), if a certificate under sub-s (1) is issued, the Secretary of State must send the request, the certificate and a copy of any relevant Order in Council to 'the appropriate judge', who is to conduct the extradition hearing.

[6] Where the documents referred to in s 70(9) have been sent to the judge, the judge may issue a warrant for the arrest of the person whose extradition is sought: s 71(1). Where the documents have not been sent the judge is empowered to issue a provisional warrant: s 73. This case involved provisional warrants and so it is only necessary to summarise the procedure concerning such warrants. Where a provisional warrant is issued the documents referred to in s 70(9) must be received by the judge within a specified period from the date of the person's arrest: s 74(11). In the case of Germany the period is 45 days. If the documents are not received within this period the judge must order his discharge: s 74(10).

[7] The next stage is the extradition hearing. Provisions as to the extradition hearing in respect of requests by category 2 territories are contained in ss 75–92 of the 2003 Act. In the case of arrest under a provisional warrant, if the documents referred to in s 70(9) are received by the judge within the specified period he must fix a date on which the extradition hearing is to begin: ss 76(1) and (2). By s 76(3) the date fixed must not be later than two months from the date on which the judge receives the s 70(9) documents. The initial stages of the hearing are governed by s 78. The judge must, by s 78(2), decide whether the documents sent to him by the Secretary of State consist of (or include)—

> '(a) the documents referred to in s 70(9), (b) particulars of the person whose extradition is requested, (c) particulars of the offence specified in the request, (d) in the case of a person accused of an offence, a warrant for his arrest issued in the category 2 territory',

and one other requirement not relevant in the present case. One of the curiosities of the statute is that although the judge's power to fix the date of the hearing depends on his receipt of the documents referred to in s 70(9) at this stage of the extradition hearing he is required by s 78(2)(a) to decide whether the documents sent to him by the Secretary of State consist of or include the documents referred to in s 70(9). Be that as it may, if the judge decides that the documents sent to him do consist of the specified documents, by s 78(4) he must decide whether, inter alia, '(c) copies of the documents sent to the judge by the Secretary of State have been served on the person' appearing or brought before him. By s 78(6) if the judge 'decides any of the questions in subsection (4) in the negative he must order the person's discharge'.

[8] In the present case, following a request for the extradition of Mr Kleinschmidt and Ms Dewar by the public prosecutor of Flensberg on 29 November 2004, on 8 December 2004 the Bow Street Magistrates' Court issued provisional warrants for their arrest under s 73 of the 2003 Act. The warrants were executed on the following day and Mr Kleinschmidt and Ms Dewar were remanded on conditional bail. The Federal Republic's extradition request was submitted to the Secretary of State on 20 December 2004. On 18 January 2005 the Secretary of State certified the request as valid in accordance with s 70 of the 2003 Act. Pursuant to s 70(9), the Secretary of State then sent the Bow Street Magistrates' Court the request, the s 70 certificate, and a copy of the relevant Order in Council, SI 2003/3334. It is stated in para 32 of Ms Fernandes's first witness statement that on 18 January the date of the extradition hearing was fixed to begin on 2 March. Since, by s 76(1)(b) the judge can only fix the date on which the extradition hearing is to begin once he has received the documents referred to in s 70(9) it appears that the documents were received on the same day the certificate was issued. The hearing date was fixed to begin within a two-month period from that date.

[9] On 28 January 2005 an opening note on behalf of the Federal Republic for the extradition hearing signed by Mr Summers was (see para 33 of Ms Fernandes' first statement) served on the respondents. Paragraph 23 of the opening note states that the relevant Order in Council sent to the judge by the Secretary of State in the present case was SI 2003/3334. Paragraph 36 of this note states that the documents referred to in s 70(9) have 'in fact' 'been served by the Crown Prosecution Service'. I refer to this note again at [48], [49], below when considering whose responsibility it was to effect service. At this stage it suffices to observe that the note was inaccurate in stating that service had been made before 28 January and suggesting that the Order in Council was one of the documents served. Ms Fernandes's first witness statement states (para 39) that the Crown Prosecution Service, as solicitors for the appellant, served Mr Kleinschmidt and Ms Dewar with copies of the s 70 certificate and the extradition request, and a copy of the arrest evidence it had received from United Kingdom police authorities on 9 February.

[10] Ms Fernandes also states (para 37 of her first witness statement) that the Crown Prosecution Service received from the Secretary of State only one of the documents listed in s 70(9), namely a copy of the s 70 certificate and (para 38) that it received no documents from the Bow Street Magistrates' Court. I have referred to the fact that in her second witness statement she states she, and thus the Crown Prosecution Service, received a copy of SI 2003/3334 from the Secretary of State on 5 May 2005. The Crown Prosecution Service thus did not receive a copy of either the extradition request or the Order in Council from the

Secretary of State before the extradition hearing on 2 March 2005. It obtained a copy of the extradition request directly from the appellant. It did not serve the respondents with a copy of SI 2003/3334 until 6 May 2005.

[11] At the extradition hearing the respondents' solicitor, Mr Dante Leccacorvi gave evidence. The note of the proceedings records that Mr Leccacorvi stated his firm took over the case on 16 December 2004 before any extradition documents had been served, that the respondents had not been served with the Order in Council and had not received any document sent by the Secretary of State to the Bow Street Magistrates' Court from the court. It also records that in cross-examination Mr Leccacorvi stated that on 25 February 2005 he was aware this point was to be taken but did not notify the court or the Crown Prosecution Service. He stated he did not notify the Crown Prosecution Service because he was not aware that it should be put on notice.

[12] The ambush having been sprung, the learned district judge rejected the appellant's submission that it was possible to cure the failure. He held that s 78(4)(c) requires the documents listed in s 70(9) to be served upon the persons against whom proceedings are brought by the requesting state rather than the court and that such service must be complied with prior to the extradition hearing. He accordingly discharged Mr Kleinschmidt and Ms Dewar under s 78(6) of the 2003 Act. It is implicit in his ruling that there is no power under s 78(4) to remedy any failure to serve once the hearing commenced.

[13] Mr Summers, on behalf of the appellant, submitted that in so holding the learned district judge fell into error. Mr Summers argued that as a matter of principle the primary duty to serve the person whose extradition is requested lies upon the court or the Secretary of State. Secondly, he argued that there is nothing in s 78(4) of the 2003 Act that requires service under the section to be made prior to the commencement of the extradition hearing.

[14] Miss Campaspe Lloyd-Jacob, on behalf of Mr Kleinschmidt and Ms Dewar and in support of the district judge's ruling, submitted that it was the responsibility of the Crown Prosecution Service, as solicitors for the requesting state, to serve the documents on the persons whose extradition is requested. On the time by which the documents must be served, she submitted the requirement in s 78(4)(c) that copies of the documents sent to the judge by the Secretary of State be served on the person whose extradition is requested is a mandatory requirement, the purpose of which is so that the person sought knows in advance of the hearing the factual material and the legal basis on which his extradition hearing is to proceed.

[15] At the hearing we invited the parties to make written submissions on the question whether, in the event that s 78(4)(c) requires service prior to the hearing, the consequences of a failure to serve depend on the effect of the breach. We have received helpful submissions on this third question from Mr Summers and Miss Lloyd-Jacob.

[16] It is first necessary to consider the nature of the requirement of service in s 78(4)(c) of the 2003 Act. Section 78(4)(c) provides that the judge must decide whether copies of the documents sent to him by the Secretary of State under s 70(9) *'have been served* on the person' (my emphasis). Miss Lloyd-Jacob submitted that no distinction should be made between the different documents s 70(9) requires to be sent to the judge and that the Order in Council does not fall into a different category to the request and the certificate. She submitted that it is clear that in drafting the 2003 Act Parliament intended to depart from the previous regime under which it was considered sufficient for the Orders in

Council to be available to all parties in court. Section 78(6) provides that if the judge 'decides any of the questions in subsection (4) in the negative he must order the person's discharge'. a

[17] The terms of s 78(6) mean that, subject to the point that I address at [35]–[38], below, and although service of the s 70(9) documents is not a prerequisite to the jurisdiction of the judge at the extradition hearing, the requirement in s 78(4)(c) is mandatory. I accept that the purpose of the b requirement that the specified documents be served is so that the person sought knows the factual material and the legal basis on which the extradition hearing is to proceed. In substance so does Mr Summers. Paragraph 20 of his supplementary skeleton argument states that two of the three documents referred to in s 70(9), the request for extradition and the Secretary of State's certificate, are 'of fundamental importance to the defendant's ability to contest c the extradition proceedings' although he argues that the position of the Order in Council is different. The Order in Council is, however, also significant because the designation of the requesting states may be changed by Order in Council and because the Order in Council affects the question whether it is necessary for the requesting state to establish a prima facie case: see ss 84(1) and (7). d

[18] The potential importance of the person whose extradition is sought knowing of and having sight of the relevant Order in Council was recognised by Scrutton J in *R v Governor of Brixton Prison, ex p Servini* [1914] 1 KB 77. Scrutton J stated (at 83) that 'It may be of importance to the prisoner to see it and have it proved in order to see whether it contains any provision which may assist him', e although he agreed (at 81) with Ridley J that the writ of habeas corpus (which was sought in that case) would not be granted in a case of mere technicality not affecting the merits of the case. Mr Summers accepted that in relation to the fact of service the terms of s 78(6) are mandatory but, responding to the question posed by the court, submitted that if, contrary to his primary argument, service is required before the commencement of the extradition hearing, they are f directory as to the timing of service.

[19] The next question is the fundamental question in this appeal: does the statute require service to be effected before the commencement of the extradition hearing. Miss Lloyd-Jacob submitted that it does because the person whose extradition is sought must know in advance of the hearing the factual material and the legal basis on which the extradition hearing is to proceed. g

[20] Although service should normally be made well before the hearing, and no doubt in most cases is so made, as Mr Summers submitted, there is nothing in s 78(4) requiring this. The appellant's primary case is that the words 'have been served' in s 78(4)(c) mean that service must be made before the judge makes his decision under that subsection. Its argument is that when, at the first time during h the hearing, the respondents stated that they had not been served, the appellant was still within time and able to comply with s 78(4)(c), but was wrongly prevented from doing so by the judge. Mr Summers argued that where the 2003 Act requires that something must be done before the commencement of the extradition hearing, this is stated on the face of the statute. He relied on ss 75(3) j and 76(4), provisions relating to the date of the extradition hearing which, as I have stated, is, by ss 75(1) and 76(2), fixed by the appropriate judge. These provisions enable a party to apply for the hearing to be fixed for a later date than that fixed by the judge if the application is made before the date fixed for the hearing. I observe that, had the appellant known before 2 March that the extradition bundle they served on the respondents on 9 February did not contain

the Order in Council they could (see [48]–[50], below) either have served it or (as this was a case in which a provisional warrant was obtained) applied under s 76(2) for the date of the hearing to be postponed.

[21] For the reasons given by Miss Lloyd-Jacob, I accept that the respondent should normally be served before the commencement of the hearing. Moreover, there is some force in her argument that the change from the previous legislative regime under which it was considered sufficient for the Orders in Council to be available to all parties in court indicates that under the 2003 Act it must be available before the hearing. If it remains sufficient for the Orders in Council to be available to the person whose extradition is sought in court and to be served during the course of the hearing or during an adjournment, why (it might be asked) was it necessary to require that they be served on the person whose extradition is sought? I have, however, concluded that notwithstanding this argument, the contrast between s 78(4)(c) and ss 75(3) and 76(4) is significant. Since s 78(4)(c) does not state that the respondent must be served before the commencement of the extradition hearing, the issue is whether the words 'before the commencement of the extradition hearing' should be read into it. In my judgment these or similar words should not be read into it.

[22] On the construction of the section which Miss Lloyd-Jacob proposes, it would not be possible to deal with any failure of service that manifested itself at the outset of the hearing (for example where a document has erroneously been omitted from the extradition bundle) whether or not that failure prejudices or is unfair to the respondent. The effect would be in substance to deprive the court conducting the extradition hearing of the jurisdiction it obtained when it received the documents referred to in s 70(9). In *Hughes (Inspector of Taxes) v Viner* [1985] 3 All ER 40, at 46 Walton J described the proposition that the requirement in s 56 of the Taxes Management Act 1970 that a party requiring tax commissioners to state a case to send notice of the fact that the case has been stated to the other party 'at or before the time when he transmits the case to the High Court' was mandatory as 'quite extraordinary' inter alia because, if it was, late service would deprive the High Court of jurisdiction it had previously obtained as a result of the transmission of the case stated to the High Court. I refer to other examples of the reluctance of the court to construe a procedural requirement in this way at [36], below.

[23] The procedural protection afforded by the 2003 Act to a person whose extradition is sought is important since that person's liberty is at stake. But as was stated by Lord Steyn delivering the judgment of the majority of the Board of the Judicial Committee of the Privy Council in a Bahamian appeal, *Cartwright v Superintendent of Her Majesty's Prison* [2004] UKPC 10 at [14], [2004] 3 LRC 151 at [14], [2004] 1 WLR 902:

> 'Throughout extradition law there are two principal threads. First, in exercising powers of extradition courts of law must ... be vigilant to protect individuals from the overreaching of their rights by the government. Justice to the individual is always of supreme importance. Secondly, the Board considers that it is imperative of legal policy that extradition law must, wherever possible, be made to work effectively.'

[24] The consequence of Lord Steyn's second thread is that the court should be slow to construe the 2003 Act so as to permit reliance on a purely technical point. The decision of this Court in *R v Governor of Brixton Prison, ex p Servini* [1914] 1 KB 77, to which I have referred at [14], above, shows that the reluctance

of a court considering an extradition matter to permit reliance on a purely technical point is long-standing.

[25] In *Re Ismail* [1998] 3 All ER 1007 at 1011, [1999] AC 320 at 327 Lord Steyn, in a speech concurred in by the other members of the Committee, stated:

> 'extradition statutes, ought ... to be accorded a broad and generous construction so far as the text permits it in order to facilitate extradition'.

In that case the context differed. The House of Lords was considering whether a person was 'accused' of an extraditable offence within s 1(1) of the Extradition Act 1989. Lord Steyn stated that a purposive interpretation of 'accused', also described by him as a 'cosmopolitan approach', ought to be adopted in order to accommodate the differences between criminal procedures in the United Kingdom and in civil law jurisdictions (see [1998] 3 All ER 1007 at 1012, [1999] 1 AC 320 at 327). In that context such an approach is particularly appropriate. But *Cartwright v Superintendent of Her Majesty's Prison* was not such a case. The majority of the Board relied on the statement in *Re Ismail*, and there is no indication that the broad and purposive construction of extradition statutes is only to be used in the circumstances of *Re Ismail*.

[26] *Cartwright*'s case may represent the high-water mark of this approach, see the dissenting judgment of Lord Hoffmann and Lord Rodger of Earlsferry in which it is stated that the majority had given the statute (s 17(3) of the Bahamas Court of Appeal Act) 'a far-fetched construction' to remedy what they perceived as a defect in the law ([2004] 3 LRC 151 at [42]). Whether or not it is, in the present case giving s 78(4)(c) a broad and generous construction involves a more modest and familiar exercise. Since the issue is, as I have noted, whether to read into the subsection the words 'before the commencement of the extradition hearing', a broad and generous construction is given to the subsection simply by not adding restricting words to the language used by Parliament.

[27] In deciding whether the need to be vigilant to protect persons whose extradition is sought from the overreaching of their rights by the government means that it is necessary to construe s 78(4)(c) as requiring service prior to the commencement of the extradition hearing, it should not be forgotten that the appropriate judge has other means of protecting the position of such persons. By s 77 of the 2003 Act the powers of the appropriate judge are the same (as nearly as may be) as those in a magistrates' court. In particular he thus has the power to stay proceedings for abuse of process (see *R (Kashamu) v Governor of Brixton Prison, R (Kashamu) v Bow Street Magistrates' Court, R (Makhlulif) v Bow Street Magistrates' Court* [2001] EWHC Admin 980, [2002] QB 887, [2002] 2 WLR 907 and the discussion in Knowles, *Blackstone's Guide to the Extradition Act 2003* (2004) pp 66–69) and he has the power to adjourn the extradition hearing: see s 77(4).

[28] There is thus a power to adjourn the hearing before the appropriate judge makes any or all of the decisions he is required to make under s 78. It is convenient to state at this point that although it appears that the appellant did not seek an adjournment, the rejection of its argument that it was possible to cure the failure of service after the hearing commenced but before the judge's decision, meant that an application to adjourn in order to serve the respondents was unlikely to succeed.

[29] The purpose of a power to adjourn a hearing is inter alia to enable the court and the parties to deal with problems which manifest themselves at or immediately before the hearing. Decisions on applications to adjourn are subject to the control of this court and the Administrative Court. The power to grant or

refuse an adjournment must be exercised appropriately, that is by taking account of the interests of all the parties and the public interest, and not so as to undermine the statute under which the proceedings are brought or in a way that deprives a person of rights conferred by that statute: see *R v Dudley Magistrates' Court, ex p Hollis, Hollis v Dudley Metropolitan BC, Probert v Dudley Metropolitan BC* [1998] 1 All ER 759, [1999] 1 WLR 642.

[30] *R (on the application of Waldon) v Highbury Corner Magistrates' Court, R (on the application of Stern) v Highbury Corner Magistrates' Court* [2003] EWHC 708 (Admin) is an example of a case where an adjournment granted on the application of a prosecutor who had failed to warn the prosecution witnesses was set aside. *R v Aberdare Justices, ex p DPP* (1990) 155 JP 324 and *R v Hereford Magistrates' Court, ex p Rowlands, R v Hereford Magistrates' Court, ex p Ingram, R v Harrow Youth Court, ex p Prussia* [1998] QB 110, [1997] 2 WLR 854 are examples of improper refusals to adjourn on the application of a prosecutor. In *Ex p Rowlands* Bingham MR, as he then was, set out the principles upon which applications to adjourn should be considered. His Lordship stated that justices are required to pay regard to the interests of justice as they affected both sides and to the question of whether the person applying for the adjournment was at fault or not. He set aside the decision to refuse an adjournment stating that, although the justices were conscious of the defendant's desire that the matter should be cleared up one way or another and should not continue to hang over him, they failed to pay proper regard to the undesirable consequence of refusing an adjournment when the result would be that the prosecution would thereupon collapse. The court stated that the justices had to take account of the interest of the prosecution, representing the public, that a charge properly preferred against a defendant should be the subject of proper adjudication.

[31] Although we did not hear argument on the application of these principles in the context of an extradition hearing, it is clear they enable the appropriate judge to protect the position of the parties, and in particular the position of the person whose extradition is sought. In the absence of such argument, while expressing no concluded view, I consider that the factors which should be considered in deciding whether to grant an application to adjourn an extradition hearing include the statutory two-month time limit in the case of a provisional warrant in s 75(2) and 76(3) (see [7], above), the responsibility for the problem which has led to the application to adjourn, and the prejudice each party would suffer from the grant or the refusal of the application. It would prima facie seem inappropriate to grant an adjournment where the extradition hearing could only be resumed after the expiry of the statutory two-month period. As to responsibility for the problem, for the reasons I give in [44]–[50], below, in practice responsibility for the service of the documents including the Order in Council lies with the appellant or its solicitor and so they bear a substantial part of the responsibility for a failure to effect service.

[32] I would therefore hold that it is not too late, as a matter of law, to effect service for the purposes of s 70(9) at the hearing, and that where such service is undertaken or proposed the district judge may grant the defendant an adjournment if the interests of justice require it. Had late service caused prejudice in this case it could have been addressed either by not granting the appellant an adjournment to enable service to be effected or (had it been sought) by granting the respondents an adjournment to enable them to consider the impact of the document on their position.

[33] It was not argued by Miss Lloyd-Jacob that the respondents were in fact prejudiced in any way by the failure to serve the Order in Council. It is clear they were not. The respondents and their solicitors knew or should have known what Order in Council was relevant to their case on or shortly after 28 January when they received Mr Summers' opening note on behalf of the Federal Republic for the extradition hearing (see para 28 of Ms Fernandes's first statement) since this note refers to it (paras 23 and 39). They knew or should have known of the failure to serve the Order in Council when, on or about 9 February, three weeks before the hearing, they were served with the bundle for the extradition hearing containing the other s 70(9) documents and a copy of the arrest evidence. I have referred to the fact that Mr Leccacorvi stated that by 25 February, over a week before the hearing he was aware that the point would be taken and chose not to inform either the court or the appellant. Even if they were under no duty to inform the court or the appellant that they had not been served with the Order in Council, which Mr Summers' opening note (see paras 25 and 36) stated had been served the respondents were not in any way prejudiced by the failure to serve the Order.

[34] My conclusion that s 78(4)(c) does not require service prior to the commencement of the hearing means that it is not in the event necessary to decide the issue on which we requested further submissions. That question is whether, if s 78(4)(c) required service of the s 70(9) documents prior to the commencement of the extradition hearing, the consequences of a failure to serve depend on the effect of the breach. Mr Summers argued that if, contrary to his primary case, the requirement that the documents be served should be treated as mandatory so far as concerns the requirement to serve the notice at some time, but directory as to the precise time of service. He relied in particular on *Hughes (Inspector of Taxes) v Viner* [1985] 3 All ER 40, to which I have referred at [22], above.

[35] There is a certain artificiality in concluding that s 78(4)(c) requires service of the documents prior to the commencement of the hearing but also concluding that the precise timing of the time of service is directory. In *Hughes (Inspector of Taxes) v Viner*, however, this was done even though, unlike the present case, the statute expressly specified the time that notice was to be given to the other party. Despite any artificiality, to so construe a statutory requirement is legitimate, provided that it does not frustrate the legislative purpose and the requirement in question does not go to the relevant court's jurisdiction. It has the advantage of enabling the court to consider the substance of the matter before it, here whether late service is unfair to the person served. The inclination to construe procedural requirements not going to jurisdiction as not defeating the jurisdiction of a court or tribunal at least where, as in the present case, there is no real possibility of one party suffering prejudice is also seen in other contexts: see *R v Sekhon, R v McFaul, R v Knights* [2002] EWCA Crim 2954, [2003] 3 All ER 508, [2003] 1 WLR 1655 at [21](ix) and *R v Immigration Appeal Tribunal, ex p Jeyeanthan, Ravichandran v Secretary of State for the Home Dept* [1999] 3 All ER 231 at 236, 239, [2000] 1 WLR 354 at 359, 362 as qualified by *Rydvist v Secretary of State for Work and Pensions* [2002] EWCA Civ 947, 1 WLR 3343.

[36] For the reasons I set out at [12]–[34], above I do not consider that to permit service of the Order in Council and, notwithstanding Mr Summers' concession (see [17], above) about their importance, the other s 70(9) documents at the hearing would frustrate the purpose of s 78(4)(c). The discretion of the appropriate judge under s 78 is limited. Section 78(7) provides that if the judge

decides the questions in s 78(4) in the affirmative he must proceed under s 79 which is only concerned with whether one of the statutory bars to extradition apply. Issues of prejudice can, however, be dealt with by exercising the power to grant adjournments or to refuse applications by the requesting state to adjourn to effect service. Deliberate flouting of the provisions for service may give rise to consideration of whether the proceedings should be stayed as an abuse of process.

[37] Accordingly, had I concluded that s 78(4)(c) required service of the s 70(9) documents prior to the commencement of the extradition hearing, I would have held that the requirement was directory as to the precise time of service provided that the timing of service in a particular case is not unfair to the person served. As Sedley LJ observed in the course of the hearing, everything served has to be served in time to be fair to the person who is being served. To hold the timing of service to be, to this extent, directory, enables the court to consider the substance of the matter, that is whether late service is unfair to the person who is being served.

[38] I now return to the question of whose responsibility it is to serve the persons whose extradition is requested. I have noted that the 2003 Act does not specify who is to effect service of the documents referred to in s 78(4)(c). Mr Summers' argument that the primary duty to effect service lies upon the court or the Secretary of State is based on the fact that the documents are in the possession of the Secretary of State and the court, and (apart from the request for extradition) not in the possession of the requesting state unless supplied to it by either the Secretary of State or the court. There is no statutory obligation on either the Secretary of State or the court to provide copies of the documents to the requesting state or to the parties and sometimes, as in the present case in relation to the request and the Order in Council, he does not do so.

[39] Miss Lloyd-Jacob submitted that if it were for the Secretary of State or the court to serve documents on the persons whose extradition is requested one would expect the statute to say so but it does not. Miss Lloyd-Jacob argued that the court has neither the role nor the resources to serve the documents in these cases and that it is well understood in extradition proceedings that service of all relevant documents is effected by the Crown Prosecution Service acting as agents of the requesting country. That is what normally happens and the bundle normally includes a copy of the Order in Council.

[40] In the present case Mr Summers argued that the Crown Prosecution Service could not include the Order in Council with the documents served in the extradition bundle because the Secretary of State had not sent it to the Crown Prosecution Service and because in the case of the Federal Republic of Germany two Orders in Council might be 'relevant' for s 70(9)(c); Extradition Act 2003 (Designation of Part 2 Territories) Order, SI 2003/3334, which was sent to the appropriate judge, and the Extradition Act 2003 (Multiple Offences) Order 2003, SI 2003/3150 (hereafter SI 2003/3150). He submitted that the Crown Prosecution Service would not know which of these was regarded as relevant by the Secretary of State. Miss Lloyd-Jacob described this proposition as extraordinary since the Orders in Council are public documents readily available to the Crown Prosecution Service and are regularly produced and served by it in other cases.

[41] At one point Mr Summers also suggested that the service by the Crown Prosecution Service of a copy of the Order in Council obtained otherwise than from the Secretary of State would not satisfy s 78(4)(c) but he did not press this, and in my judgment was correct not to do so.

[42] In response to a question Mr Summers stated that the Crown Prosecution Service had not asked the Secretary of State which Order in Council had been sent to the judge or asked the Secretary of State for a copy. This he said was because it was reluctant to engage in correspondence with the Secretary of State who is a decision-maker in the process and has a quasi-judicial role at a later stage. I consider that any reluctance by the Crown Prosecution Service to ask for a copy of the Order in Council sent by the Secretary of State to the judge was wholly misplaced. The extradition process is initiated by the requesting state. The Crown Prosecution Service acts as the requesting state's solicitor. It cannot be even arguably improper for the requesting state's solicitor to ask the Secretary of State to send it a copy of any document which is a necessary part of the process in the sense that it needs to be served on the person whose extradition is sought.

[43] The fact that the 2003 Act neither specifies who is to effect service of the documents referred to in s 78(4)(c), nor requires the Secretary of State or the court to send copies of the documents sent to the appropriate judge pursuant to s 70(9) to the requesting state or its legal representatives may lead to difficulties where copies of all the documents are not sent to them if the Secretary of State is unwilling to supply them and if they are unavailable elsewhere. There is, however, no indication of unwillingness on the part of the Secretary of State. Paragraph 34 of Ms Fernandes's first statement states that the Secretary of State often forwards a copy of the documents sent by him to the appropriate judge to the Crown Prosecution Service, as solicitors for the requesting state. The request will in any case be available from the requesting state, and the Order in Council will, for reasons I give at [50]–[51], below, generally be available to the Crown Prosecution Service. I reject Mr Summers' submissions as to who is primarily responsible for serving the persons whose extradition is requested. Neither the provisions of the 2003 Act nor practice in extradition proceedings including this case support the proposition that the responsibility for serving them lies on the Secretary of State or the court.

[44] First I consider whether the 2003 Act allocates responsibility to the court. The Act does not in fact allocate tasks to the 'court' but to 'the appropriate judge'. Assuming that Mr Summers' argument is that the appropriate judge has the responsibility to effect service, apart from arguments based on his role and the resources available to him, the argument does not sit comfortably with the wording of the statute. Section 78(4) requires the judge to decide whether 'copies of the documents sent to the judge by the Secretary of State have been served on the person' whose extradition is sought. The language suggests that service is to be made by someone other than the judge. There is nothing in s 78 or elsewhere in the 2003 Act to indicate that it is the judge who is the person responsible for service.

[45] Section 72(7) sets out the responsibilities of the appropriate judge when the person whose extradition is sought first appears or is brought before the appropriate judge following the arrest of that person pursuant to a warrant issued under s 71. By s 72(7)(a) the judge 'must' inform that person of the contents of the request for his extradition and by s 72(7)(b) he must give him the required information about consent set out in s 72(8). This occurs after the Secretary of State sends documents to the judge under s 70(9) because an arrest warrant under s 71 may only be issued after the documents have been sent to the judge. If service of the documents sent to the judge under s 70(9) is a responsibility of the judge, one would have expected this to be stated in s 72(7), but it is not.

[46] As far as the Secretary of State is concerned, s 70 sets out his responsibilities in relation to certifying a request. These do not include a requirement that he serve the documents on the persons whose extradition is requested. As Miss Lloyd-Jacob also observed, the statutory scheme does not put the Secretary of State in contact with those persons.

[47] Leaving the statutory provisions, Mr Summers' submissions that the primary responsibility for service lies on either the Secretary of State or the court and that the Federal Republic and its solicitors the Crown Prosecution Service would not know which of the Orders in Council that deal with the Federal Republic of Germany were regarded as 'relevant' by the Secretary of State in this case do not reflect the reality of this case. As to service, it was the Crown Prosecution Service which served the documents, apart from the Order in Council, on the respondents. I have referred to the fact that para 36 of Mr Summers' opening note on behalf of the Federal Republic prepared for the extradition hearing and dated 28 January 2005 states that 'in fact the documents [referred to in section 70(9)] have been served by the Crown Prosecution Service'. The note also invites the court conducting the extradition hearing to ascertain from those representing Mr Kleinschmidt and Ms Dewar that they had been served with copies of the documents. Although not altogether accurate (see [9], above) the note shows that the Crown Prosecution Service in practice effects service.

[48] As to knowledge, the Crown Prosecution Service does not appear to have been under any uncertainty as to what Orders in Council were 'relevant' in this case and thus within s 70(9). Paragraphs 1 and 39 of Mr Summers' opening note state that Order in Council SI 2003/3334 designated the Federal Republic as a category 2 territory so that Pt 2 of the 2003 Act applied, as modified by the provisions of the Extradition Act 2003 (Multiple Offences) Order, SI 2003/3150. Paragraph 23 of Mr Summers' opening note states (in footnote 2) that the relevant Order in Council sent to the judge by the Secretary of State in the present case was SI 2003/3334. On 28 January, well before the hearing date, the requesting state and its legal representative thus identified the Order in Council that was considered 'relevant' and sent to the judge by the Secretary of State. At the hearing of the appeal Mr Summers did not explain how his submission that the Crown Prosecution Service would not know which Orders in Council were 'relevant' in this case ties in with what is stated in his opening note.

[49] I do not, moreover, accept that the Crown Prosecution Service, with its statutory role in the extradition process and consequent expertise and experience in acting as the solicitor for requesting states, would not know which Order in Council was relevant. The Crown Prosecution Service will know or have the means of knowing whether the requesting state is a category 1 or a category 2 territory. In the case of a category 2 territory, such as the Federal Republic was at the time of the present request, until it is superseded by another Order, SI 2003/3334 will always be a 'relevant' Order in Council. Where extradition is sought in respect of more than one offence so that SI 2003/3150 is also 'relevant' and must be sent to the judge by the Secretary of State this will be almost invariably be clear from the request for extradition.

[50] As Miss Lloyd-Jacob observed, Orders in Council are public documents readily available to the Crown Prosecution Service. If in any particular case where the Secretary of State has not sent them a copy and there is uncertainty it is open to the Crown Prosecution Service to ask the Secretary of State which Order in Council has been sent to the judge. In this case it appears from the

opening note for the extradition hearing that there was no uncertainty but that, a
although the opening note was prepared on the basis that the relevant Order in
Council sent to the judge by the Secretary of State was SI 2003/3334, and that it
had been served by the Crown Prosecution Service as part of the extradition
bundle, the Crown Prosecution Service omitted to include a copy in the
extradition bundle.

[51] The court's powers on an appeal under s 105 of the 2003 Act are set out b
in s 106. These include directing the judge to decide the relevant question again.
For the reasons given at [22]–[34], above I have concluded that in holding that
s 78(4)(c) requires service of the documents before the commencement of the
extradition hearing the learned district judge fell into error. This appeal is
allowed. I would remit the case to the district judge with a direction that he
should proceed in accordance with the judgment of this court. c

SEDLEY LJ.

[52] The Extradition Act 2003 is throwing up a number of problems. The
present one is not the only problem attributable to apparent haste in its
composition. Its resolution has not been helped by the attitude taken by the d
Crown Prosecution Service as the requesting state's solicitor.

[53] I am able nevertheless to give my reasons for agreeing with the judgment
of Beatson J very shortly. Two questions arise: by when and by whom are the
documents specified in s 70(9) to be served?

[54] Since, remarkably, no provision is made in or under the Act for ensuring
that defendants receive necessary documents in good time, the justice of the e
common law (as Byles J once called it) will supplement Parliament's prescription
by recognising that, since the 2003 Act on the face of it allows service at any time
up to the moment when the judge decides whether or not to order extradition,
there is a judicial power—which may become an obligation—to grant an
adjournment if late service is a source of prejudice to the defendant. If this pushes f
the case past the time limits, the requesting state, for the reason I turn to next,
will have only itself to blame.

[55] Even more remarkably, the 2003 Act fails to say who is to serve these
essential documents. It follows in principle that they may be served by anybody.
But in practice, assuming that nobody else is prepared to do it, it is the Crown
Prosecution Service on the requesting state's behalf which will have to undertake g
service, for the elementary reason that otherwise there will be no extradition.
This is a matter not of legal obligation (for there is none) but of common sense.

[56] Accordingly the district judge was wrong to hold that, failing service
before the hearing, the time for service was past and extradition could not
therefore be ordered. His decision not to order extradition has to be quashed. He h
should resume the hearing and decide what course to take in the light of what has
by then been done by way of serving the missing Order in Council.

Appeal allowed.

Dilys Tausz Barrister.

Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc

[2005] EWCA Civ 854

COURT OF APPEAL, CIVIL DIVISION

AULD AND DYSON LJJ

15 JUNE, 11 JULY 2005

Costs – Order for costs – Discretion – Payment into court – Effect of offer to settle without payment in – CPR Pt 36.

The defendant was a power distribution company. Contractors employed by it trespassed on the claimants' land and felled trees growing under the defendant's power lines. On 26 February 2002 the defendant wrote to the claimants a letter marked 'without prejudice save as to costs', which included an offer to settle before proceedings in accordance with CPR 36.10[a], which was open for acceptance for 21 days. Under CPR 36.10 if a person made an offer to settle before proceedings the court would take that offer into account when making any order as to costs. The offer was not accepted, and the claimants commenced proceedings in December 2002, claiming some £780,000. In August the defendant paid £20,000 into court in settlement of the claim. The claimants asked whether by serving notice of the payment into court the defendant had withdrawn the offer of 26 February. The defendant replied that, as the claimant had not accepted that offer within 21 days, it had lapsed and was no longer open for acceptance. At trial the judge awarded the claimants damages of £25,600 which was a sum less than contained in the offer to settle. The defendants were ordered to pay a proportion of the claimants' costs. The judge held that the offer to settle made by the letter of 26 February 2002 should not affect the order for costs, because (i) it had not been followed by a payment into court as contemplated by CPR 36.10, and (ii) it had later been withdrawn. The defendant appealed.

Held – (1) An offer to settle a money claim should usually be treated as having the same effect as a payment into court if (i) the offer was expressed in clear terms so that there was no doubt as to what was being offered and it stated whether it related to the whole of the claim or to part or to an issue that arose in it, and if so to which part or issue; whether it took into account any counterclaim; and if it was expressed not to be inclusive of interest, it gave details relating to interest equivalent to those set out in CPR 36.22(2)[b] as to whether interest was offered, and if so, the amount offered, the rate or rates, and the period or periods for which it was offered; (ii) the offer was open for acceptance for at least 21 days and otherwise accord with the substance of a Calderbank offer; (ii) the offer was genuine; and (iv) the defendant was clearly good for the money at the time when

a CPR Pt 36, so far as material, is set out at [6], below

b CPR 36.22(2) provides: 'Where a claimant's Part 36 offer or Part 36 payment notice is expressed not to be inclusive of interest, the offer or notice must state—(a) whether interest is offered; and (b) if so, the amount offered, the rate or rates offered and the period or periods for which it is offered.'

the offer was made. To the extent that any of those conditions was not satisfied, the offer should be given less weight than a payment into court for the purposes of a decision as to the incidence of costs. Where none was satisfied it was likely that the court would hold that the offer afforded the defendant no costs protection at all. In the instant case all four conditions had been satisfied (see [24], [25], [31], [47], below); *Crouch v King's Healthcare NHS Trust* [2005] 1 All ER 207 and *Southampton Container Terminals Ltd v Schiffahrts-Gesellschaft Hansa Australia MBH & Co, The Maersk Colombo* [2001] 2 Lloyd's Rep 275 considered.

(2) To decide the effect of an offer on costs, one had to look to the date when the offer should have been accepted. If a claimant should have accepted an offer within 21 days, then, on the face of it, the consequence should be that he was entitled to his costs up to the date when the offer should ordinarily have been accepted, and the defendant was entitled to his costs thereafter. Usually the mere fact that an offer was withdrawn after the date when it should have been accepted should not lead to a different result. In the instant case the claimants should have accepted the offer of 26 February 2002 within 21 days and were not saying that they would have accepted the offer and reached an agreement on costs after the expiry of that period if the offer had not been withdrawn. There were, therefore, no grounds for holding that the withdrawal of the offer should have made any difference. Accordingly, the appeal would be allowed (see [41], [42], [44], [46], [47], below); *Bristol and West Building Society v Evans Bullock* (5 February 1996, unreported) considered.

Notes

For offers to settle and payments into court and for the court's discretion as to costs, see, respectively, 37 *Halsbury's Laws* (4th edn reissue) para 807 and 10 *Halsbury's Laws* (4th edn reissue) paras 16, 17.

Cases referred to in judgments

Amber v Stacey [2001] 2 All ER 88, [2001] 1 WLR 1225, CA.

Bristol and West Building Society v Evans Bullock (5 February 1996, unreported), CA.

Calderbank v Calderbank [1975] 3 All ER 333, [1976] Fam 93, [1975] 3 WLR 586, CA.

Crouch v King's Healthcare NHS Trust [2004] EWCA Civ 1332, [2005] 1 All ER 207, [2005] 1 WLR 2015.

Cutts v Head [1984] 1 All ER 597, [1984] Ch 290, [1984] 2 WLR 349, CA.

Southampton Container Terminals Ltd v Schiffahrts-Gesellschaft Hansa Australia MBH & Co, The Maersk Colombo [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275.

Cases referred to in skeleton arguments

Molloy v Shell UK [2001] EWCA Civ 1272, [2001] All ER (D) 79 (Jul).

Painting v University of Oxford [2005] EWCA Civ 161, [2005] All ER (D) 45 (Feb).

Scutt v Lomax (25 January 2000, unreported), CA.

Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

Appeal

The defendant, Western Power Distribution (South West) plc, appealed with permission of Tuckey LJ from the decision of Judge Roach in the Bristol County Court on 21 December 2004 ordering the defendant to pay half the costs of the claimants, the Trustees of Stokes Pension Fund, in the claimants' proceedings against the defendant. The facts are set out in the judgment of Dyson LJ.

Mark Simpson (instructed by *Osborne Clarke*, Bristol) for the defendant.
Leslie Blohm (instructed by *Davis Wood*, Bristol) for the claimants.

Cur adv vult

11 July 2005. The following judgments were delivered.

DYSON LJ.

[1] This is an appeal, with the permission of Tuckey LJ, against the decision of Judge Roach dated 21 December 2004, whereby he ordered the defendant to pay half the claimants' costs of these proceedings. The principal questions that arise are (a) to what extent a defendant who makes an offer to settle a money claim which the claimant fails to better at trial should be in the same position in relation to costs as he would have been if he had made an equivalent payment into court in accordance with CPR Pt 36, and (b) whether it makes any difference that the defendant withdraws the offer after the time for its acceptance has passed.

[2] The facts can be stated quite briefly. The defendant is a substantial power distribution company. The claimants are trustees of a pension fund. In October 2000, the contractors employed by the defendant trespassed on the claimants' land and felled approximately 400 trees which were growing under the defendant's power lines. On 26 February 2002 the defendant wrote to the claimants a letter marked 'without prejudice save as to costs'. It included the following:

> 'As promised I set out below the terms of a Part 36 offer now made to you in this matter in accordance with Rule 36.10 of the Civil Procedure Rules (CPR).
>
> Part 36 of the CPR will apply to this offer and is made in relation to the whole of the claim. It is open for acceptance within 21 days from the date of this letter, which is by 4.00pm on 19 March 2002. If after this time you decide you would like to accept the offer, you may only do so if we can agree liability for costs or the court gives permission ...
>
> However, we are prepared to take a commercial view of this matter and in the interests of saving time and expense and reaching an amicable settlement we are prepared to agree full and final settlement on the following basis:
>
> 1. Your claim be discontinued.
> 2. WPD pay Stokes Personal Pension Fund £27,000 in respect of replanting the trees.
> 3. WPD pay Stokes Personal Pension Fund an additional goodwill payment in the sum of £8,000 in respect of all and any losses you may have suffered in relation to this dispute (the liability for which is not accepted by WPD as mentioned above). For the avoidance of doubt, the sum of £8,000 is inclusive of interest.
> 4. Stokes Personal Pension Fund grant WPD the easement detailed in the letter of 24 September 2001, (a copy of which is enclosed for your information).
> 5. WPD pay your costs (but we understand none have been incurred to date).
>
> In the event of non-acceptance of this offer and subsequent issuing of proceedings the adverse cost consequences set out in CPR 36.20 will apply

should you fail to obtain a judgment that is more advantageous than the offer at trial.' a

[3] The offer was not accepted. The claimants' solicitors wrote to the defendant on 25 April 2002 saying that they had obtained an expert opinion and that the initial costs of supplying, planting, supporting and feeding the replacement trees was £505,000. By a letter dated 1 November 2002, the solicitors notified the defendant that the claim was now quantified at £757,500 plus VAT. b

[4] Proceedings were issued on 17 December 2002. The schedule of loss quantified the claim in a sum of approximately £780,000 including VAT. The defendant did not make a payment into court after the issue of proceedings pursuant to CPR 36.10(3).

[5] On 20 June 2003, the solicitors acting for the defendant wrote 'without prejudice save as to costs' offering to settle on terms that the claimants discontinued the proceedings, the defendant paid £1445.40 for a permanent easement over the land and the claimant paid £18,530 in respect of its costs. On 1 July 2003, the claimants' solicitors offered to settle on terms including that the defendant paid £42,500 plus costs. This offer was rejected. On 13 August, the defendant paid £20,000 into court in settlement of the claim including interest. On 14 August, the claimants' solicitors asked whether by serving notice of the payment into court, the defendant had withdrawn the offer of 26 February 2002, or whether that offer was still open for acceptance. The defendant replied on 14 August that, as the claimants had not accepted the offer of 26 February 2002 within 21 days, it had lapsed and for the avoidance of doubt it was no longer open for acceptance. c d e

[6] The trial began on 22 September 2004. On 8 November, the judge awarded the claimants damages in the sum of £25,600.

THE RELEVANT PROVISIONS OF THE CPR f

'**36.1** (1) This Part contains rules about—(a) offers to settle and payments into court; and (b) the consequences where an offer to settle or payment into court is made in accordance with this Part.

(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders ... g

36.2 (1) An offer made in accordance with the requirements of this Part is called—(a) if made by way of a payment into court, "a Part 36 payment"; (b) otherwise "a Part 36 offer".

36.3 (1) Subject to rules 36.2A(2), 36.5(5) and 36.23, an offer by a defendant to settle a money claim will not have the consequences set out in this Part unless it is made by way of a Part 36 payment. (2) A Part 36 payment may only be made after proceedings have started ... h

36.5 ... (6) A Part 36 offer made not less than 21 days before the start of the trial must—(a) be expressed to remain open for acceptance for 21 days from the date it is made; and (b) provide that after 21 days the offeree may only accept it if—(i) the parties agree the liability for costs; or (ii) the courts give permission. j

(7) A Part 36 offer made less than 21 days before the start of the trial must state that the offeree may only accept it if—(a) the parties agree the liability for costs; or (b) the court gives permission ...

(8) If a Part 36 offer is withdrawn it will not have the consequences set out in this Part.

36.10 (1) If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account when making any order as to costs.

(2) The offer must—(a) be expressed to be open for at least 21 days after the date it was made; (b) if made by a person who would be a defendant were proceedings commenced, include an offer to pay the costs of the offeree incurred up to the date 21 days after the date it was made; and (c) otherwise comply with this Part.

(3) Subject to paragraph (3A), if the offeror is a defendant to a money claim—(a) he must make a Part 36 Payment within 14 days of service of the claim form; and (b) the amount of the payment must not be less than the sum offered before proceedings began …

36.20 (1) This rule applies where at trial a claimant—(a) fails to better a Part 36 payment; or (b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer …

(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court …

44.3 (1) The court has discretion as to—(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.

(2) If the court decides to make an order about costs—(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order …

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—(a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36) …

(5) The conduct of the parties includes—(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.'

THE JUDGE'S DECISION ON COSTS

[7] The judge said that he took into account r 44.3. Since the claimants had beaten the payment into court, they had succeeded in the action. In the absence of an effective payment into court, it was just to order the defendant to pay a proportion of the claimants' costs. The claimants were not entitled to all of their costs because their approach to the litigation in claiming £757,000 plus VAT had been unreasonable. This was not a realistic sum to claim. Of this sum the judge said:

'22. It was founded on an estimate provided by a tree expert who was not called as an expert witness in the case but simply as an expert as to fact. The expert made it clear that he provided the estimate to specifications provided by Mr Crocker, the claimant's principal beneficiary. The expert gave no evidence in the case beyond the scope of the estimate.

23. Thus the estimate and the sum of money it claimed had no expert foundation. Moreover it was not confirmed by other expert evidence from tree experts called by the claimant. In my judgment therefore it was a precarious sum to claim and its lack of solidity is supported by Mr Crocker's own evidence when he was cross examined about it at trial. His response to the claim at that level being queried was to say that he thought that this element of the claim had been abandoned. In fact however the high claim was not abandoned until closing submissions were made by the claimant and none of its remaining submissions ever sought a judgment sum of anything like that magnitude.'

[8] The unreasonable approach of the claimants should be reflected in a reduction in costs. He held that one half of their costs would be a 'proportionate and just order in the circumstances of this case'.

[9] He then turned to consider whether the offer to settle made by the letter of 26 February 2002 should affect the order for costs that he should make. He said that the offer afforded the defendant no protection, because (i) it was not followed by a payment into court as contemplated by r 36.10, and (ii) it was later withdrawn. In the judge's view, the CPR makes a clear distinction between offers made pursuant to r 36.10 which are followed by a payment into court and those where a simple offer to settle is made on a basis without prejudice as to costs. He distinguished *Southampton Container Terminals Ltd v Schiffahrts-Gesellschaft Hansa Australia MBH & Co, The Maersk Colombo* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275 and *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332, [2005] 1 All ER 207, [2005] 1 WLR 2015. In the present case, the defendant had no 'practical or good reason' not to pay the money into court: it stood in a very different position from an NHS trust whose position was considered in *Crouch*'s case. By contrast with the defendant in *The Maersk Colombo*, the defendant was not 'of foreign identity such that it did not know the rules of court'. He also said that he rejected the submission that *Bristol and West Building Society v Evans Bullock* (5 February 1996, unreported) established the principle that offers to settle 'retain their costs consequences despite being time limited or despite being subsequently withdrawn': that case was peculiar to its facts.

[10] In the result, the offer of 26 February 2002 had no effect on the incidence of costs. But for the reasons already mentioned, the claimants were only entitled to half of their costs.

THE ISSUES

[11] Two issues arise on this appeal. The first is whether the judge was right to take no account of the defendant's offer dated 26 February 2002 on the grounds that (i) it was not followed by a payment into court, and (ii) it was withdrawn. The second is whether the judge was justified in reducing the claimants' costs on the grounds that the claim had been exaggerated.

SHOULD THE OFFER HAVE BEEN TAKEN INTO ACCOUNT?

Background and previous authority

[12] There is no doubt that an offer by a defendant to settle a money claim will not automatically have the cost consequences set out in r 36.20(2) unless it is made by way of a Pt 36 payment. This is expressly provided by r 36.3(1). Rules 36.2A(2), 36.5(5) and 36.23 (the three exceptions to r 36.3(1)) have no application in the present case. But the court can exercise its discretion to order that an offer which is not made in accordance with Pt 36 (including, therefore, an offer made before the commencement of proceedings which is not followed by a payment into court pursuant to r 36.10(3)(a) within 14 days of the service of the claim form) shall have the costs consequences specified in r 36.20(2): that is expressly provided by r 36.1(2) and r 44.3(4)(c).

[13] These provisions enabling the court to order that an offer should have the costs consequences specified in r 36.20(2) had the effect of reversing the pre-CPR practice which was most clearly articulated by this court in *Cutts v Head* [1984] 1 All ER 597, [1984] Ch 290. In *Cutts v Head*, Oliver LJ reviewed the history of the Calderbank offer (*Calderbank v Calderbank* [1975] 3 All ER 333, [1976] Fam 93) and the approach of the law to such an offer outside the matrimonial context. At [1984] 1 All ER 597 at 610, [1984] Ch 290 at 312, in a passage with which Fox LJ agreed, Oliver LJ cautioned that it should not be thought that a Calderbank offer could now be regarded as a substitute for a payment into court where a payment into court is appropriate. He continued:

> 'In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and speaking for myself, I should not, as at present advised, be disposed in such a case to treat a *Calderbank* offer as carrying the same consequences as payment in.'

[14] In his interim report on *Access to Justice* (June 1995), Ch 24, para 5, Lord Woolf proposed significant changes to the rules in relation to payments into court and offers to settle 'in order to further the policy of encouraging settlement'. He said that the system of payments into court should be discontinued, and that it should be permissible to use a Calderbank letter in all cases. He recognised that the offeree would not have the security that is afforded by a payment into court, but as against that he pointed out at para 6 that the party who succeeds at trial has no security for his judgment.

[15] At Ch 11 of his final report on *Access to Justice* (July 1996), Lord Woolf said:

> '3. In the interim report, I did not attach importance to the retention of payments into court as a means of achieving the kind of benefits which I believe will flow from my proposed system of offers. However, the Law Society and others who made representations in response to the interim report, while generally supporting my proposals on offers, argued that a payment into court was a useful way of assuring claimants of the substance of an offer. The fact that the money was actually available made it more likely that the offer would be accepted. Up to a point, I accept this reasoning and therefore do not now recommend the abolition of payments into court.
>
> 4. Allowing for the fact that my proposals would enable claimants as well as defendants to make offers, it is of course important that rules of court relating to offers and to payments into court respectively should diverge as little as

possible. I therefore recommend, in respect of defendants' offers, that the making of the offer itself should be the critical step, while the backing of a payment in will be secondary and optional. This means that *Cutts v Head* [1984] 1 All ER 597, [1984] Ch 290, which prevents the making of a Calderbank offer where a payment into court can be made, will no longer apply under the new rules. When considering the exercise of its discretion as to costs at the end of a case, the court will therefore have to give primary consideration to the terms of the defendant's offer regardless of whether there was also a payment into court. In practice, it should only be in an unusual case that the absence of a payment in should be taken to undermine the reasonableness of an offer.'

[16] Lord Woolf's recommendations were not, however, adopted by the Civil Procedure Committee without modification. I take the last sentence of para 4 of Lord Woolf's final report to mean that, if a claimant fails to beat a Calderbank offer, it is only in an unusual case that the defendant should achieve a less favourable order for costs than he would have done if he had made an equivalent payment into court. This strong steer as to the effect of a Calderbank offer in money claims is not reflected in the CPR. In my judgment, it is unfortunate that, although the rules provide that the court can order that an offer is to have the same costs consequences as a payment into court, they give no guidance as to how the discretion to do so should be exercised.

[17] This is not, however, entirely uncharted territory. In *Amber v Stacey*, [2001] 2 All ER 88, [2001] 1 WLR 1225, the claim was for £7579.86, and there was a counterclaim. The defendant made an offer to settle for £4000 which was refused by the claimant. The defendant then paid £2000 into court and a further £1000 a few months later. Judgment was given in favour of the claimant in the sum of £2321.16 and the counterclaim was dismissed. The judge ordered the claimant to pay the defendant's costs from the date of the offer of £4000. On appeal, Sir Anthony Evans held that it was wrong to treat the offer of £4000 as if it was a payment into court, and the judge had erred in ordering the claimant to pay the defendant's costs, thereby making the same order as he would have done if the defendant (a) had made a payment into court and (b) succeeded on all issues at trial. In agreeing, Simon Brown LJ said [2001] 2 All ER 88 at 96, [2001] 1 WLR 1225 at 1232–1233:

'39. I agree. Clear though it is that the claimant behaved thoroughly unreasonably from first to last, and tempting though it is therefore to uphold the recorder's order in full measure, I share [Sir Anthony Evans's] view that it was wrong to treat the letter of 1 October 1997 for all the world as though it constituted a payment into court. There are to my mind compelling reasons of principle and policy why those prepared to make genuine offers of monetary settlement should do so by way of CPR Pt 36 payments. That way lies clarity and certainty, or at any rate greater clarity and certainty than in the case of written offers ...

41. Payments into court have advantages. They at least answer all questions as to (a) genuineness, (b) the offeror's ability to pay, (c) whether the offer is open or without prejudice, and (d) the terms on which the dispute can be settled. They are clearly to be encouraged, and written offers, although obviously relevant, should not be treated as precise equivalents.'

[18] This decision was analysed by Clarke LJ (with whom Thorpe LJ and Holland J agreed) in *The Maersk Colombo* ([2001] 2 Lloyd's Rep 275). He emphasised

the fact (as would I) that it was the combined effect of the two factors identified in *Amber v Stacey* (the failure to pay £4000 into court and the fact that the counterclaim was dismissed) that led to the conclusion that the judge had erred in ordering the claimant to pay the defendant's costs. Clarke LJ agreed with the observations of Simon Brown LJ that there were many advantages of a payment into court, saying at [97]:

> 'In particular the money is then readily available and no question can arise as to whether the offeror can or will pay if the offer is accepted. It should thus be appreciated that offerors who do not make a payment-in do so at their peril in the sense that the Court may not be willing to reflect the offer in its order for costs.'

[19] Clarke LJ went on to say, however, that the court retains a wide discretion under r 36.1(2) to make the same order as it would have made under r 36.20 even in the absence of a payment-in: 'all depends on the circumstances'.

[20] In *The Maersk Colombo*, the defendant made a Calderbank offer which was said to be open for acceptance for 21 days. It was not accepted and some time later, an equivalent amount was paid into court. The judge awarded the claimant less than the sum that had been offered to settle the claim. He ordered the claimant to pay the defendant's costs from 21 days from the making of the offer. On appeal, it was submitted on behalf of the claimant that, in the light of *Amber v Stacey*, this decision was wrong. The defendant relied on the fact that (i) it takes time to arrange a payment into court (the underwriters of the defendants were the Swedish Club and they needed time to collate the significant sum that was required); (ii) the offer could not be regarded as an offer that was lacking in substance; and (iii) it was plain from the fact that the later payment into court was not accepted that, even if a payment into court had been made instead of an offer, it would not have been accepted. In these circumstances, it was contended that the offer should be treated as having the same effect as a payment into court. The defendant's submissions were accepted by the judge, and at [89] Clarke LJ said that the judge's decision was well within the ambit of his discretion. He continued:

> 'The Courts should encourage settlement. One way of doing so is to make effective orders for costs where claimants could have settled for more than they are ultimately held to be entitled. In the instant case there is to my mind no doubt that, if the claimants had accepted the offer in the letter of May 27, which was expressly written without prejudice save as to costs, the agreement which would then have come into existence would have been honoured by the defendants' club.'

[21] Finally, I come to the case of *Crouch v King's Healthcare NHS Trust* [2005] 1 All ER 207. Waller LJ gave the lead judgment. Mance LJ agreed and Sir Christopher Staughton agreed with the parts of Waller LJ's judgment which are material for present purposes. In fact there were two appeals before the court. In both cases, the defendant had applied the practice which NHS trusts had developed in relation to money claims of making Calderbank offers. They considered that, rather than making a payment into court, it was preferable for sums which they were willing to pay to settle money claims to be available for the provision of patient services pending resolution of the case.

[22] Having reviewed the authorities, Waller LJ said at [41] that, if the offer was admissible and was something to which the court should have regard, 'it is much less easy to see why, unless it could be shown the offer was sham or non-serious in

some way, it should not in normal circumstances have the same result as if the sum had been paid in'. He then considered the facts of *Crouch*'s case. The judge had taken into account the NHS trust offer, but had purported to apply the principles stated by Simon Brown LJ in *Amber v Stacey* and ordered the NHS trust to pay the claimant's costs despite the fact that the claimant had been awarded less than the amount that had been offered. Waller LJ was of the opinion that this was based on a misunderstanding of Simon Brown LJ's judgment. In exercising the discretion afresh, he said at [45]:

> 'Essentially the trust is bound to be good for the money. This form of offer from an NHS Trust is as sound as a payment in, and, unless there is some factor special about the circumstances of the case, a court should treat such an offer in the same way as a payment in.'

Guidance as to the exercise of the discretion

[23] How should the discretion accorded by rr 36.1(2) and 44.3(4)(c) be exercised in relation to an offer made to settle a money claim where the claimant recovers less than the amount of the offer? In the absence of any guidance in the rules, it falls to the courts to provide it. I emphasise that it is a matter for the discretion of the court. It is clear from r 36.3(1) that the offer cannot automatically have the costs consequences specified in Pt 36. The question, therefore, is what weight should be given to an offer made to settle a money claim.

[24] In my judgment, an offer should usually be treated as having the same effect as a payment into court if the following conditions are satisfied (I consider the effect of a withdrawal at [32]–[42], below). First, the offer must be expressed in clear terms so that there is no doubt as to what is being offered. It should state whether it relates to the whole of the claim or to part of it or to an issue that arises in it, and if so to which part or issue; whether it takes into account any counterclaim; and if it is expressed not to be inclusive of interest, giving details relating to interest equivalent to those set out in r 36.22(2). This condition does no more than reflect the requirements specified in r 36.5(2) in relation to payments into court. Secondly, the offer should be open for acceptance for at least 21 days and otherwise accord with the substance of a Calderbank offer. Thirdly, the offer should be genuine and not, to use the words of Waller LJ 'sham or non-serious in some way'. Fourthly, the defendant should clearly have been good for the money at the time when the offer was made.

[25] To the extent that any of these conditions is not satisfied, the offer should be given less weight than a payment into court for the purposes of a decision as to the incidence of costs. Where none of the conditions is satisfied, it is likely that the court will hold that offer affords the defendant no costs protection at all.

[26] But if all of the conditions to which I have referred are met, then I can see no reason in principle why the effect of an offer should differ from that of a payment into court. Simon Brown LJ mentioned the need to promote clarity and certainty. I agree. That is why an offer which is unclear and uncertain will usually not carry the same weight as a payment into court. But an offer which satisfies the four conditions should by definition be no less clear or certain than a payment into court. It is important to emphasise that the purpose of a payment into court is not to provide the claimant with security for his judgment if he succeeds at trial. It is to encourage settlement. As Lord Woolf said, a payment into court is 'a useful way of assuring claimants of the substance of an offer', and thereby encouraging them to settle by accepting the money that has been paid into court. If a claimant has no less

assurance as to the substance of an offer than where a payment into court has been made, there is no reason to treat the offer as providing any less encouragement to settle or to treat it differently from a payment into court.

[27] Mr Blohm submits that there is a danger of satellite litigation inherent in the approach that I have suggested. In particular, he says, there may be arguments as to whether the offer was genuine and/or whether the defendant was clearly good for the money at the time it was made, and possibly as to whether the terms of the offer are sufficiently clear. It is implicit in his judgment in *Amber v Stacey* that Simon Brown LJ was concerned about these dangers. But in my view, the risk of such satellite litigation can be overstated. In reality, it would be difficult for a claimant who refused an offer to contend after a trial that the offer was not genuine or that the defendant was not good for the money, unless he said that this was why he was refusing the offer at the time. In the absence of such a statement at that time, the court would be likely to infer that the reason for the refusal of the offer was simply that the claimant considered it to be too low. The best way for a claimant to test the genuineness of an offer and the defendant's ability to pay is to accept the offer (or at least to do so conditionally on payment being forthcoming) and see what happens. If this does not occur, it will be a rare case where a claimant will have any prospects of showing that the offer was not genuine or would not have been honoured.

[28] In the present case, the judge gave two reasons (apart from the withdrawal point) for deciding that the offer of 26 February 2002 afforded the defendant no costs protection. The first was that the defendant had no practical or good reason for not making a payment into court. He seems to have been of the view that it was the existence of practical or good reasons for the defendant not making a payment into court that led to the costs orders that were made in *The Maersk Colombo* and *Crouch*'s case. It is true that in *The Maersk Colombo* the fact that it would take time to arrange for a payment into court was one of the factors relied on by the trial judge which this court said it was open to him to take into account. But in my judgment it is clear from Clarke LJ's judgment that the principal reason why the judge's decision on costs was upheld in that case was that the defendants would have honoured the offer if it had been accepted by the claimant.

[29] In *Crouch*'s case, the reason given by this court for its decision was not that the NHS trust had a good and practical reason for not making a payment into court eg that it was a better use of its money to spend it on patient care, rather than have it tied up in court. It was simply that the offer was genuine and the trust was bound to be good for the money. There may be circumstances where the existence of a good practical reason for not making a payment into court would be considered to be a sufficient reason for holding that an offer should have the same costs consequences as a payment into court. But the existence of such a reason is certainly not a necessary condition for treating an offer as having such consequences. In my judgment, however, the substance and effect of the offer are more important than the reasons why the defendant did not make a payment into court.

[30] The second reason given by the judge was that, unlike the defendants in *The Maersk Colombo*, the defendant in the present case is not a foreign entity which was ignorant of the rules of court. I doubt whether problems faced by a defendant in getting the money together would, of themselves, be sufficient to justify treating an offer as equivalent to a payment into court for purposes of costs. But I do not see how ignorance of the rules could be a relevant factor.

[31] Leaving the effect of the withdrawal of the offer on one side, I would, therefore, hold that the reasons given by the judge for saying that the offer afforded the defendant no costs protection were not good in law. Each of the four conditions identified at [24], above was satisfied. The offer made on 26 February 2002 was clear. In substance it accorded with the requirements of an effective Calderbank letter. It was not (and never has been) suggested that it was not a genuine offer or that the defendant did not have the means to honour it if it was accepted. Subject to the withdrawal point, there were no factors which would justify doing other than treat the offer as having the same effect as if the £35,000 offered had been paid into court.

The effect of the withdrawal

[32] I now turn to the effect of the withdrawal of the offer. It is necessary to examine the decision of this court in *Bristol & West Building Society* (5 February 1996, unreported). In that case, the defendants made a Calderbank offer which the claimant beat at a hearing before the district judge. The defendant appealed and on the appeal the claimant failed to beat the defendant's offer. Between the date of the two hearings, the defendants had withdrawn the offer. The judge made no order as to costs. This court allowed the defendants' appeal against the costs order. Neill LJ said:

> 'What then is the effect of a Calderbank offer which subsequently is withdrawn? On the facts of this case—it is not necessary to go further than the facts of this case—it seems to me that, although the offer was no longer available for acceptance, unless the matter had been renegotiated between the parties, the effect of the offer letter remained. Once the letter had been sent, and it was a letter which the learned judge decided should have been accepted, the district judge could have taken account of the Calderbank offer. It seems to me that, if the offer in that letter should have been accepted, then Mrs Rosen Peacocke is right in her argument that any subsequent proceedings flowed from the refusal of the offer. There would have been no hearing before Judge Jack in October 1995 had that offer been accepted. For my part, I think it was a misinterpretation of a Calderbank letter of this kind, to treat it as though it was no longer operative. It was not operative in the sense it was open to acceptance, but the effect of it remained.'

[33] He added: 'To decide the effect of a Calderbank offer on costs one looks at the date when the offer should have been accepted'. The judge should, therefore, have ordered the claimant to pay the defendants' costs of both hearings.

[34] Ward LJ agreed and added:

> '... the principal error in my judgment, was not to distinguish between the question whether the Calderbank letter was still on the negotiating table and the question whether its terms materially related to the result of the appeal. That it had lapsed, whether by rejection, non acceptance within a reasonable time, or its withdrawal, matters not. It remained material as a fact in the history of litigation. Had it been accepted within a reasonable time after it was made, and the learned judge correctly found that it should have been because the plaintiff eventually did less well than they had been offered, then there would have been no need for the appeal at all. An appeal became necessary because, without it, the wrong order would have stood uncorrected.'

[35] In the present case, the judge distinguished *Bristol & West Building Society* on the grounds that (a) the offer to settle in that case was made after a first instance decision by the district judge; and (b) the offer was not one which could have been made by a payment into court. As to (a), what the judge said was factually incorrect: the offer was made earlier than the hearing before the district judge. But whether it was made before or after the hearing before the district judge, I do not see how this could be a proper basis for distinguishing the decision. As to (b), the point in issue was the effect of the withdrawal of the offer, not the nature of the offer. As Mr Simpson points out, the judge seems to have elided the issue of whether a written offer to settle has the same effect as a payment into court with the issue of the effect of an offer being withdrawn.

[36] Mr Blohm submits that, in so far as the defendant relies on *Bristol & West Building Society* as establishing a simple 'but for' test of causation that requires the trial court to ignore the history of the litigation or subsequent events after the offer, this is too broad a proposition and is inconsistent with the general requirements of the CPR to have regard to all relevant factors in the light of the overriding objective. He further submits that the decision is neither binding authority nor of great persuasive force.

[37] I accept that *Bristol & West Building Society* should not be taken as authority for a mechanistic application of a principle that, where it is held that a *Calderbank* letter should have been accepted by the claimant, and the claimant is awarded less than the amount of the offer at trial, the defendant should automatically be entitled to his costs from the date when the offer should have been accepted without regard to any other considerations. Even if the offer is not withdrawn, there can be no question of automatic consequences: it is a question of what weight should be given to the offer.

[38] I also agree that *Bristol & West Building Society* is not technically binding since it was a pre-CPR authority. But it is of strong persuasive force. It is true that Neill LJ did preface his remarks with the words 'on the facts of this case'. But it seems to me that neither his reasoning nor that of Ward LJ was *in fact* dependent on anything peculiar to the facts of that case.

[39] Mr Blohm submits in any event that there are other reasons why an offer that has been withdrawn should not be taken into account in relation to costs. If an offer that has been withdrawn can have the same effect as a payment into court, then this would allow a defendant to circumvent the effect of the provisions of r 36.10, and that would not encourage settlement. The bare assertion that it does not matter whether an offer is withdrawn is contrary to r 36.5(8), which makes it clear that the withdrawal of a Pt 36 offer (which this was not) means that the offer does not attract the benefits of a Pt 36 offer: this is intended to induce parties to maintain offers if they are to obtain the benefit of making them.

[40] I cannot accept Mr Blohm's submission that an offer that has been withdrawn should necessarily not be taken into account. Nor can I accept Mr Blohm's further submission that it should only be in exceptional circumstances that the court will give weight to a pre-action offer made by a defendant to settle a claim where that offer is subsequently withdrawn. Take the present case. As a matter of history, an offer was made on 26 February 2002. If it had been accepted within 21 days, the defendant would have paid the claimants' costs and there would have been no trial: the claimants would have done better than they did in fact by refusing the offer.

[41] As Neill LJ said, to decide the effect of an offer on costs, one looks to the date when the offer should have been accepted. If a claimant should have accepted an

offer within 21 days, then, on the face of it, the consequence should be that he is entitled to his costs up to the date when the offer should ordinarily have been accepted, and the defendant is entitled to his costs thereafter. Usually the mere fact that an offer is withdrawn after the date when it should have been accepted should not lead to a different result.

[42] In the present case, the judge made no finding as to whether, and if so when, the claimants should have accepted the offer of 26 February 2002. On the material that has been placed before this court, I would hold that the claimants should have accepted the offer within 21 days of 26 February. Mr Blohm advanced no submissions in justification of the refusal of the offer. It is clear that the claimants rejected the offer because their assessment of the value of the claim was grossly exaggerated and unreasonable: see [7], [8], above. Moreover, this is not a case where the claimants are saying that they would have accepted the offer (and reached an agreement on costs) after the expiry of the 21-day period if the offer had not been withdrawn. In my judgment, there are no grounds on the facts of this case for holding that the withdrawal of the offer should make any difference.

[43] There may be circumstances where the court holds that the claimant acted reasonably in not accepting the offer within the 21-day period and where the offer was withdrawn before the time when the claimant should have accepted it. In that situation, the withdrawal of the offer may have a very real effect on the order that should be made in respect of costs. But that is very different from the present case.

Conclusion on the first issue

[44] For the reasons that I have given, in my view the judge should have held that (i) the claimants were liable for the defendant's costs incurred after the expiry of 21 days from 26 February 2002, and (ii) the defendant was liable for the claimants' costs (if any) incurred before that date.

EXAGGERATION

[45] Since the proceedings were not issued until 17 December 2002, the defendant's liability for the claimants' costs (if any) must be minimal. Accordingly, the second issue does not arise, or arises only to an insignificant extent. In so far as it is necessary to deal with the second issue at all, it is sufficient to say that I see no reason to interfere with the judge's assessment of the claimants' conduct and application of r 44.3(5)(d).

OVERALL CONCLUSION

[46] I would allow this appeal, and invite counsel to agree a form of order to give effect to this judgment.

AULD LJ.

[47] For all the reasons given by Dyson LJ, I agree that the appeal should be allowed.

Appeal allowed.

Kate O'Hanlon Barrister.

Lesotho Highlands Development Authority v Impregilo SpA and others

[2005] UKHL 43

HOUSE OF LORDS,

LORD STEYN, LORD HOFFMANN, LORD PHILLIPS OF WORTH MATRAVERS, LORD SCOTT OF FOSCOTE AND LORD RODGER OF EARLSFERRY

9, 10 MAY 2005, 30 JUNE 2005

Arbitration – Award – Foreign currency – Contract stipulating currency of account and applicable law – Arbitral tribunal making award in currency other than that provided by contract – Tribunal making ordering pre-award interest under procedural law of arbitration – Whether excess of power – Arbitration Act 1996, ss 48(4), 49(3), 68(2)(b).

The claimant employer engaged a consortium of seven companies (the contractors) from various countries to construct a dam in Lesotho. The arbitration clause in the contract provided for arbitration under the rules of the International Chamber of Commerce and the right of appeal on a point of law was excluded. The law of the contract was that of Lesotho and the currency of account was the Lesotho currency, maloti. The contractors made a number of claims for reimbursements of increased costs, which were referred to arbitration. The issues referred to the arbitral tribunal included the currency or currencies of any award and whether any interest should be paid on sums found due. The tribunal issued a partial award finding that certain sums were due. It held that those sums, which were stated in Maloti, should be converted into European currencies at the rate applicable when the payments should have been made. In doing so it relied on s 48(4)[a] of the Arbitration Act 1996, which provided that a tribunal might order the payment of a sum of money, in any currency. The tribunal also awarded interest in exercise of the power to do so contained in s 49(3)[b] of the 1996 Act. The employer challenged the decisions on the basis, inter alia, of excess of power under s 68[c] of the 1996 Act. That section provided for such a challenge on the ground of serious irregularity affecting the tribunal, the proceedings or the award. The definition of serious irregularity was that it had caused or would cause substantial injustice to the applicant and could include, under s 68(2)(b), the tribunal exceeding its powers. The judge ruled that the tribunal had exceeded its powers by expressing the award in currencies other than those stipulated for in the contract and by awarding interest other than in accordance with the applicable law of the contract. The Court of Appeal upheld that decision. The contractors appealed. The central issue was whether an alleged error of arbitrators in interpreting the underlying or principal contract was an excess of power under s 68(2)(b), so as to give the court the power to intervene.

Held – The erroneous exercise of a power vested in a tribunal (rather than the purported exercise of a power which it did not have) involved no excess of power

a Section 48, so far as material, is set out at [2], below
b Section 49 is set out at [2], below
c Section 68, so far as material, is set out at [3], below

under s 68(2)(b) of the 1996 Act. By its terms s 68(2)(b) assumed that the tribunal acted within its substantive jurisdiction; it was aimed at the tribunal exceeding its powers under the arbitration agreement, terms of reference or the 1996 Act. It did not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It was not apt to cover a mere error of law. In order to decide whether s 68(2)(b) was engaged it would be necessary to focus intensely on the particular power involved, judged in all the circumstances of the case. In the instant case, (Lord Phillips of Worth Matravers dissenting) the tribunal could have erred in its interpretation of the underlying contract or as to its powers under s 48(4) to express the award in any currency, but such error of law was no more than an erroneous exercise of available power and therefore not an excess of power within s 68(2)(b). In relation to the pre-award interest the precondition of substantial injustice had not been established, moreover the power to award interest under s 49(3) of the 1996 Act had been available and even if exercised erroneously did not fall within s 68(2)(b). Accordingly, the appeal would be allowed (see [23], [24], [31]–[33], [35], [39]–[43], [54]–[56], below).

Decision of the Court of Appeal [2004] 1 All ER (Comm) 97 reversed.

Notes

For arbitration: remedies and interest, and for challenging the award on the ground of serious irregularity, see 2(3) *Halsbury's Laws* (4th edn reissue) paras 57, 58, 74.

For the Arbitration Act 1996, ss 48, 49, 68, see 2 *Halsbury's Statutes* (4th edn) (2003 reissue) 688, 700.

Cases referred to in opinions

A-G of the Republic of Ghana and Ghana National Petroleum Corp v Texaco Overseas Tankships Ltd, The Texaco Melbourne [1994] 1 Lloyd's Rep 473, HL.

Anisminic Ltd v The Foreign Compensation Commission [1969] 1 All ER 208, [1969] 2 AC 147, [1969] 2 WLR 163, HL.

Bank Mellat v GAA Development and Construction Co [1988] 2 Lloyd's Rep 44.

Bill Biakh K/S A/S v Hyundai Corp [1988] 1 Lloyd's Rep 187.

Eleftherotria (owners) v Despina R (owners), The Despina R [1979] 1 All ER 421, [1979] AC 685, [1978] 3 WLR 804, HL.

Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] 3 All ER 897, [1993] QB 701, [1993] 3 WLR 42, CA.

Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1973] 3 All ER 498, [1974] QB 292, [1973] 3 WLR 847, CA.

Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801, [1976] AC 443, [1975] 3 WLR 758, HL.

Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier (RAKTA) (1974) 508 F 2d 969, US Ct of Apps (2nd Cir).

Patel v Patel [1999] 1 All ER (Comm) 923, [2000] QB 551, [1999] 3 WLR 322, CA.

Re United Railways of The Havana and Regla Warehouses Ltd [1960] 2 All ER 332, [1961] AC 1007, [1960] 2 WLR 969, HL.

Seabridge Shipping AB v AC Orssleff's Eftf's A/S [2000] 1 All ER (Comm) 415.

Cases also referred to in list of authorities

Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291, [2005] 1 WLR 2339.

Beddow v Beddow (1878) 9 Ch D 89.

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp [1981] 1 All ER 289, [1981] AC 909, [1981] 2 WLR 141, HL.

British Columbia Institute of Technology (Student Association) v British Columbia Institute of Technology (2000) ACWS (3d) 11, BC CA.

CBI NZ Ltd v Badger Chiyoda [1989] 2 NZLR 669, Wellington CA.

Chandris v Isbrandtsen Moller Co Inc [1950] 2 All ER 618, [1951] 1 KB 240, CA.

Checkpoint Ltd v Strathclyde Pension Fund [2003] EWCA Civ 84, [2003] All ER (D) 56 (Feb), (2003) Times, 12 February.

Coppee Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liq), Voest-Alpine AG v Ken-Ren Chemicals and Fertilizers Ltd (in liq) [1994] 2 All ER 449, [1995] 1 AC 38, [1994] 2 WLR 631, HL.

Egmatra AG v Marco Trading Corp [1999] 1 Lloyd's Rep 862.

Food Corp of India v Marastro Cia Naviera SA, The Trade Fortitude [1986] 3 All ER 500, [1987] 1 WLR 134, CA.

Kuwait Oil Tanker Co SAK v Qabazard [2003] UKHL 31, [2003] 3 All ER 501, [2004] 1 AC 300, [2003] 3 WLR 14; *rvsg* [2002] EWCA Civ 34, [2002] 1 All ER (Comm) 351.

Kuwait Oil Tanker Co v Al-Bader (21 December 1998, unreported), QBD (Comm Ct).

London, Chatham and Dover Railway Co v South Eastern Railway Co [1893] AC 429, [1891–4] All ER Rep Ext 1610, HL.

Malmesbury Railway Co v Budd (1876) 2 Ch D 113.

Midland International Trade Services v Sudairy (1990) Financial Times, 2 May.

Moran v Lloyd's [1983] 2 All ER 200, [1983] QB 542, [1983] 2 WLR 672, CA.

Natoli v Walker (26 May 1994, unreported), NSW CA.

Petroships Pte Ltd of Singapore v Petec Trading and Investment Corp of Vietnam , The Petro Ranger [2001] 2 Lloyd's Rep 348.

President of India v La Pintada Cia Navegacion SA [1984] 2 All ER 773, [1985] AC 104, [1984] 3 WLR 10, HL.

President of India v Lips Maritime Corp, The Lips [1987] 3 All ER 110, [1988] AC 395, [1987] 3 WLR 572, HL.

Quintette Coal Ltd v Nippon Steel Corp (1990) 50 BCLR (2d) 207, BC CA.

Unione Stearinerie Lanza v Weiner [1917] 2 KB 558, [1916-17] All ER Rep 1079.

Wadsworth v Lydall [1981] 2 All ER 401, [1981] 1 WLR 598, CA.

Appeal

The defendants, Impregilo SpA, Hochtief AG, Bouygues SA, Kier International Ltd, Sitrling International Civil Engineering Ltd, Concor Holdings (Pty) Ltd and Group Five Construction (Pty) Ltd (the contractors) appealed with permission of the House of Lords Appeal Committee given on 4 March 2004 from the decision of the Court of Appeal (Brooke, Latham LJJ and Holman J) on 31 July 2003 ([2003] EWCA Civ 1159, [2004] All ER (Comm) 97) dismissing their appeal from the decision of Morison J on 15 November 2002 ([2002] EWHC 2435 (Comm), [2003] 1 All ER (Comm) 22) allowing the application of the claimant, the Lesotho Highlands Development Authority (the employer) to remit to the arbitral tribunal (John Uff QC, John Blackburn QC and Gordon Jaynes) an award made on 25 January 2002 as having been made in excess of powers. The facts are set out in the opinion of Lord Steyn.

Ian Glick QC and *Neil Kitchener* (instructed by *Slaughter & May*) for the contractors. *Nicholas Dennys QC* and *James Howells* (instructed by *White & Case*) for the employer.

Their Lordships took time for consideration.

30 June 2005. The following opinions were delivered.

LORD STEYN.

[1] My Lords, this appeal raises issues regarding the jurisdiction of arbitrators under the Arbitration Act 1996 which are of great importance for the effective functioning of the statute.

[2] It arises from an award made by three experienced International Chamber of Commerce (ICC) arbitrators, sitting in London as the seat of the arbitration, in disputes under a construction contract governed by the law of Lesotho. The arbitrators exercised or purported to exercise two powers under the 1996 Act viz to make an award in any currency in terms of s 48(4) and to grant pre-award interest in terms of s 49(3). The relevant provisions read as follows:

> '**48.** *Remedies.*—(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
>
> (2) Unless otherwise agreed by the parties, the tribunal has the following powers ...
>
> (4) The tribunal may order the payment of a sum of money, in any currency ...
>
> **49.** *Interest.*—(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.
>
> (2) Unless otherwise agreed by the parties the following provisions apply.
>
> (3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—
>
> (a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award; (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.'

The central issue before the House is whether the arbitrators exceeded their powers under s 68(2)(b) of the Act.

[3] Section 69 provides for a right of appeal on 'a question of law', which is defined under s 82(1) as 'a question of the law of England'. The parties are free to exclude this right of appeal by agreement. They did so by r 28.6 of the Rules of Arbitration of the International Chamber of Commerce (1998 edn) in the case before the House. Section 68, so far as material, reads as follows:

> '(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award ...
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—... (b) the tribunal exceeding its

powers (otherwise than by exceeding its substantive jurisdiction: see section 67) ...'

The question arises how s 68(2)(b) and s 69, so far as the latter excludes a right of appeal on a question of law, are to operate. Specifically, can an alleged error of arbitrators in interpreting the underlying or principal contract be an excess of power under s 68(2)(b), so as to give the court the power to intervene, rather than an error of law, which can only be challenged under s 69 if the right of appeal has not been excluded?

I. THE CONTRACT

[4] In 1991 the Lesotho Highlands Development Authority engaged a consortium of seven companies from the United Kingdom, South Africa, Italy, Germany and France to construct the Katse Dam in Lesotho. Collectively the contracting companies were referred to as the Highlands Water Venture. The contract was made on 15 February 1991 and was concluded on the standard FIDIC Conditions of Contract (4th edn) with terms and additions. The contract was governed by the law of Lesotho.

[5] The contract provided that claims and disputes would in the first instance be determined by the engineer appointed by the employer. If the parties were not satisfied with the engineer's decision, they were entitled to resort to arbitration. The arbitration clause provided for arbitration under the rules of the ICC. Those rules provide that all parties agree, so far as they are allowed to do so, to forego any right of appeal to the courts. This is an effective exclusion agreement of the right of appeal on a point of law under s 69.

II. PERFORMANCE

[6] On 1 February 1991 the works commenced. On 26 February 1998 the taking over certificate for the whole of the contract works was issued.

III. CLAIMS

[7] In the course of the contract, the contractors made a number of claims for reimbursement of increased costs and for upwards adjustments to prices and rates. These claims included:

(a) a claim for additional costs incurred due to an increase in Lesotho vehicle licence fees (claim 12);

(b) a claim for reimbursement of consequential costs resulting from the employer's instruction to increase labour wage rates (claim 37);

(c) a claim in respect of variations to the contract works (claim 53/66); and

(d) a claim for reimbursement of additional costs incurred as a result of the engineer's instruction to use increased amounts of shotcrete (claim 62).

The claims were rejected by the employer and were referred to the engineer for decision under the agreed dispute resolution procedure. The engineer rejected the claims. The contractors then referred these claims (and other claims) to ICC arbitration as provided in the contract. On 29 October 1999 the arbitration was commenced.

IV. THE TERMS OF REFERENCE

[8] On 29 September the parties and the arbitrators signed ICC terms of reference. Under para 4 of the terms of reference two issues referred to the tribunal were (1) the currency or currencies of any award and (2) whether any

interest should be paid on sums found due. Paragraph 6 of the terms of reference contained the following provision:

> '... The arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the engineer related to the dispute, provided always that the arbitrator shall be bound to issue in writing to each party, including the engineer, fully documented reasons for and derivation of the said final settlement.'

The terms of reference further read as follows:

> '7.1 As the seat of the arbitration is to be London, the dispute is to be finally settled in accordance with the provisions of the Arbitration Act 1996 (UK) (which will apply in lieu of the Arbitration Act No 12 of 1980 of Lesotho) and the rules of arbitration of the International Chamber of Commerce in force as from 1 January 1998.
>
> 7.2 The law applicable to the substance of the disputes pursuant to cl 5 of the conditions of particular application and the arbitration agreement referred to in para 6.4 is to be that in force in the Kingdom of Lesotho ...
>
> 8.1 The tribunal shall have the power to make a partial, or interim, award on any issue or matter before making a final award. Any such award or awards shall to the extent to which the tribunal considers to be appropriate, specify a single net amount (if any) to be paid by one party to the other, having regard both to the claimants' claim[s] and the respondent's counter-claim.'

V. THE AWARD

[9] On 25 January 2002 the tribunal issued a partial award. The effect of the award is summarised as follows in the agreed statement of facts and issues:

> 'In their partial award, the arbitrators (Gordon Jaynes, John Blackburn QC and John Uff QC) found that the following sums, "expressed in Maloti", were due to the appellants in respect of the claims: claim 12–46,659; claim 37–14,321,105; claim 53/66–3,000,713; claim 62–1,532,522 ... The arbitrators held that the dates on which payment in respect of the claims were due were as follows: claim 12–1 January 1997; claim 37–1 July 1996; claim 53/66– 1 July 1996; claim 62–1 July 1997 ... The arbitrators decided that the partial award should be expressed in European currencies in the following proportions:

Currency	%
Italian Lira	26.34
UK Pounds	24.83
French Francs	32.12
Deutsche Marks	16.71
	100

> The arbitrators (rightly or wrongly) derived these proportions from the supplement to tender schedules A and O, which form part of the contract. The arbitrators said that, "sums presently stated in Maloti should be converted in the same ratio, inter se, as the four European currencies are stated." The rates of exchange used by the arbitrators were those set out in cl 72.1 (as amended) and the supplement to tender schedules A and O. European currencies were then converted into Euros where appropriate ... The arbitrators further decided that pre-award simple interest would be

awarded on the claims from the dates on which they were due at annual average rates agreed by the parties.'

VI. THE REASONS OF THE TRIBUNAL

[10] In respect of the currency issue the tribunal relied on s 48(4) of the Act. The tribunal pointed out that the terms of reference expressly provided that the dispute shall be settled in accordance with the provisions of the 1996 Act. They stated (at para 13.17):

> '... s 48 applies "unless otherwise agreed by the parties". The respondent contended that the matter of currencies was dealt with under the contract. While this may provide for the currencies in which payment under the contract is to be made, the contract is silent as to the currency in which any arbitral award is to be given. The tribunal is of the opinion that the parties have not "otherwise agreed" on the powers available to the tribunal, and the tribunal accordingly concludes that it has the power to order payment of any sum of money found to be due in any currency. Accordingly, while the tribunal takes careful note of the contract currencies and their stated proportions, the tribunal will express its awards in such currencies as are considered appropriate in the circumstances.'

The detailed provisions in the principal contract regarding currencies do not matter but for completeness' sake they are set out in an appendix to this opinion.

[11] In respect of pre-award interest the tribunal referred to the provision in the terms of reference that the dispute shall be settled in accordance with the provisions of the 1996 Act. The tribunal concluded (at para 13.16):

> 'The tribunal therefore concludes, prima facie, that the power under s 49(3) to award simple or compound interest is available. The respondent, however, contended that the provisions dealing with interest under the contract constitute an agreement "otherwise" which excludes the tribunal's powers under s 49(3). In the tribunal's opinion, cl 60(10) of the contract cannot be read as covering the claimants' entitlement to interest upon an award given in these proceedings. The clause expressly covers payments following certification. Necessarily, these proceedings are concerned with sums which have not been certified. The contention that cl 60(10) effectively deprives the claimants of any interest on sums ultimately held to be due in arbitration proceedings is so far at variance with any normal commercial practice, that the tribunal could not reach such a conclusion without clear words. No such clear words are to be found in the contract and the tribunal is satisfied that it was not "otherwise agreed" by the parties for the purpose of s 49(2). Accordingly, the tribunal concludes that the power to award interest under s 49(3) is available.'

Clause 60(10) of the principal contract is also contained in the Appendix to this opinion.

VII. THE COMMERCIAL CONTEXT

[12] The commercial context in which the award was made is as follows. The tribunal found that the employer had failed to pay to the contractors various sums that had been due under the contract on dates between 1 July 1996 and 1 July 1997. If these payments had been made when they ought to have been made, the employer would have made them in the contractual currencies of

payment, largely Lesothan maloti (a currency tied to the South African rand). Between 1 July 1997, when the last of the payments should have been made, and the date of the award in January 2002, the value of the rand, and thus of the maloti, fell heavily. The case of the contractors was that they had no use for maloti (other than for conversion into hard currency), because the works had long since been completed. In order to remedy the employer's failure to make the payments when they were due, the tribunal made their award in hard currencies, converted from maloti at a rate prescribed in the contract which pre-dated the maloti's collapse. In the result the complaint of the employer against the award relates not to the currencies in which the award is expressed but rather against the rate at which maloti had been converted into those hard currencies.

[13] The tribunal awarded interest on the payments from the times that they were due until the date of the award.

VIII. THE DECISION OF MORISON J

[14] On 22 February 2002 the employer challenged the decisions of the tribunal relating to the currencies of the award and pre-award interest. The challenge was made on the dual basis of lack of substantive jurisdiction under s 67 of the 1996 Act and excess of power under s 68(2)(b). Morison J ruled that the tribunal did have substantive jurisdiction. He held, however, that they had exceeded their powers by (a) expressing the award in currencies other than those stipulated for in the contract; and (b) awarding interest in circumstances not permitted under Lesotho law. Accordingly, the judge remitted the decisions on currency and interest to the tribunal with directions as to how they ought to carry out their task afresh: *Lesotho Highlands Development Authority v Impregilo SpA* [2002] EWHC 2435 (Comm), [2003] 1 All ER (Comm) 22.

IX. THE JUDGMENT OF THE COURT OF APPEAL

[15] On appeal to the Court of Appeal the employer rightly abandoned its challenge under s 67 to the substantive jurisdiction of the arbitrators. The Court of Appeal, therefore, had to consider whether the decisions of the tribunal on currency and interest were made in excess of power under s 68(2)(b). On 31 July 2003 the Court of Appeal gave its unanimous judgment upholding the decision at first instance on both points ([2003] EWCA Civ 1159, [2004] 1 All ER (Comm) 97). Brooke LJ (with whom Latham LJ and Holman J agreed) concluded on the currency point:

> '[30] It follows that where there is a contract which identifies the currency of account and the currency of payment and specifies the proportions of any debt due under the contract which must be apportioned in different currencies to the different members of an international consortium, s 48(4) of the 1996 Act merely repeats in codified form what had already been established by this court in [*Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1973] 3 All ER 498, [1974] QB 292], namely that English procedural law did not require London arbitrators to convert this substantive debt in a foreign currency into English currency for the purpose of making their award. The parties' agreement was clear on the face of their contract, and the arbitrators, standing in the shoes of the engineer, were bound to give effect to it. Section 48(4) does not create a free-standing power to choose whatever currency arbitrators might think appropriate when the terms of a contract are clear ...

a [34] In my judgment the arbitrators ought therefore to have interpreted the parties' contract in accordance with the applicable law (and there was no suggestion that the law of the Kingdom of Lesotho was in any material respect different from English law in this regard) and made an award in the currencies which the parties had agreed upon. Section 48(4) of the 1996 Act merely restated what must be taken (in the absence of evidence to the b contrary) to be the effect of the substantive law of the Kingdom of Lesotho which the arbitrators were bound to apply. I therefore agree with the judge that the arbitrators exceeded their powers when they thought that s 48(4) of the 1996 Act gave them any power to depart from what the parties had agreed. I would therefore dismiss the appeal on the currency point.'

c In respect of interest Brooke LJ concluded:

'[48] Where the law of a different jurisdiction, like the law of the Kingdom of Lesotho, confers a substantive right to interest ex mora, there is no room for any discretionary procedural power. The unpaid party to a contract is entitled as of substantive right to interest from the time when payment is d contractually due. There was no need for the parties to agree the express exclusion of s 49(3) of the 1996 Act, because of the saving provision in s 49(6): "(6) The above provisions do not affect any other power of the tribunal to award interest."

[49] By art 7.2 of their terms of reference the arbitrators were bound to apply the law of the Kingdom of Lesotho to the substance of the dispute. e That law was the law of the contract, and by that law [the contractors] were entitled as of substantive right to interest on sums which they ought to have been paid, subject to the "duplum" cap. Section 49(6) of the 1996 Act made provision for the power of the tribunal to award interest in these circumstances as a matter of substantive right. The arbitrators therefore f exceeded their powers when they had recourse to what would have been their discretionary powers in s 49(3) to resolve a matter to which they should have applied the substantive law of the contract. The opening words of art 10(1)(c) of the Rome Convention [Rome Convention on the Law Applicable to Contractual Obligations 1980], which refer to the limits of the powers conferred on the court by its procedural law, plainly have nothing to g do with the situation with which we are concerned.

[50] So far as the rate of interest is concerned, in the absence of express agreement this is a matter for the arbitrators to decide as a matter of the lex fori (see [*Dicey* and *Morris on the Conflict of Laws* (13 edn, 2000)] para 33–387 para 33-387: I would adopt the editors' reasoning), although they will no h doubt be slow to depart from the rates of interest the parties agreed to be appropriate in relation to the non-payment of interim certificates.'

X. THE ISSUES

j [**16**] The following issues arise: (1)(a) Did the tribunal have the power to express the award in the currencies they did pursuant to s 48(4) of the 1996 Act or was any power that might otherwise have been available under that section excluded or modified by the terms of the principal contract? (b) If the decision of the tribunal on the currency point amounted to an error of law, did it constitute an excess of jurisdiction under s 68(2)(b)? (2)(a) Did the tribunal have the power to grant pre-award interest pursuant to s 49 of the Act or was any power that might otherwise have been available under that section excluded or modified by

the terms of the principal contract or by operation of Lesotho law as the substantive law of the contract? (b) If the decision of the tribunal on the interest point amounted to an error of law, did it constitute an excess of jurisdiction under s 68(2)(b)? Before I can examine these issues it is necessary to explain several contextual matters.

XI. THE ETHOS OF THE 1996 ACT

[17] It is important to take into account the radical nature of the changes brought about by the Arbitration Act 1996. Lord Mustill and Stewart Boyd QC (*Commercial Arbitration: 2001 Companion Volume to the Second Edition*, preface) stated:

> 'The Act has however given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities ... have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature.'

These general propositions are correct but do not fully explain the important changes which are relevant to the present case.

[18] Lord Wilberforce played a large role in securing the enactment of the Arbitration Bill. During the second reading of the Bill in the House of Lords he explained the essence of the new philosophy enshrined in it: Hansard, 18 January 1996 (568 HL Official Report (5th series), col 778). He said:

> 'I would like to dwell for a moment on one point to which I personally attach some importance. That is the relation between arbitration and the courts. *I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law—yes, its substantive law.* I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts.
>
> Other countries adopt a different attitude and so does the UNCITRAL model law. The difference between our system and that of others has been and is, I believe, quite a substantial deterrent to people to sending arbitrations here ...
>
> How then does this Bill stand in that respect? After reading the debates and the various drafts that have been moving from one point to another, I find that on the whole, although not going quite as far as I should personally like, it has moved very substantially in this direction. It has given to the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of

a enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors.' (My emphasis.)

Characteristically, Lord Wilberforce did not express his understanding of the new Arbitration Bill in absolute terms. But the general tendency of his observations, and what Parliament was being asked to sanction, is clear. It reflects the ethos of b the 1996 Act.

XII. APPROACH TO THE INTERPRETATION OF THE 1996 ACT

[19] It is also necessary to consider how the 1996 Act should be interpreted. In his speech already cited Lord Wilberforce pointed out that 'Many laymen have to participate in arbitrations and many arbitrations are conducted by people who are c not lawyers' (col 777). Can they realistically be asked to interpret the 1996 Act in the light of pre-existing case law? Clearly not. In *Seabridge Shipping AB v AC Orssleff's Eftf's A/S* [2000] 1 All ER (Comm) 415 Thomas J (now Thomas LJ), a judge with enormous experience in this field, made valuable observations on which I cannot improve. He said, (at 422):

d

> 'One of the major purposes of the Arbitration Act 1996 was to set out most of the important principles of the law of arbitration of England and Wales in a logical order and expressed in a language sufficiently clear and free from technicalities to be readily comprehensible to the layman. It was to be "in user friendly language". (See the Report on the Bill and the Act made by the e Departmental Advisory Committee, published in Arbitration International, (1997) vol 13, at p 275.) As this has been the actual achievement of the Act, it would in my view be a retrograde step if when a point arose reference had to be made to pre-Act cases. Reference to such cases should only generally be necessary in cases where the Act does not cover a point—as, for example, in relation to confidentiality or where for some other reason it is necessary f to refer to the earlier cases. A court should, in general, comply with the guidance given by the Court of Appeal and rely on the language of the Act. International users of London arbitration should, in my view, be able to rely on the clear "user-friendly language" of the Act and should not have to be put to the trouble or expense of having regard to the pre-1996 Act law on issues g where the provisions of the Act set out the law. If international users of London arbitration are not able to act in that knowledge, then one of the main objectives of the reform will have been defeated.'

The reference to an earlier decision of the Court of Appeal is to *Patel v Patel* [1999] 1 All ER (Comm) 923, [2000] QB 551. I would respectfully indorse the h observation in the *Seabridge Shipping* case.

XIII. THE SEAT OF THE ARBITRATION

[20] The 1996 Act is engaged where the 'seat' of the arbitration is in England and Wales or Northern Ireland: s 2(1). This is a reference to 'the juridical seat' of j the arbitration designated, inter alia, by the parties to the arbitration agreement: s 2. The determination of the juridical seat of the arbitration as England (as was done in the present case) is the gateway to the powers of the tribunal spelled out in many provisions of the Act. In setting out the powers of a tribunal the 1996 Act often uses the permissive expression 'the parties are free to agree'. Subject to agreements to the contrary, the relevant powers in the present case are s 48(4) (currency) and s 49(3) (pre-award interest.)

XIV. THE INDEPENDENCE OF THE ARBITRATION AGREEMENT

[21] It is part of the very alphabet of arbitration law, as explained in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 3 All ER 897 at 916, [1993] QB 701 at 724–725, per Hoffmann LJ (now Lord Hoffmann) and spelled out in s 7 of the 1996 Act, that the arbitration agreement is a distinct and separable agreement from the underlying or principal contract. It is in the arbitration agreement, read with the curial law, in this case the Arbitration Act 1996, that the powers of the tribunal are to be found and not in the underlying contract. In the present case one is dealing with an ICC arbitration agreement. In such a case the terms of reference which under art 18 of the ICC rules are invariably settled may, of course, amend or supplement the terms of the arbitration agreement. The terms of reference too are a source of the powers of the arbitrator. This is the context in which the terms of reference in the present case expressly provided for the dispute to be settled in accordance with the provisions of the 1996 Act.

XV. THE CURRENCY POINT

[22] Section 48 of the 1996 Act provides that unless otherwise agreed by the parties, the tribunal may order the payment of a sum of money, in any currency. Any agreement to the contrary is only effective if in writing: s 5(1). The Court of Appeal did not take into account the radical nature of the alteration of our arbitration law brought about by the 1996 Act. Moreover, the Court of Appeal approached the construction of s 48(4) through the lens of case law pre-dating the 1996 Act. The Court of Appeal cited *Re United Railways of The Havana and Regla Warehouses Ltd* [1960] 2 All ER 332, [1961] AC 1007; *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1973] 3 All ER 498, [1974] QB 292; *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, [1976] AC 443; and *Eleftherotria (owners) v Despina R (owners), The Despina R* [1979] 1 All ER 421, [1979] AC 685. But for this approach the Court of Appeal would have had no reason to disagree with the natural and commercially sensible construction of the wide words of s 48(4) which the tribunal adopted. I would hold that the power of the tribunal under s 48(4) was unconstrained and was available to the tribunal. If this view is correct, s 48(4) has a businesslike meaning which will assist the arbitral process. I would rule that it is the correct view. On this simple basis I would reverse the Court of Appeal on the currency point.

[23] Contrary to the view I have expressed, I will now assume that the tribunal committed an error of law. That error of law could have taken more than one form. The judge ([2003] 1 All ER (Comm) 22 at [25]) and the Court of Appeal ([2004] 1 All ER (Comm) 97 at [34]) approached the matter on the basis that the tribunal erred in the interpretation of the underlying contract. Another possibility is that the tribunal misinterpreted its powers, under s 48(4) to express the award in any currency. Let me approach the matter on the basis that there was a mistake by the tribunal in one of these forms. Whichever is the case, the highest the case can be put is that the tribunal committed an error of law.

[24] But the issue was whether the tribunal 'exceeded its powers' within the meaning of s 68(2)(b) of the 1996 Act. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more

than an erroneous exercise of the power available under s 48(4). The jurisdictional challenge must therefore fail.

[25] Given the general importance of the point it is necessary to explain it in a little more detail. The reasoning of the lower courts, categorising an error of law as an excess of jurisdiction, has overtones of the doctrine in *Anisminic Ltd v The Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147 which is so well known to the public law field. It is, however, important to emphasise again that the powers of the court in public law and arbitration law are quite different. This has been clear for many years, and is now even more manifest as a result of the enactment of the 1996 Act. Sir Michael J Mustill (now Lord Mustill) and Stewart Boyd QC (*The Law and Practice of Commercial Arbitration in England*, (2nd edn, 1989) p 555) explained:

> 'If ... [the arbitrator] applies the correct remedy, but does so in an incorrect way—for example by miscalculating the damages which the submission empowers him to award—then there is no excess of jurisdiction. An error, however gross, in the exercise of his powers does not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure.'

See also my judgments in *Bill Biakh K/S A/S v Hyundai Corp* [1988] 1 Lloyd's Rep 187 at 190; *Bank Mellat v GAA Development and Construction Co* [1988] 2 Lloyd's Rep 44.

[26] In order to understand the radical nature of the alteration of our arbitration law brought about by s 68 of the 1996 Act it is necessary to refer to the pre-existing law. Section 68 replaced ss 22 and 23 of the Arbitration Act 1950. Section 22(1) of the 1950 Act provided:

> 'In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.'

The sweeping generality of this provision is clear. In the case law the remedy of remission was held to be available on the grounds of 'procedural mishap' or 'misunderstanding.' Section 23 provided:

> '(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.
>
> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.'

In the 1980s and 1990s there was persistent criticism about the excessive reach of these powers of intervention. The Departmental Advisory Committee on Arbitration Law (the DAC) under the chairmanship of Lord Justice Saville (now Lord Saville of Newdigate) explained in its *Report on the Arbitration Bill*, at p 11, paras 21–22:

> '... there is no doubt that our law has been subject to international criticism that the courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes.
>
> Nowadays the courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the

courts from awards brought into effect by the Arbitration Act 1979, and changing attitudes generally, have meant that the courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach ...'

A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process.

[27] The legislative technique adopted to achieve this purpose was spelled out explicitly in the *Report on the Arbitration Bill* and in particular in discussion of cl 68, which became s 68 of the 1996 Act. The DAC observed about cl 68 that it 'is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected': p 58, para 280. On the other hand, the DAC recommended adoption of 'the internationally accepted view that the court should be able to correct serious failure to comply with the "due process" of arbitral proceedings: cf article 34 of the Model Law:' p 59, para 282. The ethos of the DAC report was that parties are entitled to a fair hearing leading to an impartial adjudication. But the idea that s 68 contemplated an adjudication which arrives at the 'right' conclusion would have been wholly out of place in these recommendations. The DAC report was the matrix of the parliamentary debates.

[28] It is now necessary to examine s 68 in its textual setting. For this purpose it is necessary to set out s 68 more fully than I have done earlier in this judgment. Section 68 reads as follows:

'(1) A party to arbitral proceedings may ... apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award ...

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—(a) failure by the tribunal to comply with section 33 (general duty of tribunal); (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67); (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; (d) failure by the tribunal to deal with all the issues that were put to it; (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; (f) uncertainty or ambiguity as to the effect of the award; (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; (h) failure to comply with the requirements as to the form of the award; or (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—(a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part. The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.'

This is a mandatory provision. The policy in favour of party autonomy does not permit derogation from the provisions of s 68. A number of preliminary observations about s 68 are pertinent. First, unlike the position under the old law, intervention under s 68 is only permissible *after* an award has been made. Secondly, the requirement is a serious irregularity. It is a new concept in English arbitration law. Plainly a high threshold must be satisfied. Thirdly, it must be established that the irregularity caused or will cause substantial injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges. It is also a new requirement in English arbitration law. Fourthly, the irregularity must fall within the closed list of categories set out in paras (a)–(i).

[29] It will be observed that the list of irregularities under s 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in s 68 is there any hint that a failure by the tribunal to arrive at the 'correct decision' could afford a ground for challenge under s 68. On the other hand, s 68 has a meaningful role to play. An example of an excess of power under s 68(2)(b) may be where, in conflict with an agreement in writing of the parties under s 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest. There is a close affinity between s 68(2)(b) and s 68(2)(e). The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator.

[30] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (10 June 1958; UNTS 3320 (1959); Cmnd 6419) and art 34 of the UNCITRAL Model Law on International Commercial Arbitration were in part a provenance of s 68: see General Note to s 68 of the Arbitration Act 1996 as published in Current Law Statutes (1996) vol 2, pp 23–46. Specifically, it is likely that the inspiration of the words 'the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)' in s 68 are the terms of art V(1)(c) of the New York Convention and the jurisprudence on it. The context is that art V(1)(a) stipulates that the invalidity of the arbitration agreement is a ground for non-enforcement of an award: it involves the competence of the arbitrator. Article V(1)(c) relates to matters beyond the scope of the submission to arbitration. It deals with cases of excess of power or authority of the arbitrator. It is well established that art V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award: *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier (RAKTA)* (1974) 508 F 2d 969; Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981), pp 311-318; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001), pp 158-162. By citing the *Parsons* decision counsel for the contractors alerted the House to this analogy. It points to a narrow interpretation of s 68(2)(b). The policy underlying s 68(2)(b) as set out in the DAC report similarly points to a restrictive interpretation.

[31] By its very terms s 68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal *exceeding its powers* under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong

conclusion as a matter of law or fact. It is not apt to cover a mere error of law. This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a 'question of law' which may in the circumstances specified in s 69 be appealed unless the parties have excluded that right by agreement. In cases where the right of appeal has by agreement, sanctioned by the 1996 Act, been excluded, it would be curious to allow a challenge under s 68(2)(b) to be based on a mistaken interpretation of the underlying contract. Moreover, it would be strange where there is no exclusion agreement, to allow parallel challenges under s 68(2)(b) and s 69.

[32] In order to decide whether s 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under s 68(2)(b).

[33] For these reasons the Court of Appeal erred in concluding that the tribunal exceeded its powers on the currency point. If the tribunal erred in any way, it was an error within its power.

[34] I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the 1996 Act, which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed, it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of Appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point.

XVI. THE PRE-AWARD INTEREST POINT

[35] Counsel for the employer submitted that the arbitrators exceeded their power by awarding interest pursuant to s 49(3). But counsel advanced his challenge in respect of pre-award interest in an almost apologetic way. He said this aspect was parasitic on the currency point. It is easy to follow why he approached the matter in this fashion. For this ground to get anywhere the employer had to show that the decision in question caused or will cause a substantial injustice to the employer. To make good this proposition in causative terms a comparison needs to be made with either the regime of interest under the underlying contract or under the applicable law of Lesotho. It is clear, however, as the tribunal observed, that the proceedings are concerned with sums that have not been certified under cl 60(10) of the contract. A comparison with the position under cl 60(10) is therefore irrelevant. The only other possibility is to have regard to the law of Lesotho so far as it governs the substance of the dispute between the parties. There is, however, no finding about the law of Lesotho in the judgments of either Morison J or the Court of Appeal. Counsel observed that it must have been assumed that there was a substantial injustice. This is not good enough. The burden is squarely on the applicant, who invokes the exceptional remedy under s 68, to secure (if he can) findings of fact which establish the pre-condition of substantial injustice. The employer did not satisfy this requirement. In these circumstances I would rule that the precondition of substantial injustice has not

been established and that on this ground alone the challenge to pre-award interest should fail.

[36] The ground of appeal relating to pre-award interest is, however, faced with other formidable difficulties. The tribunal held that the power under s 49(3) to award interest is prima facie available. This conclusion was inescapable. The only question is whether the provisions of cl 60(10) of the contract could amount to an agreement to the contrary. The tribunal pointed out that cl 60(10) only relates to certified payments. The arbitration proceedings were concerned with sums which had not been certified. There was no agreement to the contrary under s 49 of the 1996 Act. The grounds relied on before the tribunal to say that the tribunal had no power to act under s 49 collapsed.

[37] Morison J appeared to take the view that the law of Lesotho, as the law applicable to the construction contract, may be relevant. This presumably is on the basis that it constitutes an agreement to the contrary under s 49. Ignoring for the moment the fact that one does not know what the law of Lesotho is, this view comes up against the difficulty that only an agreement in writing as defined in the 1996 Act can qualify as an agreement to the contrary under s 49: s 5(1). This is no mere technicality. In the words of the DAC (p 14, para 35): 'By introducing some formality with respect to all agreements, the possibility of subsequent disputes (e g at the enforcement stage) is greatly diminished.' The law of Lesotho is not an agreement to the contrary in writing.

[38] The Court of Appeal apparently accepted the submission of the contractors that the parties did not expressly agree pursuant to s 49(3) to exclude the arbitrators' power to award interest: (see [2004] 1 All ER (Comm) 97 at [48]). Having come to this conclusion the Court of Appeal ought to have held that the arbitrators had the power to award interest under s 49(3). It did not do so. For reasons which are difficult to follow (and which were not argued before the Court of Appeal), the Court of Appeal held that (1) Lesotho law itself gives a substantive right to interest; (2) The tribunal was entitled to grant substantive interest pursuant to s 49(6) of the 1996 Act; (3) Accordingly, there is no room for any discretionary procedural power under s 49(1). The conclusion does not flow from the premise. Section 49(6) does not state that any other power to award interest shall exclude the operation of s 49(3). Section 49(6) provides that the powers conferred by ss 49(1)–(5) do not necessarily oust any other power to award interest. It is no more than a saving provision. It does not confer priority on any such 'other power'.

[39] Rightly counsel for the employer found himself unable to support the reasoning of the Court of Appeal. He did, however, attempt to support the conclusion of the Court of Appeal on other grounds. Counsel submitted that the law to be applied to the entitlement of the contractors was the law of Lesotho. This submission flounders on two separate grounds. The law of Lesotho cannot be an agreement to the contrary under s 49(2). The power to award simple or compound interests as the tribunal 'considers meets the justice of the case' was therefore available to the tribunal. In any event, for reasons already discussed under the currency point, if it is assumed for the sake of argument that the tribunal awarded interest which ought not to have been awarded as a matter of Lesotho law, it may have made an error of law. But the tribunal certainly did not act in excess of power within the meaning of s 68(2)(b).

[40] I would therefore reject the submissions of counsel for the employer in respect of pre-award interest.

XVII. DISPOSAL

[41] I would allow the appeal, set aside the order for remission of the award, and dismiss the employer's application. The employer must pay the costs of the contractors in the lower courts and in the House of Lords.

APPENDIX TO THE OPINION OF LORD STEYN

A. Provisions in Principal Contract (including Part II Conditions of Particular Application) Relating to the Currency of Contractual Payments

CLAUSE	PROVISION
60.11	The currency of account shall be Maloti and for the purposes of payment, conversion between Maloti and the currencies stated in the contract shall be made in accordance with the rates of exchange determined in accordance with cl 72.
60.12	All payments to the contractor by the Employer shall be made: (a) in the case of a claim for additional payment under the contract where the contractor is due reimbursement of cost, in the currencies stated in the contract but in the proportions as far as possible in which the costs were incurred as agreed with the engineer; (b) in the case of payment for any provisional sum item, in the currencies stated in the contract but in the proportions applicable to the item as agreed with the engineer at the time when the engineer gives instructions for the work covered by the item to be carried out; (c) for increase or decrease in price, in accordance with sub-cl 70.1; (d) in any other case, in the currencies and proportions stated in the contract, except that interim certificates may be valued in differing currency proportions provided always that the final amounts payable by the employer to the contractor in the various currencies shall be in the proportions given in Tender Schedule A, subject to approved variations, escalation factors and other matters agreed between the parties ...
72.1	Payments to the contractor shall not be subject to variations in the rates of exchange between Maloti and the foreign currencies that have been stated in the contract. The rates of exchange to be used for the contract shall be the selling rates applicable at close of business of the Central Bank of Lesotho 42 days before the closing date for submission of tenders, which rates shall have been notified to the contractor by the employer prior to the submission of tenders and included in the contract.
72.2	Payments shall be made to the contractor by the employer in the currency proportions stated in the contract subject to the provisions of sub-cl 60.12.

Supplement to Tender Schedule A and O

Currency Requirements						
	Total Equiv Maloti	Maloti /Rand	Deutsche Marks	French Francs	Italian Lira	Sterling Pounds
1. Currency Proportions of Payment	100.00%	58.35%	5.95%	13.38%	10.97%	10.34%
2. Clause 72.1 Exchange Rates		1.0000	0.8571	2.2206	484.8843	0.2355

B Provisions in Principal Contract (including Part II Conditions of Particular Application) Relating to the Pre-Award Interest

CLAUSE	PROVISION
60.10	The amount due to the contractor under any interim certificate issued by the engineer pursuant to this clause, or to any other term of the contract, shall, subject to cl 47, be paid by the employer to the contractor within 28 days after such interim certificate has been delivered to the employer, or, in the case of the final certificate referred to in sub-cl 60.8, within 56 days, after such final certificate has been delivered to the employer. Provided that any amount in respect of any claim as certified by the engineer pursuant to sub-cl 53.5 shall be paid by the employer to the contractor within 182 days after the interim certificate has been delivered to the employer. In the event of the failure of the employer to make payment within the times stated, the employer shall pay to the contractor interest at the rate stated in the appendix to tender upon all sums unpaid from the date by which the same should have been paid, excepting in the case of any unpaid sums in respect of any claim where such interest shall be paid from 56 days after the delivery of the interim certificate to the employer. The provisions of this sub-clause are without prejudice to the contractor's entitlement under cl 69.

Tender Schedule A – Financial Requirements – Part I: Currency Requirements

Note (2) The rate of interest applicable to unpaid sums in local currency in terms of sub-cl 60.10 of the conditions of contract shall be 1% (one percent) in excess of the prime overdraft rate charged by the First National Bank of Southern Africa Limited of Johannesburg on the due date.

Note (3) The rate of interest applicable to unpaid sums in foreign currency in terms of sub-cl 60.10 of the conditions of contract shall be at the rate of 2% (two percent) in excess of the Commercial Interest Reference Rate (CIRR) applicable on the due date to the respective currencies in which payment is due.

LORD HOFFMANN.

[42] I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Steyn. Subject to one reservation, I agree with it and would allow the appeal. My reservation concerns [22], above. For the reasons given by my noble and learned friend, Lord Phillips of Worth Matravers, I think it is very likely that the arbitrators did make an error of law in calculating the sums awarded in the way in which they did. I prefer to express no opinion on the point. But for the reasons given by Lord Steyn, I think that this was at worst an error of law and not an excess of power.

LORD PHILLIPS OF WORTH MATRAVERS.

[43] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. I agree without reservation with his conclusions in relation to the arbitrators' award of interest. Section 49 of the Arbitration Act 1996 is in very wide terms. They give to arbitrators the power to compensate the successful party for the delay in receiving and enjoying the use of the money awarded. The terms are, however, wide enough to enable arbitrators to compensate for the decline in value of the currency in which the award is made if, between the date at which the award falls to be assessed and the date of the award, that currency has diminished in value in comparison to other currencies. It follows that in a case such as this, where the parties have not by agreement excluded the application of s 49, the scope of the power afforded by s 48(4) may not be of great significance. None the less I am unable to agree with either the arbitrators or Lord Steyn as to the ambit of that power.

[44] When sterling was a strong currency it was accepted that, as a matter of procedure, courts were obliged to give judgment and arbitrators to make awards in sterling. If a debt was a foreign currency debt, or damages were sustained in a foreign currency, conversion into sterling took place at the date that the cause of action arose. The effect of this was to shelter plaintiffs or claimants from the risk of a decline in relative value of other currencies.

[45] When sterling lost its stability and declined in value against other relevant currencies the approach described above was seen to result in injustice to plaintiffs or claimants, who received their judgments or awards in a devalued currency. Arbitrators reacted by introducing and following a practice of making awards in foreign currencies instead of converting into sterling. That practice was upheld by the Court of Appeal as falling within the powers of arbitrators in *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1973] 3 All ER 498, [1974] QB 292. In *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, [1976] AC 443 this House followed suit in holding that the English court could give judgment in a foreign currency.

[46] The *Jugoslavenska* case and *Miliangos*'s case removed the procedural bars to awards or judgments in a foreign currency. It did not follow that arbitrators or the courts had a free discretion as to the currency in which awards should be

made or judgment given. As Roskill LJ remarked in the *Jugoslavenska* case, [1973] 3 All ER 498 at 506, [1974] QB 292 at 305:

> '... this decision does not amount to a general licence to arbitrators and umpires to make awards in any currency they choose heedless of the provisions of the contract with which they are concerned. The currency of account and the currency of payment will in most cases be easily ascertainable just as the proper law of a contract is in most cases easily ascertainable.'

[47] The English courts proceeded to develop a substantial body of jurisprudence dealing with the principles that governed the power of the court or an arbitrator—no distinction was drawn between the two—to award in a foreign currency and the dates at which foreign currency obligations should be converted, when conversion was appropriate. The development of this jurisprudence is well set out in Ch 16 of the 17th edn (2003) of *McGregor on Damages*. It includes two subsequent decisions of this House: *Elefftherotria (owners) v Despina R (owners), The Despina R* [1979] 1 All ER 421, [1979] AC 685 and *A-G of the Republic of Ghana and Ghana National Petroleum Corp v Texaco Overseas Tankships Ltd, The Texaco Melbourne* [1994] 1 Lloyd's Rep 473. Broadly speaking, where a contract does not expressly cover the situation, the approach is to give judgment or make the award in the currency in which the loss was felt. This may or may not prove advantageous to the claimant.

[48] Lord Steyn considers that s 48(4) of the 1996 Act replaces this body of substantive law, leaving it open to arbitrators to approach the currency of their awards, and any questions of currency conversion, in accordance with their discretion as to what is appropriate in all the circumstances. This is what the arbitrators in the present case have done. They stated in para 13.17 of their award that s 48 gave them the power—

> 'to order payment of any sum of money found to be due in any currency. Accordingly, while the tribunal takes careful note of the contract currencies and their stated proportions, the tribunal will express its awards in such currencies as are considered appropriate in the circumstances.'

I read this statement as indicating that the arbitrators believed that they had a discretion to deal with currencies in whatever way they felt appropriate, and this conclusion is reinforced by the manner in which the arbitrators dealt with the currencies, as I shall indicate in due course.

[49] There are two possible ways of interpreting s 48(4). On one interpretation it does no more than make it plain that arbitrators have the procedural power to make an award in any currency. If that is the correct interpretation, s 48(4) reproduces in statutory form the position that already prevailed under English law. The alternative interpretation, that of the arbitrators and Lord Steyn, makes a radical change to English substantive law. No decided case was cited to us in support of either interpretation. *Merkin on The Arbitration Act 1996* observes at p 112 that it is unclear from the Act whether s 48(4) gives the arbitrators an absolute discretion. *Mustill and Boyd, Commercial Arbitration: 2001 Companion Volume to the Second Edition,* p 330 on that s 48(4) 'restate[s] the old law'. *Russell on Arbitration* (22nd edn, 2003) takes the same view, stating at p 263 (para 6-122):

'**Currency of payment.** As section 48(4) of the Arbitration Act 1996 makes clear, an award may order payment to be made in any currency. An award in a foreign currency may be enforced in England without the need to convert it to sterling. The tribunal should make the award in the proper currency of the contract under which the dispute arose unless the parties have expressly or impliedly agreed otherwise in writing. The proper currency of the contract is the currency with which payments under the contract have the closest and most real connection or, if there is none, the currency which most truly expresses the claimant's loss.'

[50] I am not able to accept that s 48(4) has had the radical effect of empowering arbitrators to disregard the substantive law in relation to foreign currency obligations. I find the difference in wording between s 48(4) and s 49 significant. Had the draftsmen intended to give arbitrators the power to deal with foreign currency obligations according to a broad discretion, I would have expected them to make this plain by the use of language such as the phrase 'as it considers meets the justice of the case' that is found in s 49.

[51] As I shall shortly show, the arbitrators have adopted an approach to currencies that departs from English law which, we are required to assume in the absence of evidence to the contrary, is the same as the law of Lesotho. Was this simply an error of law, excluded from court review by s 69 of the 1996 Act together with the Rules of Arbitration of the International Chamber of Commerce, or was this an example of a 'tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)', so as to be capable of amounting to a 'serious irregularity' under s 68? I have come to the conclusion that the latter is the true position. The concept of an excess of power that is not an excess of jurisdiction is not an easy one, but I find that it applies to the arbitrators' conduct in this case. They expressly stated that s 48(4) gave them a discretionary power which they did not in fact enjoy and then proceeded to purport to exercise that power. It follows that the arbitrators were guilty of a serious irregularity under s 68(2) provided that their conduct resulted in 'substantial injustice' to the respondents. That question requires one to consider the effect of the arbitrators' approach to currencies.

[52] Had the respondents received payment in accordance with the provisions of the contract they would have received payments in maloti. The arbitrators converted the maloti into European currencies. Had they done so at the rates prevailing when the maloti payments should have been made they would have protected the respondents from the loss that they would otherwise have experienced as a result of the collapse of the maloti between the time when the sums should have been paid and the date of the award. Even if this would have been beyond their power under s 48(4) I doubt whether it would have caused the respondents substantial injustice. Had the arbitrators not achieved this result by invoking s 48(4) it seems to me likely that they would have sought to achieve the same result by appropriate adjustment to their award of interest under s 49.

[53] The arbitrators went further than this, however. The rates that they adopted for converting maloti into the European currencies were the rates prevailing 42 days before the closing date for submission of tenders. The evidence before us does not show how the maloti had moved against the European currencies between that date and the date when the maloti payments

should have been made. If the maloti had lost significant value during this period, the appellants received a windfall for which I can see no justification.

[54] Had I been in the majority in concluding that the arbitrators had exceeded their powers under s 68 it would have been necessary to give further consideration to the question of whether this had caused substantial injustice to the respondents. As, however, I am in a minority, this question does not arise and both limbs of the appeal will be allowed.

LORD SCOTT OF FOSCOTE.

[55] I have had the advantage of reading in advance the opinion prepared by my noble and learned friend, Lord Steyn and agree that, for the reasons he has given, this appeal should be allowed with costs. I too, however, prefer the approach adopted by my noble and learned friend in [23] of his opinion rather than that in [22]. The arbitrators calculated in maloti the sums due to the appellants but expressed their award in various European currencies. There is no dispute but that they were entitled under s 48(4) of the Arbitration Act 1996 to do so. But they directed that the maloti should be converted into the European currencies at the exchange rates set out in cl 72.1 (as amended) of the contract. The contract was dated 15 February 1991 and the award was made in 2002. Over that period there had been a substantial shift in exchange rates. Maloti had lost value in relation to the European currencies. The maloti that represented the appellants' entitlement under the award were, therefore, converted into greater sums in the European currencies than would have been the case if the conversion had been at the exchange rates applicable when the award was made. It might well be that the selection by the arbitrators of historic exchange rates rather than the current ones constituted an error of law. But, for the reasons given by my noble and learned friend, I am unable to regard the selection of the wrong exchange rates as constituting an excess of jurisdiction under s 68(2)(b) of the 1996 Act.

LORD RODGER OF EARLSFERRY.

[56] I have had the advantage of considering the speech of my noble and learned friend, Lord Steyn, in draft. For the reasons given by my noble and learned friend, Lord Phillips of Worth Matravers in [44]–[50] of his speech, I would prefer to adopt the approach in [23] of Lord Steyn's speech, rather than that in [22]. Subject to that qualification, I agree with his speech and would accordingly allow the appeal and make the order which he proposes.

Appeal allowed.

Dilys Tausz Barrister.

Wong v Igen Ltd and others (Equal Opportunities Commission and others intervening)

Emokpae v Chamberlin Solicitors and another (Equal Opportunities Commission and others intervening)

Webster v Brunel University (Equal Opportunities Commission and others intervening)

[2005] EWCA Civ 142

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, PETER GIBSON AND SCOTT BAKER LJJ

7, 8, 18 FEBRUARY 2005

Employment – Sex discrimination – Complaint of discrimination – Burden of proof – Sex Discrimination Act 1975, s 63A.

Race Relations – Discrimination – Employment – Complaint of discrimination – Burden of proof – Race Relations Act 1976, s 54A.

Employment – Disability – Discrimination – Complaint of discrimination – Burden of proof – Disability Discrimination Act 1995, s 17A(1C).

(1) Amendments to the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995, introduced in s 63A[a] of the 1975 Act, s 54A[b] of the 1976 Act and s 17A(1C)[c] of the 1995 Act, provide in relation to complaints of sex discrimination, racial discrimination, and disability discrimination, that where a complainant proves facts from which the employment tribunal 'could ... conclude in the absence of an adequate explanation' that the respondent to the complaint has committed (or is to be treated as having committed) an act of discrimination (or in the case of the 1976 Act, of harassment), the tribunal shall uphold the complaint, unless the respondent proves that he did not so act, or should not be so treated. These amendments require the tribunal to go through a two-stage decision-making process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the tribunal could, apart from the amending sections, conclude in the absence of an adequate explanation that the respondent has committed the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit

a Section 63A is set out at [5], below

b Section 54A is set out at [5], below

c Section 17A, so far as material, is set out at [5], below

or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld. The statutory amendments do not codify, but alter, the pre-existing position established by the case law relating to direct discrimination. It is now for the applicant complaining of discrimination only to make out his case to satisfy the first stage requirements. If the second stage is reached, and the respondent's explanation was inadequate, it will not be not merely legitimate but also necessary for the tribunal to conclude that the complaint should be upheld. The statutory amendments shift the evidential burden of proof to the respondent if the complainant proves what he was required to prove at the first stage. However, tribunals are not required to divide the hearings into two parts to correspond with the two stages, generally they will wish to hear all the evidence, including the respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the respondent has discharged the onus shifted to him (see [17]–[19], below); *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 considered.

(2) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. The tribunal is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation, the complainant will succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage, although it is possible that facts found relevant to the first stage may also relate to the explanation of the respondent (see [21]–[23], below); *University of Huddersfield v Wolff* [2004] IRLR 534 considered.

(3) It is for the complainant to prove the facts from which, if the statutory amendments had not been passed, the tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. The language of the statutory amendments is plain. It does not say that the facts to be proved are those from which the tribunal could conclude that the respondent 'could have committed' such acts of discrimination. The scheme is simple and makes good sense given that a complainant can be expected to know how he has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated. There may be cases where the complainant will have difficulty in proving that it was the employer who committed the unlawful act; or may have no less difficulty in establishing other of the essential facts, but that does not mean that it is sufficient for the complainant to prove only the possibility rather than the probability of those other facts at the first stage. The legislative intention is that the respondent should explain why he has done what he has been proved by the complainant to have done, rather than the respondent having to prove the fact that it was not he who did it at all (see [27], [28], [30], [31], below).

Notes

For complaints of discrimination: enforcement in the employment field, see 13 *Halsbury's Laws* (4th edn reissue) paras 374, 455, 484–491.

For the Sex Discrimination Act 1975, s 63A, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 120.

For the Race Relations Act 1976, s 54A, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 225.

For the Disability Discrimination Act 1995, s 17A, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 404.

Cases referred to in judgment

Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332, [2003] ICR 1205, EAT.

Chattopadhyay v Headmaster of Holloway School [1981] IRLR 487, [1982] ICR 132, EAT.

Enderby v Frenchay Health Authority Case C-127/92 [1994] 1 All ER 495, [1993] ECR I-5535, [1994] ICR 112, ECJ.

Glasgow City Council v Zafar [1998] 2 All ER 953, [1998] ICR 120, [1997] 1 WLR 1659, HL.

Hinks v Riva Systems Ltd (22 November 1996, unreported), EAT.

Khanna v Ministry of Defence [1981] IRLR 331, [1981] ICR 653, EAT.

King v Great Britain-China Centre [1991] IRLR 513, [1992] ICR 516, CA.

Law Society, The, v Bahl [2003] IRLR 640, EAT; *affd* [2004] EWCA Civ 1070, [2004] IRLR 799, CA.

Martin v Lancehawk Ltd (t/a European Telecom Solutions) [2004] All ER (D) 400 (Mar), EAT.

Nagarajan v London Regional Transport [1999] 4 All ER 65, [2000] 1 AC 501, [1999] 3 WLR 425, HL.

Nelson v Carillion Services Ltd [2003] EWCA Civ 544, [2003] IRLR 428, [2003] ICR 1256.

North West Thames Regional Health Authority v Noone [1988] IRLR 195, [1988] ICR 813, CA.

Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd [2003] UKHL 33, [2003] 4 All ER 1113, [2003] ICR 867.

Schofield v Stuart Kaufmann (11 October 2002, unreported), EAT.

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] 2 All ER 26, [2003] ICR 337.

Specialarbejderforbundet i Danmark v Dansk Industri (acting for Royal Copenhagen A/S) Case C-400/93 [1995] All ER (EC) 577, [1995] ECR I-1275, [1996] ICR 51, ECJ.

University of Huddersfield v Wolff [2004] IRLR 534, [2004] ICR 828, EAT.

Appeals

Wong v Igen Ltd and others (Equal Opportunities Commission and others intervening)

Igen Ltd, Beverley Parsons, Christine McNiven and Liz Green appealed with permission of Mummery LJ from the decision of the Employment Appeal Tribunal (Judge McMullen QC, Ms J Drake, and Professor PD Wickens OBE) on 12 May 2004 dismissing their appeal from the decision of the employment tribunal upholding a complaint by Kay Wong of unlawful discrimination by reason of race discrimination, harassment and victimisation. The Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission appeared as interveners. The facts are set out in the judgment of the court.

Emokpae v Chamberlin Solicitors and another (Equal Opportunities Commission and others intervening)

Chamberlin Solicitors and T Emezie appealed with permission of the Court of Appeal (Mummery and Dyson LJ) from the decision of the Employment Appeal Tribunal (Judge McMullen QC, Mr C Edwards and Mr J Hougham CBE) on 15 June 2004 dismissing their appeal from the decision of the employment tribunal upholding a complaint by I Emokpae of unlawful discrimination on grounds of sex. The Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission appeared as interveners. The facts are set out in the judgment of the court.

Webster v Brunel University (Equal Opportunities Commission and others intervening)

Brunel University appealed from the decision of the Employment Appeal Tribunal (Burton J (President), Mr J Mallender and Mr GH Wright MBE) on 14 December 2004 remitting the complaint of Gurdish Webster against Brunel of unlawful discrimination on grounds of race to a fresh employment tribunal. The Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission appeared as interveners. The facts are set out in the judgment of the court.

Elizabeth Slade QC and *Richard Leiper* (instructed by *Lupton Fawcett*, Leeds) for the appellants in the case of Wong.

Antony White QC and *James Laddie* (instructed by *Ford & Warren*, Leeds) for Ms Wong.

Mathew Purchase (instructed by *C T Emezie Solicitors*) for Chamberlins and Mr Emezie.

Neil Vickery (instructed by *Eversheds*) for Brunel.

Paul Troop (instructed by *Thompsons*) for Ms Webster.

Robin Allen QC and *Anna Beale* (instructed by the *Equal Opportunities Commission*) for the interveners.

Ms Emokpae did not appear.

Cur adv vult

18 February 2005. The following judgment of the court was delivered.

PETER GIBSON LJ.

INTRODUCTION

[1] These are three appeals from the Employment Appeal Tribunal (the EAT). The circumstances of each differ widely from those of the others, but they all raise questions on the interpretation and application of the statutory provisions comparatively recently introduced into the Sex Discrimination Act 1975 (the SDA) and the Race Relations Act 1976 (the RRA) respectively as to the shifting of the burden of proof in direct discrimination cases under those Acts.

[2] A similar statutory provision has recently been introduced into the Disability Discrimination Act 1995 (the DDA). Similar provisions are also to be found in the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, reg 29 and in the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 29.

[3] Because of the possible impact which our decisions in these appeals may have on practice in discrimination cases, the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission successfully applied to this court for permission to intervene. We are grateful to Mr Robin Allen QC and Ms Anna Beale, appearing for those Commissions, for their assistance.

[4] From the statistics provided to us by Mr Allen it is apparent that a significant proportion of the originating applications presented to an Employment Tribunal (ET) each year raise discrimination complaints. In just under 20,000 cases (17% of all cases) commenced in 2003–4 the main complaint was of discrimination, and although there are no figures available of how many of those cases concerned allegations of direct, rather than indirect, discrimination, it is likely that the majority would have been cases of alleged direct discrimination.

THE LAW

[5] The new provisions in the Discrimination Acts are the following:

(*a*) *SDA*

Section 63A (inserted by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, SI 2001/2660) provides:

> '*Burden of Proof: employment tribunals.*—(1) This section applies to any complaint presented under section 63 to an employment tribunal.
>
> (2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2, or (b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.'

(*b*) *RRA*

Section 54A (inserted by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626) provides:

> '*Burden of proof: employment tribunals.*—(1) This section applies where a complaint is presented under section 54 and the complaint is that the respondent—(a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in Section 1 (1B)(a) (e) or (f) or Part IV in its application to those provisions, or (b) has committed an act of harassment.
>
> (2) Where on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—(a) has committed such an act of discrimination or harassment against the complainant, or (b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit

a the act or, as the case may be, is not to be treated as having committed that act."

(c) *DDA*

Section 17A (1C) (inserted by the Disability Discrimination Act 1995 b (Amendment) Regulations 2003, SI 2003/1673) provides:

> 'Where, on the hearing of a complaint under subsection (1) the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal c shall uphold the complaint unless the respondent proves that he did not so act.'

[6] It has long been recognised that proving discrimination claims may pose great difficulties for claimants. Before the new provisions were inserted into the SDA, the RRA and the DDA respectively, ETs generally followed the guidance d given by this court in a case under the RRA, *King v Great Britain-China Centre* [1991] IRLR 513, [1992] ICR 516. Neill LJ (with whom Nourse LJ and Sir John Megaw agreed) said this (see [1991] IRLR 513 at 518, [1992] ICR 516 at 528–9):

> 'From these several authorities it is possible, I think, to extract the following principles and guidance: (1) It is for the applicant who complains of e racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail. (2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be f ill-intentioned but merely based on an assumption "he or she would not have fitted in." (3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 65(2)(b) of the Act of 1976 from an evasive or equivocal reply to a questionnaire. (4) Though there will be some g cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal h considers the explanation to be inadequate or unsatisfactory it will be legitimate for the Tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May LJ put it in *Noone* [1988] IRLR 195, "almost common sense." (5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw j such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.'

[7] That guidance received the express approval of the House of Lords in *Glasgow City Council v Zafar* [1998] 2 All ER 953, [1998] ICR 120. In that case

Lord Browne-Wilkinson acknowledged that remarks which he made when, as Browne-Wilkinson J, he presided in the EAT in two earlier cases, *Khanna v Ministry of Defence* [1981] IRLR 331, [1981] ICR 653 and *Chattopadhyay v Headmaster of Holloway School* [1981] IRLR 487, [1982] ICR 132, went too far and should not be followed. Thus in *Chattopadhyay*'s case it was said:

> 'the law has been established that if an applicant shows that he has been treated less favourably than others in circumstances which are consistent with that treatment being based on racial grounds, the Industrial Tribunal should draw an inference that such treatment was on racial grounds, unless the respondent can satisfy the Industrial Tribunal that there is an innocent explanation ...' ([1981] IRLR 487 at 490, [1982] ICR 132 at 137).

However, it might be thought that, with the introduction of the new provisions set out at [5] above, those remarks are now consistent with the Discrimination Acts as amended.

[8] European law had in the meantime been moving in the direction now enacted in the new provisions. In a series of cases, culminating in *Enderby v Frenchay Health Authority* Case C-127/92 [1994] 1 All ER 495, [1993] ECR I-5535, [1994] ICR 112 and *Specialarbejderforbundet i Danmark v Dansk Industri (acting for Royal Copenhagen A/S)* Case C-400/93 [1995] All ER (EC) 577, [1995] ECR I-1275, [1996] ICR 51, the European Court of Justice (the ECJ) ruled that in the field of sex discrimination the burden of proof might be shifted when that was necessary to avoid depriving workers, who appeared to be the victims of discrimination, of any effective means of enforcing the principle of equal pay.

[9] That was then followed by the promulgation of Council Directive (EEC) 97/80 (OJ 1998 L14 p 6) (the Burden of Proof Directive). This recited the requirement under para 16 of the Community Charter of the Fundamental Social Rights of Workers (Strasbourg, 9 December 1989) (OJ 1989 C323 p 1) (the Social Charter) that action should be intensified to ensure the implementation of the principle of equality for men and women (recital (3)). It further recited that plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminating (recital (17)). The aim of the Burden of Proof Directive was said in art 1 to be:

> 'to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.'

By art 4(1):

> 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

By art 4(2) it was provided that the Directive was not to prevent member states from introducing rules of evidence more favourable to plaintiffs.

[10] The United Kingdom did not originally accede to the Social Charter and so was not bound by the Burden of Proof Directive. However, it did so accede in 1997 and by Council Directive (EC) 98/52 (OJ 1998 L205 p 6) the Burden of Proof Directive was extended to apply to the United Kingdom. Section 63A of the SDA was intended to implement the Burden of Proof Directive.

[11] Meanwhile in October 1997 art 13 of the Treaty of Amsterdam (Amsterdam, 2 October 1997) (OJ 1997 C340 p 1) amended the Treaty of Rome by including a power for the Council to legislate against discrimination in relation to a range of grounds. The Council exercised that power twice in 2000.

[12] In Council Directive (EC) 2000/43 (OJ 2000 L180 p 22) (the Race Directive) it was recited (in recital (21)):

> 'The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.'

By art 8(1) and (2) member states were directed in like manner as in art 4(1) and (2) of the Burden of Proof Directive. Section 54A of the RRA was intended to implement art 8.

[13] In Council Directive (EC) 2000/78 (OJ 2000 L303 p 16) (the Framework Employment Equality Directive) recital (31) contained the like provision to recital (21) of the Race Directive. By art 10(1) and (2) member states were directed in like manner as in art 8(1) and (2) of the Race Directive. Section 17A (1C) of the DDA was intended to implement art 10.

THE BARTON GUIDANCE

[14] Following the insertion of s 63A into the SDA, the EAT (Judge Ansell presiding) in a sex discrimination case, *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 at 337–338, (para 25) [2003] ICR 1205 at 1217–1218 set out the following guidance in the light of the statutory changes:

> '(1) Pursuant to s. 63A of the 1975 Act, it is for the applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the applicant which is unlawful by virtue of Part II, or which, by virtue of s. 41 or 42 SDA, is to be treated as having been committed against the applicant. These are referred to below as "such facts."
>
> (2) If the applicant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in."
>
> (4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word is "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s. 74(2)(b) of the Sex Discrimination Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within s. 74(2) of the Sex Discrimination Act: see *Hinks v Riva Systems Ltd* (22 November 1996, unreported).

(7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant, and if so, take it into account in determining such facts pursuant to s. 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.

(9) It is then for the respondent to prove that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

(10) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(11) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.

(12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'

[15] That guidance (the *Barton* guidance) has been applied many times by ETs and EATs not only in the field of sex discrimination to which its wording is directed but also in relation to race and disability discrimination. It is not in dispute that the Discrimination Acts should be construed consistently with each other so far as possible. The appeals considered by the House of Lords in *Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd* [2003] UKHL 33, [2003] 4 All ER 1113, [2003] ICR 867 provide a striking example of that notwithstanding differences in the statutory language used.

[16] Before us there has been no challenge to the broad outline of the *Barton* guidance, although suggestions have been put to us as to how it might be improved. Some criticisms have been made and suggestions put forward by the EATs in other cases. We shall return to the wording of the guidance later. However it is important to stress at the outset that ETs must obtain their main guidance from the statutory language itself. No error of law is committed by an ET failing to set out the *Barton* guidance or by failing to go through it paragraph by paragraph in its decision.

[17] The statutory amendments clearly require the ET to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.

[18] There was some debate before us as to whether the statutory amendments merely codified the pre-existing law or whether it had made a substantive change to the law. Miss Elizabeth Slade QC (appearing in Wong v Igen Ltd for the employer), in initially arguing for the former, relied on the comment by Simon Brown LJ in *Nelson v Carillion Services Ltd* [2003] EWCA Civ 544 at [26], [2003] IRLR 428 at [26], [2003] ICR 1256:

> 'It seems to me tolerably clear that the effect of s. 63A [of the SDA] was to codify rather than alter the pre-existing position established by the case law.'

That comment was made obiter in a case relating to alleged indirect discrimination. We think it clear, as Mr Allen submitted and as Miss Slade accepted, that the amendments did not codify, but altered, the pre-existing position established by the case law relating to direct discrimination. It is plain from the Burden of Proof Directive that member states were required to take measures to ensure that once the complainant established facts from which it might be presumed that there had been discrimination, the burden of proof shifted to the respondent to prove no breach of the principle of equal treatment. Looking at Neill LJ's guidelines in *King*'s case (set out at [6] above), it is plain that paras (1), (4) and (5) of the *Barton* guidance need alteration. It is for the applicant complaining of discrimination only to make out his or her case to satisfy the first stage requirements. If the second stage is reached, and the respondent's explanation is inadequate, it will be not merely legitimate but also necessary for the ET to conclude that the complaint should be upheld. The statutory amendments shift the evidential burden of proof to the respondent if the complainant proves what he or she is required to prove at the first stage.

[19] Although we have referred to the two stages in the ET's decision-making process, we do not thereby intend to suggest that ETs should divide hearings into two parts to correspond to those stages. No doubt ETs will generally wish to hear all the evidence, including the respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the respondent has discharged the onus shifted to him.

[20] One issue which arose before us was whether the words of the statutory amendment, 'in the absence of an adequate explanation', precluded consideration of the respondent's explanation at the first stage. Miss Slade submitted that it did not. She argued that the totality of the evidence must be considered. She said that the ET should at the first stage consider whether the respondent has provided an adequate explanation and, if so, it should take that into account at that stage. She referred us to the remarks of the EAT in *University of Huddersfield v Wolff* [2004] IRLR 534 at 537–538, [2004] ICR 828 at 835–836 where Burton J, after setting out the *Barton* guidance, said:

'26. The right course, therefore, for the tribunal, had it set out at first to find material facts, but in any event even though it did not quite follow that format, would be to address s. 63A and, in particular, to conclude that the burden moves where the applicant has proved facts from which inferences could be drawn that the respondents have treated the applicant less favourably on the grounds of sex. It must therefore arrive at a conclusion that there is a prima facie case that the respondent has treated the applicant less favourably on the grounds of sex. Once it has done that, then it passes to consider the respondent's explanations; it must, if it has not already done so, make findings of fact, or draw inferences from findings of fact, for the purposes of concluding whether any of the explanations put forward by the respondent satisfy them, the burden being on the respondent to show that the less favourable treatment was not on the grounds of sex.'

Miss Slade said that the last sentence showed that the ET might already have made findings of fact about the explanations of the respondent before the second stage and she argued that therefore Burton J was supporting the notion that explanations should be taken into account at the first stage.

[21] Mr Antony White QC, appearing for the employee in Wong's case, takes issue with Miss Slade on this point. He submits, and is supported by Mr Allen in that submission, that in considering what inferences or conclusions can be drawn from the primary facts, the ET must assume that there is no adequate explanation for those facts. Mr White accepts that that does not prevent the ET from taking into account at the first stage the fact that the respondent has given an inadequate explanation, but he argues that that is in no way inconsistent with the assumption which the words 'in the absence of an adequate explanation' require to be made.

[22] We agree with Mr White. The words 'in the absence of an adequate explanation', followed by 'could', indicate that the ET is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation, the complainant will succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage. We think that Miss Slade seeks to extract more significance from the words used by Burton J in *Wolff*'s case than they can reasonably have. It is of course possible that the facts found relevant to the first stage may also relate to the explanation of the respondent.

[23] We accept Mr White's suggestion that in view of our conclusion it may be helpful for the *Barton* guidance to include a paragraph stating that the ET must assume no adequate explanation at the first stage. That suggestion was supported by Mr Allen.

[24] We draw attention to another related point on the language of the statutory amendments, although there was no dispute before us on it. The language points to the complainant having to prove facts, and there is no mention of evidence from the respondent. However, it would be unreal if the ET could not take account of evidence from the respondent if such evidence assisted the ET to conclude that in the absence of an adequate explanation unlawful discrimination by the respondent on a proscribed ground would have been established. Paragraphs (6) and (7) of the *Barton* guidance give examples of unsatisfactory conduct by the respondent, in response, for example, to the statutory questionnaire or in breach of a code of practice, being relevant to the

drawing of inferences at the first stage, and it cannot matter whether the claimant or the respondent gave that evidence.

[25] An important point of construction is raised by the decision of the EAT in Webster v Brunel University. We shall come to the particular circumstances of that appeal later, but the short point raised is whether the word 'could' in the statutory amendments imports that it is not necessary for the complainant to prove that the respondent in fact committed the act of discrimination complained of so long as the complainant proves that there was an act of less favourable treatment on a prohibited ground and that that act could have been committed by the respondent. As Burton J put it in para 34 of the judgment of the EAT:

> 'It will be for a tribunal to ask itself, having found the facts as to what occurred, whether the treatment, which it, on the balance of probabilities, has established, *could have been* by the respondent.'

[26] Mr Paul Troop, appearing for the complainant employee, submits that the EAT was right in that construction. He says that the wording of the statutory amendments is clear: at the first stage the burden is on the claimant merely to establish facts from which it could be inferred or concluded, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant. He relies on the example given by the EAT of a group of 100 people in a room, 30 of whom are employees of the respondent and one of the 100 present uttered a racially discriminatory word, 'Paki', offensive to the Asian complainant, but the complainant is unable to identify which of the 100 people said it. Mr Troop accepted that in those circumstances the ET might not conclude that the respondent employer had committed the act of discrimination. However, he said that if 70 of the 100 were employees, the ET might conclude that the respondent had committed that act.

[27] Mr Neil Vickery for the employer submits that such a construction is contrary to the statutory language and to that of the Directive. He points out that the effect of this construction is to place the onus on the respondent to disprove certain facts which go to make up the act of discrimination: the respondent not only needs to provide an explanation for his conduct once he has been shown to have acted in a certain way but needs to prove that he did not even do the act in the first place. He describes such a result as startling. He adverts to the fact that the statutory amendments use the words 'apart from this section' when describing what the complainant needs to prove. He points out that, apart from the statutory shift of the burden of proof, the EAT's construction runs contrary to existing case law, it being repeatedly said that it is for the complainant to prove his or her case.

[28] With all respect to the EAT, we cannot accept its construction. We have no hesitation in agreeing with Mr Vickery. The language of the statutory amendments seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the ET could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the ET could conclude that the respondent 'could have committed' such act.

[29] The relevant act is, in a race discrimination case such as Webster, that (a) in circumstances relevant for the purposes of any provision of the RRA (for example in relation to employment in the circumstances specified in s 4 of the RRA), (b) the alleged discriminator treats another person less favourably and (c)

does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities. The EAT said (in para 34) that it was satisfied that the burden of showing that the discriminatory act was done by an employee of the employer should not remain upon the complainant 'once a prima facie case has been established'. That is a direction that what the EAT in Webster's case called the ingredient even more necessary than less favourable treatment on the ground of sex (no doubt the EAT meant race), viz that the act was by the respondent, need not be proved on the balance of probabilities, so long as it was shown that the ET could conclude, in the absence of an adequate explanation, that there was a possibility that it was by the respondent. There is nothing in the language of the statutory amendments, in the language of the Directive or in the travaux préparatoires to which we were taken, which supports such a construction. On the contrary: the Directive requires the complainant to establish facts from which it may be presumed that there has been discrimination by the alleged discriminator.

[30] We add that we were not persuaded by the argument advanced by Mr Troop that the language of the Burden of Proof Directive does not assist because art 4(2) of that Directive allowed a member state to introduce rules of evidence more favourable to plaintiffs, and that similar provisions were included in the Race Directive and the Framework Employment Equality Directive. The amendments were all made by regulations made pursuant to s 2 of the European Communities Act 1972 and we would have expected statutory amendments, if they went beyond obligations imposed by Directives, to have been signposted more clearly and to have been effected by primary legislation rather than by regulations.

[31] The scheme of the statutory amendments appears to us simple and to make good sense given that a complainant can be expected to know how he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated. Of course there may be cases where the complainant will have difficulty in proving that it was the employer who committed the unlawful act. But that is a difficulty faced by many who feel aggrieved and would wish to obtain redress through the courts or the tribunals. The complainant may have no less difficulty in establishing others of the essential facts, but that does not mean that it is sufficient for the complainant to prove only the possibility rather than the probability of those other facts at the first stage.

[32] The EAT has read too much into the word 'could' without appreciating that its use is linked to the assumption 'in the absence of an adequate explanation'. The very word 'explanation' seems to us a pointer to the legislative intention that the respondent should explain why he has done what he has been proved by the complainant to have done, rather than to the respondent having to prove the fact that it was not he who did it at all.

[33] Finally, if there is any doubt at all as to the correct interpretation, it must surely be resolved by the consideration that, if the EAT is right, a very real injustice may be done to the respondent. Take any case where there is a possibility that the alleged discriminator, through an employee, has done the unlawful act but there is also a possibility that a person who has nothing to do with the respondent did it, and the respondent not only does not know any more than the complainant does but has no means of proving that it was not his employee who committed the act. What is the justice of imposing the burden of proof and hence liability on him rather than the complainant? We would add that

it does not appear to us to be a sound basis for deciding whether the requirements of the first stage are satisfied by counting heads, in the example given by the EAT as set out at [26] above. Once it is accepted that the mere possibility of an employee having uttered the word 'Paki' is sufficient to satisfy the first stage requirements, the burden of proof must shift, whether or not employees outnumber non-employees.

[34] We also heard argument on the need for there to be a comparator in the ingredient of less favourable treatment which the complainant must prove for there to be sexual or racial discrimination. However there was no real dispute before us on this point. That a comparison must be made is explicit in the language of the definition of discrimination. In s 1(1)(a) of the SDA one finds 'he treats her less favourably than he treats or would treat a man'. In s 1(1)(a) of the RRA one finds 'he treats that other less favourably than he treats or would treat other persons'. The comparison must be such that the relevant circumstances of the complainant must be the same as or not materially different from those of the comparator. It is trite law that the complainant need not point to an actual comparator. A hypothetical one with the relevant attributes may do. Our attention was drawn to what was said by Elias J, giving the judgment of the EAT in *The Law Society v Bahl* [2003] IRLR 640 at 660 (paras 162, 163). There it was held that it is not obligatory for ETs formally to construct a hypothetical comparator, though it was pointed out that it might be prudent to do so and that the ET might more readily avoid errors in its reasoning if it did so. Similarly, when *Bahl*'s case went to appeal, this court said ([2004] EWCA Civ 1070 at [156], [2004] IRLR 799 at [156]) that it was not an error of law for an ET to fail to identify a hypothetical comparator where no actual comparator can be found. However, this court also said that not to identify the characteristics of the comparator might cause the ET not to focus correctly on what Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at [7], [2003] 2 All ER 26 at [7], [2003] ICR 337 called 'the less favourable treatment issue' (viz whether the complainant received less favourable treatment than the appropriate comparator) and 'the reason why issue' (viz whether the less favourable treatment was on the relevant proscribed ground). The importance of a failure to identify a comparator or the characteristics of the comparator may vary from case to case, and may be thought to be of particular relevance to the appeal in Emokpae v Chamberlin Solicitors.

[35] Finally, we should refer to a dispute on whether para (10) of the *Barton* guidance requires modification. In Emokpae's case ([2004] IRLR 592, [2004] ICR 1476) Judge McMullen QC, giving the judgment of the EAT, held that the reference in para (10) to the words 'no discrimination whatsoever', which are taken from the Burden of Proof Directive, was inappropriate because they concerned not the definition of or the ingredients in discrimination but merely the forms of discrimination. Instead Judge McMullen suggested ([2004] IRLR 592 at 59 (para 38), [2004] ICR 1476 at 1487–1488) that para (10) be rewritten to read:

> 'To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was not significantly influenced, as defined in [*Nagarajan v London Regional Transport* [1999] 4 All ER 65, [2001] 1 AC 501] by grounds of sex.'

That was a reference to the following passage in Lord Nicholls's speech in *Nagarajan*'s case (see [1999] 4 All ER 65 at 72, [2001] 1 AC 501 at 512–513):

'Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'

[36] Miss Slade supported the correctness of that amendment to para (10). Mr Allen cogently criticised it as based on a misreading of the relevant Directives and he drew particular attention to the French version of them. We think it sufficient to say that we see no reason to change the original para (10). In *Nagarajan*'s case, a race discrimination case, unsurprisingly there does not appear to have been any consideration of the Burden of Proof Directive relating to sex discrimination. That Directive is emphatic in its definition in art 2(1) of the principle of equal treatment as meaning that there shall be no discrimination whatsoever based on sex, either directly or indirectly, and in requiring by art 4(1) that once the burden shifts for the second stage it is for the respondent to prove that there has been no breach of that principle. In art 2(1) of the Framework Employment Equality Directive there is a definition of the principle of equal treatment to similar effect (viz 'there shall be no direct or indirect discrimination whatsoever on any of the [proscribed] grounds'). Only in the definition of the principle of equal treatment in art 2(1) of the Race Directive is the word 'whatsoever' omitted, but it would be idle to suggest that that omission entails a meaning different from that of the other Directives. The language of the definitions in the French texts of the three Directives is in effect the same.

[37] In any event we doubt if Lord Nicholls's wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial. We would therefore support the original para (10) of the *Barton* guidance and, consistently therewith, a minor change suggested by Mr Allen to para (11) so that the latter part reads 'it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.'

THE APPEALS

[38] We come now to the circumstances of the three appeals.

(I) *Wong v Igen Ltd.*

[39] The applicant, Ms Kay Wong, was employed by Leeds Careers Guidance (LCG), the predecessor in title to the appellant, Igen Ltd, in October 1988 as a careers adviser specialising in assisting young people to find work. In 1999 she transferred to a new project, The Learning Gateway, the purpose of which was to work with young disaffected people. Her role was to act as a personal adviser to particular individuals.

[40] Ms Wong complained to an ET about her treatment between September 2001 and June 2002. She alleged that she had been unlawfully discriminated against by LCG and Beverley Parsons, her line manager, Christine

McNiven, her senior manager, and Liz Green, the personnel manager. Those individuals are all white. Ms Wong is of Afro-Caribbean racial origins. On 10 July 2002 she applied to the ET, complaining against LCG and the three managers of race discrimination, harassment and victimisation. She said she had been less favourably treated in three ways: (a) she had not been allowed to attend a personal adviser diploma course; (b) she had been subjected to an unduly critical Individual Performance Review (IPR) in April 2002; (c) inappropriate and unfair disciplinary proceedings had been pursued against her because (i) she refused to sign the IPR and to accept the assessment in it or to appeal against it, and (ii) she had complained of having been victimised and harassed but had failed to withdraw or justify her complaint.

[41] Her complaint was heard by an ET in Leeds over four days. By a decision sent to the parties on 7 October 2003 the ET dismissed complaints (a) and (b), but upheld complaint (c). Applying the *Barton* guidance, it held that it could infer discrimination against Ms Parsons, Ms McNiven and Ms Green in the absence of an adequate explanation and went on to hold that those individuals had not adequately explained the totality of their actions and had not proved that the treatment of Ms Wong was in no sense whatsoever on the grounds of her race. The ET also found that LCG was liable under s 32(1) of the RRA for the actions of the individuals.

[42] On appeal by LCG, Ms Parsons, Ms McNiven and Ms Green (together 'the appellants') the EAT on 12 May 2004 ([2004] All ER (D) 152 (May)) dismissed the appeal. Permission to appeal to this court was granted by Mummery LJ on the papers.

[43] Before us Miss Slade, appearing with Mr Richard Leiper for the appellants, submitted that (i) the ET erred by not specifying the primary facts it relied upon to justify concluding in para 55 of its decision: 'we take the view that it could be open to us to draw an inference of discrimination', and by not setting out the process by which it could draw that conclusion; and (ii) the ET wrongly found that the appellants had failed to discharge the burden of proof once it had transferred to them.

[44] On the first point Miss Slade suggested that the ET failed to take into account the appellants' adequate explanations and failed to make adequate findings in relation to each of the individual appellants. She pointed out that the only facts directly linked to race were those found in para 55 that Miss Wong is from a minority ethnic origin whereas Ms Parsons, Ms McNiven and Ms Green are all white Europeans. Miss Slade described the ET as going too far into the realms of conjecture or speculation from the limited facts found by it and as making too great a leap when it said (in para 55):

> 'On the basis of the primary facts found by us it seems to us that it would be open to us to conclude that Ms Parsons resented her authority being challenged by the applicant, by reason of her ethnic origins, and that Ms McNiven and Ms Green closed ranks against the applicant to support Ms Parsons and to try and compel the applicant to "toe the line".'

[45] On her second point Miss Slade submitted that the ET may have identified alternative, non-discriminatory reasons had it constructed a hypothetical comparator. She said that its failure to do so raised doubts as to whether the ET had properly considered all potentially relevant explanations when identifying whether or not unlawful discrimination existed. She complained that the ET failed to take into account the unhelpful conduct of

Ms Wong and her representative, Mr Dawes. She contended that the discrimination found must have been subconscious but said that the ET failed to explain how it reached that conclusion. She further pointed to the favourable finding by the ET that Ms Parsons carried out the IPR in good faith and suggested that the ET failed to consider the inherent unlikelihood of Ms Parsons being motivated by race on that occasion but not on another.

[46] Mr White, appearing with Mr Laddie for Ms Wong, submits that no error of law is disclosed by the ET's decision as upheld by the EAT. He argues that the ET did set out at length the facts found in relation to what the ET considered to be the appellants' unreasonable conduct including their inability to provide any satisfactory explanation for what the ET plainly regarded as a strikingly unreasonable aspect of its conduct, namely transferring Ms Wong back to her previous job in advance of a disciplinary hearing and without prior consultation with the employee. He further submits that it is clear from the authorities that unexplained unreasonable conduct is capable of giving rise to an inference of unlawful discrimination. He points out that the ET did record matters such as the intransigence of Ms Wong in refusing to comply with LCG's established procedures and the uncooperative stance of Mr Dawes, which formed the basis of the appellants' explanation of their conduct. He stresses that there is no perversity challenge to the ET's decision.

[47] Because of the nature of the challenge to the ET's decisions we shall go in a little more detail through how the ET arrived at its decision. The ET in paras 1–31 of its extended reasons set out what it called the relevant facts. It then referred to the applicable statutory provisions before considering the way Ms Wong's case was put. It made findings destructive of what we have called (at paras [40] and [41] above) complaints (a) and (b) before turning to complaint (c) in paras 40 ff. It said:

> '40. Thereafter, we find many of the respondents' actions difficult to understand. It is of course a difficulty to have an employee who does not comply with procedures to the precise letter and it is a difficulty when an employee makes allegations of victimisation, harassment and discrimination against her line manager. It does seem to us however, that the application of some common sense at an early stage would have defused the situation. The respondents, be it Ms Parsons, Ms McNiven or Ms Greene could have taken the applicant's response of 19 April as an appeal and set up an appeal hearing, or could have taken her refusal to confirm that she intended to appeal, as an indication that she did not want to do so. Her actions were capable of either interpretation and as long as the position was made sufficiently clear to her, it would be in the applicant's own hands to correct the position were that to be necessary.
>
> 41. As to the complaint made against her manager, this was potentially a very serious matter. To suggest that a manager had failed properly to appraise her performance because she had spoken out about training procedures was a serious complaint to make. That complaint came to the attention of Ms Greene, who told us that she was a very experienced Personnel Manager. The complaint could, and should have been flushed out. Ms Greene or her assistant, Mr Stokes, could have been sent to sit down with the applicant to make it clear that her complaint was being taken seriously and the applicant could then have been compelled either to withdraw her complaint, if it was baseless, or to provide specific information

which would have been required to have launched a proper investigation. By placing the onus upon the applicant, as happened in Ms Greene's memorandum of 1 May 2002, to embark upon formal procedures or to herself seek out Mr Stokes simply sowed the seeds of what was to follow.

42. It was unreasonable of Ms Greene to have attended the meeting on 31 May, without giving the applicant prior warning of her intention to do so. This meeting was also an opportunity for a skilled and sympathetic manager to have listened to the applicant, and to her complaints. She was after all meeting with her senior manager with a view to doing just that. Instead Ms Greene turned the meeting into a confrontational meeting which then revolved around what was coming to be the obsessional demand for the IPR form to be properly completed. All hope that the applicant was going to consider Ms Greene, or those who worked with her, as being an avenue for receiving counselling and support in respect of the alleged harassment, went out of the window when Ms Greene started using the language of lawyers and threatening the applicant with breach of contract and disciplinary proceedings. In our view the applicant was entitled to take the view that Ms Greene was conducting herself as if she was defending someone, namely Ms Parsons, as against her, the complainant. She had reason to believe, in those circumstances, that she was not going to get a fair hearing.

43. The pressure was then increased on 5 June. She found herself in a formal meeting, where the person against whom she was pursuing a complaint was present, supported by her manager, and she was not permitted representation herself. Once again, Ms Parsons and Ms NcNiven conducted that meeting in a way which was designed to inflame the situation, not to resolve it. As a consequence she was transferred back to become a careers adviser once again. Ms Greene was unable to explain the rationale behind that move. To begin with it was being suggested that the respondents were entitled to do it under the terms of their disciplinary procedure. It is true that in the disciplinary procedure, as set out in the Handbook, relegation or transfer is an option as an alternative to dismissal after a full formal Disciplinary Hearing has taken place. No such disciplinary hearing had, of course, taken place. Ms Greene then suggested that the respondents were contractually entitled to effect this change, as it did not involve an alteration to the applicant's terms and conditions of employment. She then however conceded that with her personnel knowledge and experience it would be highly unusual for such a transfer to be imposed upon an employee without any prior discussion or consultation.

44. The issue of the unsigned IPR form and the refusal to withdraw or pursue the harassment complaint was then formalised into a disciplinary matter. Thus, the respondents became more and more entrenched and a sensible resolution to what was, in reality, a trivial issue, became more and more remote.

45. The applicant then consulted with Mr Dawes, clearly an experienced trade union officer. At an early stage Ms Green had suggested that the applicant should seek advice either internally or externally and sensibly, she had done just that. That was, as it turned out, the final opportunity that the respondents had to resolve the situation. Skilled and sympathetic managers dealing with a professional trade union official should have been able to achieve a situation where the applicant could have been persuaded to confirm whether she wished to appeal the IPR or not and

whether she wished to formally pursue the harassment procedure or not. As the applicant told us, she still had faith, in the Chief Executive, Mr Higginbotham, she did not see him as being tainted in the same was as she viewed Ms Parsons, Ms NcNiven and Ms Greene. There were, in our view, many routes by which Mr Dawes could have assisted the respondents to achieve a solution that was mutually acceptable to the respondents and to the applicant. That was an opportunity that Ms Greene should have seized with both hands.

46. Instead she continued to adopt an inflexible and officious approach. True it is that she was not helped by the applicant or by Mr Dawes, who refused to disclose precisely what his credentials were. As however the Tribunal put to Ms Greene in the situation in which she had found herself, anybody who had the trust of the applicant and who was able to enter into sensible dialogue could, potentially, have provided a way out of this impasse.'

[48] The ET then directed itself correctly by stating that unreasonable behaviour was not the same as discriminatory behaviour. It referred to the judgment of the EAT in *Bahl*'s case and to Elias J's remarks ([2003] IRLR 640 at 651 (para 100)) that where the alleged discriminator acts unreasonably, an ET will want to know why he has acted in that way, and (at 651 (para 101)) that the significance of the fact that the treatment is unreasonable is that an ET will more readily in practice reject the explanation given than it would if the treatment were reasonable and that, if the reason is not accepted, it may be open to the ET to infer discrimination.

[49] The ET considered (at para 48) whether it need construct a comparator but found little purpose in doing so. It then turned to the *Barton* guidance and directed itself in a way which has not been criticised. It returned again to complaints (a) and (b) which it rejected. In para 54 it considered what it called the unreasonable actions of the appellant and whether that unreasonable conduct in itself took the complainant past the first stage, and again noted what Elias J said about the possibility of unexplained unreasonable conduct giving rise to a situation where the ET is entitled to find discrimination. It concluded on the first stage:

'55. At any event we take the view in this case that it could be open to us to draw an inference of discrimination. The applicant is a person from a minority ethnic origin. Her manager, Ms Parsons, her senior manager, Ms NcNiven and the Personnel Manager, Ms Greene are all white European. On the basis of the primary facts found by us it seems to us that it would be open to us to conclude that Ms Parsons resented her authority being challenged by the applicant, by reason of her ethnic origins, and that Ms NcNiven and Ms Greene closed ranks against the applicant to support Ms Parsons and to try and compel the applicant to "toe the line".

56. We make it clear of course that that is not a definitive finding that we make but, it seems to us, that that is a finding which, in the absence of an adequate explanation, we could have arrived at.'

[50] The ET then directed itself at the second stage by reference to the *Barton* guidance. It examined the appellants' explanations which, they accepted, explained in part the actions of the appellants. But they concluded:

'60. What however the respondents have not explained to us, and indeed in part have not even tried to explain to us, is why they adopted the confrontational and inflexible approach that they did. Ms Greene could give no explanation for the confrontational tone of her memorandum of 31 May when she suggested that the applicant would be in breach of contract. She could give no adequate explanation for why she did not proactively question or investigate the allegation of victimisation and harassment. She could give no explanation for why it was thought appropriate to transfer the applicant in advance of any disciplinary proceeding without any consultation at all. She could not explain why such a confrontational approach was adopted with Mr Dawes, who may well have been able to assist the respondents, given the opportunity. Ms Greene of course was not acting on her own, she was clearly consulting with Ms Parsons and Ms McNiven.

61. We are therefore driven to the conclusion that the respondents have not adequately explained the totality of their actions and have not therefore proved on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the applicant's race.'

[51] We recognise, as Mr White properly acknowledged, that the ET has reached conclusions on the conduct of the appellants which other ETs may well not have reached. But it is the tribunal of fact, entitled to use its industrial expertise to guide it in reaching its conclusions, and it has not been suggested that in doing so it was perverse. It has directed itself on the law impeccably. We do not accept Miss Slade's criticisms that it failed to make the necessary findings of primary facts from which inferences could be drawn. It is apparent that it is the finding of unexplained unreasonable conduct from which it has drawn the inferences satisfying the requirements of the first stage. Whilst we would caution ETs against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground, we cannot say that the ET was wrong in law to draw that inference, and we repeat that there is no perversity challenge. At the second stage it did consider whether the appellants had discharged the onus on them by their explanations, but it found those explanations inadequate for the reasons which it gave. It did expressly refer to the conduct of Ms Wong and Mr Dawes. The fact that one finding favourable to Ms Parsons has been made does not preclude another finding unfavourable to her. No error of law has been disclosed.

[52] For these reasons, we conclude that this appeal must be dismissed.

(II) *Emokpae v Chamberlin Solicitors*

[53] The applicant, Ms Emokpae, is from Nigeria where she obtained legal qualifications. She was employed by the first respondents, Chamberlin Solicitors, on a part-time basis as a legal assistant from 29 November 2002 until summarily dismissed on 3 February 2003. The firm comprised at the material time a principal, Mrs Chamberlin, the second respondent, Mr Emezie, the office manager, and approximately five solicitors and two legal assistants. It was Mr Emezie who dismissed Ms Emokpae.

[54] She complained that she had been unlawfully discriminated against by Mr Emezie on the grounds of her sex. The claim was put on the basis that she was dismissed because of rumours about a relationship between her and

Mr Emezie and that such rumours would not have occurred in relation to a male employee.

[55] The complaint was heard by an ET sitting at London Central. The ET was faced with sharp conflicts of fact. On balance the ET preferred Ms Emokpae's version of events and rejected the respondent's evidence that she was dismissed because of her unsatisfactory performance. In its extended reasons promulgated on 21 October 2003 it found that there was a culture of rumour and gossip in the firm and that Ms Emokpae actively participated in the spreading of gossip. It also found that Mr Emezie acted towards Ms Emokpae in a way that might have provoked rumours of a relationship, buying perfume for her, giving her lifts home and having a drink with her at least once. The ET took into account that a firm of solicitors working under a legal franchise, subject to good practice requirements, dismissed an employee with no warning of the charges she was to face, no opportunity to be accompanied and with no note taken of the event. The ET commented that the case was not about whether there was an improper relationship between Mr Emezie and Ms Emokpae (it made no findings on that) but about the reason for her dismissal.

[56] The ET set out the *Barton* guidance and considered whether Ms Emokpae had proved the facts required to satisfy the first stage. It said (in para 13):

> 'There was sufficient evidence to conclude that the applicant could have been unlawfully dismissed by the second respondent because of rumours about a relationship between her and the second respondent. This was less favourable treatment on the ground of sex: such rumours would not have led to her dismissal if she had been male.'

[57] At the second stage the ET found that the respondents had failed to discharge the burden of proof, and held that the firm was liable for the actions of Mr Emezie in the course of his employment as well as finding that he knowingly aided the firm to do an unlawful act.

[58] On appeal, the EAT on 15 June 2004 upheld the ET, saying that it had applied the correct legal test to a relatively simple dispute of fact. Mummery LJ on the papers refused permission to appeal, but on a renewed application he and Dyson LJ permitted the appeal to go ahead.

[59] Although Ms Emokpae had been represented by Counsel before the ET and the EAT, she has not appeared or been represented before us.

[60] Mr Purchase for Chamberlin Solicitors and Mr Emezie submits that the ET, in finding that Ms Emokpae was dismissed because of rumours about a relationship between her and Mr Emezie, did not make a finding that she was dismissed on the ground of her sex. He submits that the last sentence in para 13, which we have cited at [56] above, is wholly unreasoned. He prays in aid the reasoning of the EAT, Rimer J presiding, in *Martin v Lancehawk Ltd (t/a European Telecom Solutions)* [2004] All ER (D) 400 (Mar).

[61] In that case a married woman employee had an affair with a manager of the employer company. When the affair broke down, she was dismissed. She complained to an ET of unfair dismissal and sex discrimination. She succeeded in the former claim but the ET dismissed the latter. The EAT accepted her submission that the irresistible conclusion from the primary facts found by the ET was that the reason for the dismissal was the breakdown of the affair and accepted that but for her sex there would have been no affair. However, the EAT said that the reason for her dismissal was not because she was a woman. It also rejected a suggestion made on her behalf that the ET should have compared her

position with that of a heterosexual male employee as a comparator, as the manager would not have had an affair with such a person. The EAT suggested that the appropriate hypothetical comparator would be a male employee with whom the manager had had a homosexual relationship which had broken down. It saw no reason for assuming that the manager would have dealt with any such male comparator differently. Accordingly the EAT dismissed the appeal.

[62] Mr Purchase relied on both aspects of the decision in *Martin*'s case. He says that just as a dismissal because of the breakdown of an affair between the female complainant and a male manager is not a dismissal on the ground of the complainant's sex, so a dismissal because of rumours of a relationship between Ms Emokpae and Mr Emezie is not a dismissal on the ground of her sex. He also submits that just as the appropriate comparator in *Martin*'s case was a male employee with whom the manager had had a homosexual affair, so in the case of Ms Emokpae the appropriate comparator would be a male employee, with whom it was rumoured that the manager was having a homosexual relationship. He argues that there is no reason to think that such a person would have been treated any differently from Ms Emokpae.

[63] We have noted that another EAT, Wall J presiding, in *Schofield v Stuart Kaufmann* (11 October 2002, unreported), on facts very similar to those in *Martin*'s case, came to a different conclusion from that reached in *Martin*'s case. Rimer J dealt with that case in his judgment and declined to follow the earlier EAT. We observe that in *Schofield*'s case the EAT dealt with the case at a preliminary hearing and expressed its reasoning very briefly. We agree with the impressive reasoning of, and conclusion reached by, the EAT in *Martin*'s case.

[64] In our judgment, Mr Purchase is correct in his submissions. Ms Emokpae unequivocally asserted that she was dismissed because of the rumours. It is not enough that there would have been no rumours but for Ms Emokpae being a woman. The ET had to be able to infer that the reason in the mind of Mr Emezie was her sex, but the ET's acceptance of the rumours as the reason for dismissal shows that she was not dismissed on the ground of her sex. Further, the ET would have had to be able to infer that Mr Emezie would have treated a male employee subject to similar rumours more favourably, that is to say that he would not have dismissed such a man. It is important that the comparator should satisfy the test of s 5(3) of the SDA so that his circumstances are not materially different from those of Ms Emokpae. There is simply no explanation of the ET's thinking on this point and no attempt has been made to identify the attributes of the comparator. To say only that the rumours would not have arisen and would not have led to Ms Emokpae's dismissal if she had been male suggests to us that the ET has failed to focus on the necessary attribute that the comparator must be someone in the like circumstances, viz rumoured to have had a relationship with Mr Emezie. The obvious comparator, as in *Martin*'s case, is a male with whom Mr Emezie was rumoured to have had a homosexual affair. The ET's conclusion, with all respect to it and the EAT, is fundamentally flawed.

[65] For the sake of completion we would add that the suggestion, which we are told was raised on the renewal application for permission in this court, that the comparator might be Mr Emezie himself, cannot be sustained. This was plainly not how the ET approached the comparison and in any event Mr Emezie, who dismissed Ms Emokpae, could not be the comparator.

[66] For these reasons we conclude that, in the light of the finding that the reason for the dismissal was the rumours and not on the ground of Ms Emokpae's sex, her case fails at the first stage. In truth she is the innocent victim of an unfair

dismissal, but, unfortunately for her, because she was employed for such a short period she cannot obtain redress for this from the ET. We would allow this appeal, set aside the order of the EAT and the decision of the ET and dismiss her originating application.

(III) *Webster v Brunel University*

[67] The applicant, Ms Webster, is employed as a Help Desk officer providing Information Technology (IT) support to administrative staff of the first respondent, Brunel University (Brunel). She is of Asian origin. On 22 August 2003 she complained against Brunel of race discrimination as having occurred in a number of incidents, only one of which remains relevant. This was that while giving advice over the telephone on 27 May 2003 to one of three members of Brunel's accommodation office team, she heard laughter in the background and the word 'Paki'. In her originating application she makes clear her claim that she heard one of the three, Ms Myers, Ms Goldthorpe and Ms Standing, use the word. Mr Troop accepts that it could not have been Ms Myers who used that word as Ms Webster was speaking to her on the phone.

[68] The members of the accommodation office had sought help from Ms Webster as to the operation of the IT system. On 27 May Ms Webster received a call from Ms Myers as her photo editor was not working. The ET found (in para 15 of its extended reasons): 'During this conversation [Ms Webster] heard constant laughing in the background and the words "Paki" and "e-mail" being used.'

[69] Ms Webster felt, following this and a number of other incidents, that she had been 'given the run around' by those who had sought her help. However, she did nothing about it until after a complaint to her line manager, Mr Pearson, had been made against her by the Accommodation Services Manager on 28 May 2003 for her abrasive manner when she was approached for assistance. Mr Pearson concluded that there was no evidence to support the complaint against Ms Webster. Between 6 and 10 June 2003 Ms Webster sought advice from Brunel's Employee Advisory Service and was advised that she could search the emails of the accommodation office staff for racist material. On 10 June she had a meeting with Mr Pearson and informed him for the first time that when speaking to staff in the accommodation office, she had heard racist comments and she asked for access to the staff's email account to substantiate her claim. Eventually the emails were examined.

[70] The conclusions arrived at by the ET on this complaint were the following:

> '106. The tribunal finds on a balance of probabilities that the term "Paki" was said and heard by the applicant in her conversation with Ms Myers, on the 27 May 2003.
>
> 107. The tribunal further finds that the applicant was having difficulties in dealing with the staff of the accommodation department, namely Ms Standing, Ms Goldthorpe and Ms Myers for which the applicant felt she was being given the run around in that the staff of the accommodation office should have been able to resolve their problems following the advice she had given. As a fact, the tribunal find that the advice given had not resolved the problems.
>
> 108. The tribunal does not find on these facts, that an inference can be drawn that the applicant was being given a difficult time from the

accommodation staff on account of her race. The tribunal particularly finds that the accommodation office is a busy public place of the university, and that numerous visitors enter throughout the day, and for which the term "Paki" could have been used by anyone; the accommodation staff, as well as any visitor to the office.

109. On looking at the emails subsequently discovered, the tribunal finds no evidence of the term "Paki" being used, although other disparaging remarks have been used which could amount to discrimination. However, as regards the specific allegations of the applicant, there is nothing to tie the accommodation staff complained against, to the word "Paki", the basis for the applicant's complaint.

110. The tribunal notes that a person who has a propensity to use certain words and terms, would be likely to make repeated references to such words. In this instance, the term "Paki" not having been evidenced in any documents or evidence before this Tribunal as originating from the three members of staff complained against, is significant in that it suggests that on the 27 May 2003, the term "Paki" was not used by staff in the accommodation department, and therefore cannot explain the behaviour that the applicant complains of receiving from the accommodation staff, on that day, and therefore not in these circumstances, on grounds of her race.

111. The tribunal for completeness, has further considered whether the staff having racist tendencies, drawing on the evidence of the e-mails subsequently discovered, had on the 27 May 2003, discriminated against the applicant. In this respect, this tribunal finds that the calls made to the applicant concerning the problems encountered by the staff of the accommodation team, were genuine problems for which the assistance of the help desk was required and for which the correspondence flowing between the applicant and the accommodation office staff had taken place ...

112. In these circumstances, this tribunal does not find any acts for which the applicant has been treated less favourably so as to amount to an act of discrimination or facts from which an inference of discrimination can be drawn, even allowing for any racist tendencies that may have existed on the part of any staff of the accommodation team.'

[71] The ET therefore found this complaint failed and also rejected Ms Webster's other complaints.

[72] Ms Webster appealed to the EAT on the single issue of the use of the word 'Paki' on 27 May 2003. Two grounds were put forward. One based on perversity was rejected. The other, raising the point on s 54A which we have discussed at [25]–[33] above, succeeded. The EAT accordingly remitted the case to a fresh ET to conclude: (i) what precisely occurred on 27 May 2003; (ii) was there a prima facie case of unfavourable treatment by someone for whom Brunel was vicariously liable; (iii) if so, whether Brunel could establish no less favourable treatment by one of its employees on racial grounds; and (iv) if not, whether Brunel had a defence under s 32(3) of the RRA.

[73] For the reasons already given in that earlier discussion we are of the view that the EAT erred in its construction of s 54A of the RRA.

[74] Mr Troop drew our attention to other matters. He pointed out that the ET made no reference in its decision to s 54A at all and submits that therefore it may not have applied the right test. However, it is not in dispute that the attention of the ET had been drawn to s 54A, and we think it tolerably clear that

the ET found that Ms Webster's claim had not been proved at the first stage. She did not establish that it was Ms Standing or Ms Goldthorpe who spoke the word 'Paki'. In our judgment the ET was entitled to conclude that accordingly the claim failed. Mr Troop also sought to rely on the evidence from the emails that other disparaging remarks which could amount to discrimination were found. But that, as the ET found in para 109 and was entitled to find, did not assist Ms Webster on the specific complaint which she made as to the word 'Paki' on 27 May 2003.

[75] For these reasons we would allow this appeal, set aside the order of the EAT and restore the decision of the ET.

THE REVISED *BARTON* GUIDANCE

[76] As this is the first time that the *Barton* guidance has been considered by this court, it may be helpful for us to set it out again in the form in which we approve it. In Webster's case Burton J refers to criticisms made of its prolixity. Tempting though it is to rewrite the guidance in a shorter form, we think it better to resist that temptation in view of the fact that in practice the guidance appears to be offering practical help in a way which most ETs and EATs find acceptable. What is set out in the annex to this judgment incorporates the amendments to which we have referred and other minor corrections. We have also omitted references to authorities. For example, the unreported case referred to in para (6) of the guidance may be difficult for ETs to obtain. We repeat the warning that the guidance is only that and is not a substitute for the statutory language.

ANNEX

(1) Pursuant to s 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Pt II or which by virtue of s 41 or s 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Appeal in the case of Wong dismissed.

Appeal in the case of Emokpae allowed.

Appeal in the case of Webster allowed.

Dilys Tausz Barrister.

Scammell and others v Dicker

[2005] EWCA Civ 405

COURT OF APPEAL, CIVIL DIVISION
WARD AND RIX LJJ
21 JANUARY, 14 APRIL 2005

Practice – Compromise of action – Consent order – Uncertainty – Whether consent order could be void for uncertainty.

By a consent order, the parties compromised proceedings to determine the precise line of the boundary between their properties. The order, which referred to and annexed a plan, declared the line of the boundary and provided for the erection of a fence between the parties' properties. The parties contemplated that the boundary line would be measured, agreed and pegged out by their respective surveyors. When the surveyors sought to do so, they encountered a number of difficulties, particularly in locating the various points at one end of the boundary and in determining whether a telegraph pole was on the claimants' land, as shown on the plan, or on the defendant's, as would have been consistent with the terms of the order. Nevertheless, the surveyors agreed and pegged a line on the ground which, save for the position of the telegraph pole, fitted the requirements of the plan. Over a year later, the claimants brought county court proceedings to set aside the consent order as being void for, inter alia, uncertainty. The judge held that the consent order was void for that reason, apparently on the basis that the task of locating the boundary on the ground had been impossible, in part because of the conflict between order and plan, and in part because of insufficiency of physical data. On the defendant's appeal to the High Court, the judge held that the court had to consider whether the terms of a contract required further agreement between the parties to implement them; that a contract had to be sufficiently definite to enable the court to give it a practical meaning; and that the parties' apparent agreement had been vitiated because there was a need for further agreement to implement the order and because the judge below had found on the facts that it was without practical meaning. Accordingly, he dismissed the appeal. On a second appeal by the defendant, the Court of Appeal considered whether a consent order could be void for uncertainty.

Held – In theory it was possible that a consent order might be declared void for uncertainty, but given that the court was always on hand to lend its assistance in the working out of its orders or in their clarification, it could not be a mere difficulty in interpretation or execution that could undo what, with due formality, had been entered as an order of the court in settlement of litigation before it. Moreover, it was only in the absence of agreement as to essential terms that a contract was in danger of failing for uncertainty because further agreement was required. In the instant case, it was not impossible to implement the parties' agreement. The most that could be said was that its implementation, in relation to the telegraph pole, threw up a relatively small practical problem of detail which in turn involved a problem of interpretation. There had been use of detailed and precise language, aided by a plan, and a clearly ascertainable and

a determinate intention to contract, which had received the formal approval of the court's own order. The court, with the parties' consent, had acted upon that intention by dispensing with trial and bringing the original proceedings to an end. The parties had acted upon that intention by settling their litigation and preparing for the building of a fence. Their agreement was sufficiently definite to enable the surveyors and the court to give it practical meaning. It was capable of being made b definite without further agreement. It was reasonably certain. Accordingly, the appeal would be allowed (see [28], [30], [40], [42], [44], [46], below).

Scammell v Ouston [1941] 1 All ER 14 considered.

Notes

c For the requirement of certainty in contracts, see 9(1) *Halsbury's Laws* (4th edn reissue) para 672.

Cases referred to in judgments

Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD [2001] EWCA Civ 406, [2001] 2 All ER (Comm) 193.

d *Scammell v Ouston* [1941] 1 All ER 14, [1941] AC 251, HL.

Appeal

The defendant, Margaret Kathleen Dicker, appealed with permission of Chadwick LJ granted on 26 September 2003 from the decision of McCombe J on 11 July 2003 ([2003] EWHC 1601 (QB), [2003] All ER (D) 200 (Jul)) dismissing her e appeal from the order of Judge Rudd in the Southampton County Court on 23 August 2002 setting aside a consent order of 10 February 1994 which had compromised earlier proceedings brought by Mrs Dicker against the claimants, Hubert Stanley Scammell, Dora Scammell and Donald David Green (the Scammells). At the start of the hearing, the Court of Appeal granted permission f for Mrs Dicker to appeal on a ground which had not been before Chadwick LJ. The facts are set out in the judgment of Rix LJ.

Charles Auld (instructed by *Thring Townsend*, Bath) for Mrs Dicker.

George Laurence QC (instructed by *Jacksons*, Fordingbridge) for the Scammells.

g

Cur adv vult

14 April 2005. The following judgments were delivered.

h **RIX LJ** (giving the first judgment at the invitation of Ward LJ).

[1] This is an appeal about a boundary dispute between neighbours, but perhaps unusually for such a dispute it is one where the parties have been let down by the legal process as much as by their own irreconcilable differences.

[2] The essential issue on this appeal is whether a consent order made in j February 1994, compromising original proceedings between the parties which were commenced in 1989, was void for uncertainty, thereby throwing the parties back into unfinished litigation. A second set of proceedings was commenced in August 1995, challenging the consent order. Following a three-day trial in 2002, Judge Rudd gave judgment in August 2002 declaring the consent order to be void for uncertainty, and in July 2003 McCombe J dismissed an appeal ([2003] EWHC 1601 (QB), [2003] All ER (D) (Jul)).

[3] Thus the litigation from which this second appeal arises has been going on since 1989. Mr and Mrs Scammell and Mr Donald Green (the Scammells) and Mrs Dicker occupy adjoining properties near Wimborne in Dorset. The property owned by the Scammells is called Glenwood Farm and that owned by Mrs Dicker is known as Hillside. Glenwood Farm (the Scammells) is to the west of Hillside (Mrs Dicker). The properties are contiguous over a distance of about 200 m. In the area of the boundary between the two properties is a track running roughly north/south. A hedgerow runs for most of that distance on a bank to the immediate west of the track, but the hedgerow does not continue to the northern or southern ends of the properties.

THE 1989 PROCEEDINGS

[4] When in 1989 Mrs Dicker commenced the original set of proceedings against the Scammells in order to determine the precise line of the boundary the difference between the parties was measured in feet rather than inches. Mrs Dicker said that the boundary was some four feet to the west of the hedge. The Scammells said that it lay along the western edge of the track. The Scammells were concerned about maintaining access off the track to their farm. Mrs Dicker was concerned about the encroachment of farm buildings on what she said was her property at its northern end.

[5] The original proceedings dragged on in a desultory way until 1994. The Scammells' solicitor in those proceedings was a Mr Bourke. He admits to being so negligent in his preparations for trial that he came to advise the Scammells that they had little option but to find a compromise, which they no sooner made than they appear to have regretted. The compromise had been discussed in correspondence but ultimately was drawn up in the form of a consent order lodged on 10 February 1994, signed by solicitors on behalf of the respective parties. The consent order referred to and annexed a coloured plan (the consent order plan) the original of which has been lost, but an uncoloured copy of which has been established: it has been referred to as 'plan D4'. This plan, which was signed by the parties' solicitors, shows the agreed boundary line drawn on it between point A in the north, via points C, D and F, to point B in the south. Just to the north of point C a telegraph pole is marked on the plan a little to the west of the boundary line. This plan in its original form was dated 25 June 1992 and is on a scale of 1:500.

THE 1994 CONSENT ORDER

[6] The consent order required the Scammells inter alia to remove a barn and green box container from Mrs Dicker's land, to pay her mesne profits and damages in the sum of £2,000, and to pay her costs. For present purposes, however, its critical wording is as follows:

> 'BY CONSENT IT IS HEREBY DECLARED that the boundary between [Mrs Dicker's] land and [the Scammells'] land is the line coloured red between the points "A" and "B" on the plan annexed to this Order and signed by the respective parties' Solicitors
>
> AND BY CONSENT IT IS ORDERED that:-
>
> 1. [The Scammells] do, on or before 22nd March 1994 ...
>
> b) take down the lines of fencing along the hedgerow and re-erect along the western bank of the hedgerow (being the declared boundary between the respective parties lands) between the points marked "C" and "D" on the plan annexed hereto fencing posts and railings suitable for restraining cattle

and other animals from trespassing on [Mrs Dicker's] land, the said fencing posts and railings thereafter belonging to [Mrs Dicker];

c) take down the fencing between the points marked "D" and "B" on the plan annexed hereto and re-erect between the points marked "D", "F" and "B" on the plan annexed hereto fencing posts and railings suitable for restraining cattle and other animals from trespassing upon [Mrs Dicker's] land, the said fencing posts and railings thereafter belonging to [Mrs Dicker].'

[7] Thus the hedgerow went between points C in the north and D in the south. North of C and south of D there was no hedgerow. The order said that 'the western bank of the hedgerow' was 'the declared boundary' (para 1(a) of the order). North and south of the hedgerow the plan showed the agreed boundary line extending in both directions in a straight line. At the northern end of this straight line the boundary line turned to the east for a short distance at an angle of about 60% until it reached point A at a kink in the parish boundary as marked on an Ordnance Survey extract. At the southern end of this straight line the boundary turned (at point F) for an even shorter distance almost due east until it reached point B.

THE AFTERMATH OF THE CONSENT ORDER

[8] The boundary line drawn on the consent order plan if measured to the scale of the plan is some three feet thick. The parties contemplated that where this line was to go on the land itself would be measured, agreed and pegged out by surveyors acting for the parties. Mr West (for Mrs Dicker) and Mr Pollard (for the Scammells) attended on site. They encountered a number of difficulties, which they attempted to work around in the spirit of compromise. Judge Rudd described a difficulty they encountered to the south in the following passage:

'At the southern end of the boundary they had nothing to go on at all from the order plan to locate the various points at that end of the boundary. They looked at what has been described as a soil line to show where a fence had been, but neither of them were certain it was the line of the old fence. It could have been a cow track; it could have been anything or nothing.'

[9] On this appeal, however, Mr George Laurence QC, on behalf of the Scammells, has not concentrated on the southern end as much as on the northern end, where the difficulties, such as they were, were more complex, in part because there had not in the past been any physical division between the properties. Thus, as I have mentioned above, the consent order plan, plan D4, shows the boundary line extending in a straight line to the north, passing immediately to the east of a telegraph pole. The effect of this was to place the telegraph pole on what was agreed to be the Scammells' land. The surveyors discovered, however, that on the ground such a line, if extended northwards beyond the northern end of the 'western bank of the hedgerow', would in fact pass to the west of the telegraph pole, thus placing it on Mrs Dicker's land. However, they agreed to accommodate that displacement in order to produce a boundary line on the ground which otherwise fitted the requirements of plan D4. They pegged out their agreed line on the ground, and they annotated a copy of plan D4 with their findings and comments and signed it, adding the date 18 February 1994. This annotated version of plan D4 has become known as plan D5.

[10] Plan D5 says, of the area towards the northern end of the hedgerow:

'This area was the subject of discussion and is subject to solicitors' formal approval. Pegs have been positioned at the bottom of the western edge of the existing bank. Please note the existing timber shed encroaches over Mrs Dicker's boundary into the bank. Verbal agreement has been reached on site with both parties that the building shall remain for its natural life. All other buildings within the hatched area are on the [Scammells'] land.'

[11] As for the telegraph pole, the surveyors endorsed plan D5 as follows: 'The telegraph pole is on [Mrs Dicker's] land but it is agreed that it shall remain in its existing position unhindered and that the services fixed to it shall remain.' The surveyors also wrote on the plan: 'All notes and dimensions have been agreed on site between Mr Pollard and Mr West' and they signed and dated it.

[12] Unfortunately, as Judge Rudd found, the surveyors' agreements were subject to further instructions and it was Mr Bourke, as that judge also found, who was the source of disagreement. The fence, having been put up once, was taken down and moved. At any rate a fence was put up, and remains there to this day. The effect of the fence was to block the Scammells' existing access points from the track into their farm: but contemporary correspondence shows that this was known by them at the time of the consent order. Although it is not formally in evidence before us, the court was told that the Scammells had 'limped on' in their farming over the following decade by using an alternative route.

PLAN D3

[13] One difficulty about the reading of both plan D4 and plan D5 is that the thick line drawn on them to represent the agreed boundary line makes other aspects of them difficult to read. For instance, the precise location of the telegraph pole is, at any rate on the copies available in court, very hard to pinpoint. However, these plans had developed out of an earlier plan, known as D3, which is based on the same drawing dated 25 June 1992 as the other plans, but does not have the thick agreed boundary line drawn on it. It does however have other details on it which have either not survived onto plans D4 and D5 or have been obscured by the thick boundary line drawn on them. Thus the telegraph pole can be clearly seen on plan D3 closely sandwiched between two separate lines. It is immediately to the west of a broken line of dashes which appears to be a northern extension of an unbroken line which plan D3 notes is 'centre line of hedge'; and also lies immediately to the east of a broken line of dashes and dots which, although running essentially parallel to the 'centre line of hedge', manages (as one proceeds from south to north) to begin contiguously with the centre line of hedge, then to move slightly to the east of it, then to move back towards it and finally to cross it and move slightly to the west of it. In other words the two lines, or one at least of them, are not entirely straight.

[14] On D4 and D5, however, these two lines cannot be seen and have been replaced or covered by the thick agreed boundary line. Moreover, the legend 'centre line of hedge', which in any event would not make sense in the absence of the line to which it refers, has been removed.

THE SECOND SET OF PROCEEDINGS: THE SCAMMELLS' ACTION

[15] It was not long before the Scammells dispensed with Mr Bourke's services and new solicitors were on the scene by April 1994. Some sixteen months later, on 21 August 1995, the second and still current set of proceedings were commenced, this time by the Scammells as plaintiffs, to set aside the consent

order as being void either for uncertainty or mistake. By then, the Scammells' litigation was being funded by the Solicitors' Indemnity Fund. As Judge Rudd was to find, Mr Bourke 'was one of the most dilatory and incompetent solicitors I have had the misfortune to see and indeed hear in evidence for a long time'. The Scammells' original particulars of claim were signed by Mr Laurence. To begin with Mrs Dicker supported the renewed litigation privately, but by April 1998 she was having to rely on legal aid. Judge Rudd said that she had been 'reduced to poverty by a decade of litigation'.

[16] The Scammells' action came to trial in March 2002. The matter had become complicated. The surveyors gave evidence about what their understanding of things had been back in 1994. Mrs Dicker relied not only on the consent order, but also on correspondence leading up to it in which additional details had been discussed, such as the following of a soil line in the southern area, and the pegging out of the boundary by the parties' surveyors. Such matters were addressed in detail in a lengthy letter from Mrs Dicker's solicitors dated 3 February 1994, to which Mr Bourke had replied on the same day to say that 'It would appear that agreement has now been reached and I will instruct Mr Pollard to liaise with Mr West to peg out the agreed boundaries'. However, Mr Laurence on behalf of the Scammells had been the first to rely on this correspondence in order to introduce the concept of the 'centre line of hedge' as a purportedly agreed concept. It is clear from the Scammells' pleadings and Mr Laurence's skeleton argument for trial that the question of the Scammells' access points from the track was the major bone of contention. It is also clear from that skeleton argument that Mr Laurence had four grounds on which he submitted that the consent order should be set aside, and that the argument from uncertainty was only the fourth of them: the first three relied on mutual mistake as to the status of or rights over the track or even on Mrs Dicker's solicitor's alleged attempt to promote and take advantage of Mr Bourke's mistaken belief as to these matters.

THE JUDGMENT OF JUDGE RUDD

[17] The judge rejected entirely the Scammells' case based on mistake. He found (at para 44):

> 'Having considered the contemporaneous correspondence and heard the evidence of Mr Bourke and Mr Simpson [Mrs Dicker's solicitor in 1994], I am satisfied that the dispute about the track was not fundamental to the agreement to settle this litigation, and that such misapprehensions as either of them may have laboured under as to the fact or law or mixed fact and law in respect of the use of the track and its status, were not material to the settlement of the boundary dispute.'

There was no appeal from that finding.

[18] Before coming to the argument regarding the uncertainty of the settlement, the judge appears to have been strongly influenced by his view, having considered the conveyances, that the parties' true boundary was a parish boundary, unmarked on the ground, but to be found four feet to the east of the centre line of the hedge. He said (at para 9): 'This is one of the most obvious boundaries I have seen for a long time because of the position of the parish boundary being relevant and located.' If this was right, then the consent order would have been over-generous to Mrs Dicker by a factor of five or six feet, as the judge pointed out (at para 24).

[19] The judge plainly regarded the consent order plan as the determinative document and said so. He appears to have viewed the boundary line on the plan as being the centre line of the hedge, citing the evidence to that effect of Mr Mackay, a surveyor called by the Scammells as an expert witness at trial, and found that the western edge of the bank was 'extremely difficult to locate' (para 31). His critical reasoning is in the following passage:

> '33. ... I am satisfied that the boundary indicated is the centreline of the hedge where there was a hedge, and the centreline of where the hedge was thought to be where it did not exist. That plan conflicted with the text of the order and what the parties appear to have agreed, namely that the line was the base of the western edge of the bank, where there was a bank. Fifthly, location of the southern end of the boundary was virtually impossible from the plan. Sixthly, I am satisfied that the surveyors' task after the order was to peg the boundary as best they could, and it was subject to final agreement which never happened. Seventhly, the task of the surveyors was not to create a boundary. Their task was to locate an agreed boundary which was provided for by the order, but that was simply impossible, because firstly, the line on the plan and the words of the order conflicted; secondly, there was insufficient data to locate with certainty the points at the southern end of the boundary. Indeed, even where there was a bank, there was considerable difficulty locating that.
>
> 34. For the above reasons the consent declaration and order and plan could not possibly represent any agreement on the location of the boundary, and consequently the conclusion that I come to is that there never was a concluded agreement.'

[20] The judge cited no authorities or principles in relation to the question of uncertainty. He made no order as to costs.

THE APPEAL TO McCOMBE J

[21] Mrs Dicker appealed on the uncertainty issue and the Scammells cross-appealed on the question of costs. There was no appeal on the mistake issues.

[22] McCombe J dismissed both appeals. There is no further appeal on the question of costs.

[23] On one matter at any rate McCombe J found in favour of Mrs Dicker. He considered that the order properly construed said that the declared boundary was the western bank of the hedgerow and that therefore, where there was such a hedge or bank, the plan was intended to represent the western bank of the hedgerow itself. The question was whether the order as so construed was sufficiently certain to be effective. He next referred to certain passages on the issue of certainty from Lewison *The Interpretation of Contracts* (2nd edn, 1997) and to Lord Wright's speech from *Scammell v Ouston* [1941] 1 All ER 14, [1941] AC 251, and concluded as follows:

> '[25] It seems to me that those passages require the court to consider whether the terms of the contract require further agreement between the parties to implement them ... Also the contract must be sufficiently definite to enable the court to give it a practical meaning ... The learned judge found as a fact that in certain respects the agreement was "impossible" or "virtually impossible" to implement. He further found that it was extremely difficult to locate the bank and where its edge was. These seem to me to be findings that

there was a need for further agreement to implement the order and that, therefore, the order was not sufficiently definite to give it a practical meaning ...

[27] I have also considered the point that in many cases a plan such as that annexed to the order, if found in a conveyance, would be seen as a luxury and the courts have managed to construe successfully plans inferior to that used here. However, one has to have regard to the purpose of the documentation. It was designed to compromise a dispute about a boundary some 200 m in length where the terrain varied in character and there were kinks and obstructions on the ground. It was not designed simply to identify a parcel of land to be conveyed on sale. Its very object was to resolve the type of problem encountered by the surveyors on 18 February 1994. For that purpose the learned judge found (in the words of the authorities) that it was without practical meaning and needed further agreement in order to be implemented. He was clearly entitled so to find on the evidence before him.'

[24] There was an additional argument addressed to him by Mr Charles Auld, who appeared for Mrs Dicker as he does again on this appeal, to the effect that it was contrary to the overriding objective of the CPR, and unjust, to permit the Scammells to litigate anew when they had had their opportunity in 1994 and had instead resolved to settle. The judge however rejected that submission, on the ground that the CPR could not override substantive law.

PERMISSION TO APPEAL TO THE COURT OF APPEAL

[25] The obtaining of permission for this second appeal has not run smooth. Following McCombe J's judgment, Mrs Dicker's solicitors sought legal aid for obtaining advice concerning an appeal. There was confusion about whether legal aid had been granted. Mrs Dicker's solicitors in the meanwhile filed a holding notice of appeal on 25 July 2003. That notice of appeal was in limited terms, in essence taking the point about the effect of the overriding objective under the CPR. On 4 August 2003 the Legal Services Commission (LSC) extended Mrs Dicker's certificate to allow for taking counsel's advice about an appeal: Mr Auld's opinion was forwarded to the LSC on 18 August 2003 and on 22 August 2003 substituted grounds covering in addition the issue of uncertainty, and a full skeleton argument in support, together with the bundles required by the Civil Appeals Office, were forwarded to that office, somewhat out of time. In the meantime an extension of time had been requested, but it does not seem to have been dealt with. Chadwick LJ dealt with the application on paper on 26 September 2003 and granted permission to appeal on the CPR issue as a question of principle fit to be heard on a second appeal. Although, as it emerged, the substituted grounds and full skeleton argument had not been put before Chadwick LJ, his reasons for his decision began with the comment: 'In my view there is much force in the point that the agreement reached between the parties to the 1989 action ... was not, itself, open to challenge on the grounds of uncertainty.'

[26] Because of the terms in which permission had been given, on 13 October 2003 Mrs Dicker's solicitors wrote to the Civil Appeals Office to inquire whether the substituted grounds had been seen by Chadwick LJ and asking that the matter be referred back to him in case they had not. The answer given was to the effect that he had only seen the original grounds, and that if an application was to be made to amend the original grounds, that should be done at the hearing.

[27] That was what happened at the opening of this appeal. The application to amend and to grant permission to appeal on the issue of uncertainty was made

by Mr Auld at the beginning of the hearing and opposed by Mr Laurence. In a short ex tempore judgment given on behalf of the court by Ward LJ, permission to amend and to appeal on the issue of uncertainty was granted. Whether or not, once permission for a second appeal on one ground had already been granted, it was strictly necessary for the additional ground itself to pass the hurdle for second appeals laid down by CPR 52.13, the court considered that the issue of uncertainty also raised an important point of principle, and that the delay was sufficiently explained.

THE ISSUE OF UNCERTAINTY

[28] Mr Laurence was asked in the course of his submissions if he could cite any case in which a consent order of the court had ever been declared to have been void on the ground of uncertainty: but he was unable to say that that had ever happened. In theory it is, I suppose, possible, just as a consent order may be set aside for misrepresentation or fraud or for mistake. However, given that the court is always on hand to lend its assistance in the working out of its orders or in their clarification, it cannot be a mere difficulty in interpretation or execution that can undo what with due formality has been entered as an order of the court in settlement of litigation before it.

[29] Judge Rudd cited no principles or precedents for the conclusion to which he came, but the basis of his decision appears to have been that the task of locating the boundary on the ground was 'simply impossible', in part because of the conflict between order and plan and in part because of the insufficiency of physical data. McCombe J did consider the principles involved and went further than Judge Rudd in giving meaning to the order, but he appears to have concluded that the parties' apparent agreement was vitiated because 'there was a need for further agreement to implement the order' and also because Judge Rudd had found on the facts that 'it was without practical meaning'.

[30] In my judgment, however, these conclusions were erroneous. In the first place, as a matter of fact, it was not impossible to implement the parties' agreement. The surveyors, Mr West and Mr Pollard, in fact did so implement it. Although I am content to assume that the surveyors' agreement on the pegging out of the boundary line did not bind the parties (although I can see a strong argument for saying that there was a collateral agreement between the parties that it should do so) and that therefore the parties were entitled to dispute the surveyors' solution, nevertheless it is simply a non sequitur to argue from a disagreement about the meaning and effect of a contract to its legal uncertainty. Parties are always disagreeing about the contracts which they make. They take those arguments, if necessary, to the courts, or to arbitration, for their resolution: and sometimes the resolution is very difficult indeed to arrive at. That is equally true of disputes as to the meaning of contracts and of disputes as to the application of contracts to the facts and of disputes as to the proper understanding of the facts. None of that makes a contract uncertain. For that to occur—and it very rarely occurs—it has to be legally or practically impossible to give to the parties' agreement any sensible content.

[31] Although Judge Rudd said it was 'virtually impossible' to find the southern end of the boundary and that it was 'simply impossible' to locate the agreed boundary (see para 33 of his judgment), the only examples he cited were (1) the difficulty of interpreting a soil line at the southern end, (2) the difficulty of locating the western edge of the bank, and (3) the conflict between order and plan. None of these matters amounted to an impossibility. As for (1) the

a southern end: although Judge Rudd said that a line in the soil could have been anything and not necessarily the line of an old fence, the fact appears to be that some such line could be detected (and it is referred to in correspondence without any dispute); it ran in the area delineated on the plan; the circumstance that one could not be positive as to its origin seems to me to be neither here nor there, for one is not seeking certainty in such matters; and if necessary, even in the absence b of any guidance from a soil line, the boundary could be plotted from the plan in a straight line from the western bank of the hedgerow. As for (2), the line of that bank or hedgerow, Judge Rudd said that there was 'considerable difficulty' in locating it, and McCombe J referred to that finding; but there was plainly a bank and a hedgerow, and the fact that there may be difficulty or even considerable difficulty in delineating it does not amount to such an impossibility as might be a c destroyer of contract. As for (3), it is for the parties to resolve any disagreement as to interpretation arising from apparent or even real inconsistencies between different parts of a document or several documents making up a contract. Such inconsistencies, apparent or real, are the everyday stuff of contract and of commerce. If the parties cannot resolve such problems, they go to tribunals to d find an answer: and the courts should strain to be the preserver and not the destroyer of bargains, especially where, as here, the parties have acted upon their apparent agreement (namely, by settling their litigation, standing down their preparations for trial, erecting a fence which has stood to this day even if disputed, etc). As McCombe J held, the declared boundary was, where the hedge e existed, the western bank of the hedgerow, and the plan was to be interpreted accordingly, if it could be.

[32] On all these three points which so influenced both judges below, Mr Laurence in this court was unable to show an impossibility, and barely tried in submission to do so. Instead he focused almost exclusively on a difficulty at the northern end to which neither judge alluded, and that was the problem about f the telegraph pole. It will be recalled that the consent order plan, plan D4, showed the telegraph pole just to the west of the drawn boundary line, whereas the surveyors pegged their line so that it stood just to the east of it. It was common ground before us that for the purposes of identification it is generally possible to look to extrinsic evidence, and so it was that neither party objected to g consulting plan D3 in order to understand why the surveyors encountered this difficulty resulting in them drawing a line on the ground which conflicted with the boundary line drawn on the consent order plan.

[33] The answer as it emerged appeared to be that the thickness of the agreed boundary line, equal, as Judge Rudd found, to some three feet on the ground, h embraced an area from the centre line of the hedge to the western bank of the hedgerow. Where the hedge and its bank existed, the order made it clear that the boundary went along the western edge of the bank. North and south of the hedge, the boundary line was to proceed in a straight line. But the fixed position of the telegraph pole showed that a straight line could not be extended to the northern end of the boundary so as to leave the telegraph pole on its west. That j could only be achieved if a line were drawn from the centre of the northern end of the hedge to the northern end of the boundary, rather than a continuation of a line from the western edge of the hedgerow's bank.

[34] In these circumstances, how was the parties' agreement to be interpreted? It seems to me that there were only four possibilities. One is the solution adopted by the judges below—although not in explicit recognition of this point about the

telegraph pole at the northern end—to say that the agreement was impossible to operate and thus legally uncertain. a

[35] The three other possibilities represent an attempt to give the parties' agreement a consensual application objectively ascertainable from the terms of their consent order and plan. One is to draw a straight line extension of the boundary line in the area of the hedgerow from the northern end of the western edge of the bank to the northern end of the boundary. (I say northern end of the b boundary, but it will be recalled that at the northern end the boundary turns some 60% to the east for a short distance. That turning point can be described as point X, and was so described by the surveyors in their markings on plan D5. For present purposes I refer to that as the northern end of the boundary.) That is what the surveyors did in February 1994. It was a perfectly sensible solution. It c achieved a straight line boundary as marked on the plan; it achieved a straight line extension of a boundary which passed along the western edge of the bank in the area where the hedge stood, just as the consent order required of the 'declared boundary'. The only small incompatibility with the plan was that it produced a line which went the wrong side of the telegraph pole, a matter of some six inches or so. d

[36] The second is to produce as straight a line as possible from the northern end of the western edge of the bank to the northern end of the boundary (point X) but to deflect it from complete straightness just enough to carry it on the eastern side of the telegraph pole. That means that the telegraph pole remains on the correct side of the agreed boundary line, but the parties' aspiration of an entirely e straight boundary line is marginally departed from.

[37] The third is to step the boundary back at the northern end of the hedge, so that its northwards extension runs not from the western edge of the bank but from the centre of the hedge. If that happens, then an entirely straight line, stepped back to the east from the boundary line along the hedge but parallel to f that boundary line, can be drawn northwards to the northern end of the boundary (point X) so as to leave the telegraph pole to its west, as shown on the plan.

[38] In my judgment, it hardly matters which of these three solutions is adopted, and there is much to be said for each of them, but the one I would prefer is solution three. This is because it fulfils all the requirements of the consent g order and the plan, namely a straight line extension of the boundary to its northern end, with the telegraph pole just to its west. The step back, although in one sense not marked on the plan, is to be found there in the thickness of the boundary line which covers an area at the northern end of the hedge from the western edge of the bank to the centre line of the hedge. Indeed, it was h Mr Laurence's own submission, using an extract from plan D3 to help identify the lie on the ground of the boundary line adopted, that plan D5 showed an extended boundary line at the northern end as a continuation of the centre line of the hedge.

[39] Any of these three solutions would do justice to the parties' agreement, j as working out a detail of it. The applicable legal motto is: that is certain which can be rendered certain (id certum est quod certum reddi potest). What would to my mind be a complete injustice would be, just because of the difficulty about the precise position of the boundary line in immediate juxtaposition with the telegraph pole, to conclude that the parties had completely failed on the grounds of uncertainty to settle their litigation at all, although that is what they plainly

intended to do and what they did in fact do with the aid of a detailed consent order and plan.

[40] As for McCombe J's conclusion that the consent order was uncertain because it needed further agreement in order to be implemented, I respectfully disagree. The most that could be said is that its implementation, in this matter of the telegraph pole, threw up a relatively small practical problem of detail which in turn involved a problem of interpretation. McCombe J derived his principle from a statement now found at para 8.09 (pp 258–261) of *Lewison* (3rd edn, 2004), which he cited (from the second edition of that work) at para 24 of his judgment, to the effect that 'A contract, or provision in a contract, may be uncertain ... where the terms of the contract require further agreement between the parties in order to implement them'. *Lewison* goes on to develop that principle at paras 8.14ff (p 270) under a section heading 'Save in exceptional circumstances the court will not recognise an agreement to agree as having any legal effect'. However, the parties' consent order did not contain 'terms requiring further agreement' or any agreement to agree. And even if they had, the legal consequences cannot be simply stated (see *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 at [69], [2001] 2 All ER (Comm) 193 at [69]). In particular, it is only in the absence of agreement as to essential terms that a contract is in danger of failing for uncertainty because further agreement is required. The world is otherwise full of perfectly sound contracts which require further agreement for the purpose of their implementation. Furthermore, I am impressed by the submission that if problems of interpreting plans for the purpose of identifying boundaries were to lead to the failure of contracts, then plans would have to be as large as the area of land in issue.

[41] As for *Scammell v Ouston* [1941] 1 All ER 14, [1941] AC 251, a rare case of uncertainty of terms, the agreement there was for a purchase 'on hire-purchase terms'. It was held that that expression was so vague, because there were many kinds of hire-purchase agreements in widely different terms, that no definite agreement could be ascribed to the parties. Lord Wright said ([1941] 1 All ER 14 at 25–26, [1941] AC 251 at 268–9):

> 'There are, in my opinion, two grounds on which the court ought to hold that there never was a contract. The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted. The test of intention, however, is to be found in the words used. If these words, considered however broadly and technically, and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found, but I think that it is found in this case. My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right to hold the appellants to any particular version. It was all left too vague. There are

many cases in the books of what are called illusory contracts—that is, where the parties may have thought they were making a contract, but failed to arrive at a definite bargain. It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain. In my opinion, that requirement was not satisfied in this case.

However, I think the other reason, which is that the parties never in intention, nor even in appearance, reached an agreement, is a still sounder reason against enforcing the claim. In truth, in my opinion, their agreement was inchoate, and never got beyond negotiations.'

[42] Lord Wright's second reason has no application here, but it sets the scene for his first reason. In any event, nearly everything that Lord Wright there said is directly contrary to the approach of the judges below. In the present case there was use of detailed and precise language, aided by a plan, and a clearly ascertainable and determinate intention to contract, which received the formal approval of the court's own order. The court, with the parties' consent, acted upon that intention by dispensing with trial and bringing the original proceedings to an end, and the parties acted upon that intention by settling their litigation and preparing for and building a fence. Their agreement was sufficiently definite to enable the surveyors and, pace the courts below, this court, to give it practical meaning. Its terms were not 'all left too vague'. It was capable of being made definite without further agreement. It was reasonably certain.

[43] Nothing was done formally to challenge that settlement for over a year. The Scammells did not seek the assistance of the court to clarify any uncertainty or difficulty in implementation: but went, after that lengthy period, straightway to try to set the order aside. The result, when the courts below accepted the Scammells' submission, which in reality was clearly based on their regret and second thoughts about agreeing a plan which would block the access to their farm, albeit they always knew that would happen, was not to do justice but to render injustice by condemning the parties to further rounds of litigation. And all in defence of a solicitor's negligence which, if it be the case, as Judge Rudd said, that the parish boundary was 'one of the plainest boundaries I think I have ever seen', would itself provide the Scammells with the basis for compensation for its consequences.

[44] I would therefore allow the appeal.

THE CPR AND THE OVERRIDING OBJECTIVE

[45] In the circumstances it is unnecessary to approach the matter from a procedural as distinct from a substantive point of view. Mr Auld's submission was that, by reason of the overriding objective found in CPR Pt 1 and the court's power under CPR 3.1(2)(f) to stay proceedings, and by reason of the justice of the matter, the court should have stayed the Scammells' 1995 proceedings. It appears from Mr Auld's skeleton argument of 17 January 2002, which was before Judge Rudd, that the argument, in reliance on CPR 1.1 and 3.1, that the Scammells' action should not be allowed to proceed, was made, even though it does not figure expressly in his written closing submissions nor in the learned judge's judgment. I agree with McCombe J that mere matters of procedure cannot override substantive rights, but I have some sympathy with the submission, as indeed Chadwick LJ appeared to have also, that an element of

a procedural principle may enter into the question of a claim to set aside the court's own order, even if it was entered by consent, when that order had stood unchallenged for over a year and when the 1995 proceedings had themselves taken nearly seven years to reach trial. It may be, however, that we know too little about the events of those years. In any event, it seems to me that there is no need to go any further into these matters as the Scammells' claim to set aside the b consent order of February 1994 for uncertainty must in any event fail on its merits.

WARD LJ.

[46] I agree.

Appeal allowed. Permission to appeal refused.

Kate O'Hanlon Barrister.

Customs and Excise Commissioners v Barclays Bank plc

[2004] EWCA Civ 1555

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, LONGMORE LJJ AND LINDSAY J

11, 12 OCTOBER, 22 NOVEMBER 2004

Bank – Duty of care – Freezing order – Claimant serving on bank freezing orders prohibiting disposals from clients' accounts – Clients transferring money from accounts after claimant serving orders on bank – Bank writing letters to claimant confirming that it would comply with order and seeking reimbursement of costs – Claimant receiving letters after money transferred from accounts – Whether bank owing duty of care to claimant to prevent payment of money from accounts.

The claimant commissioners obtained freezing orders in respect of outstanding value added tax against two companies, both of which held current accounts with the defendant bank, which were at all material times in credit. The orders specifically prohibited disposal of or dealing with assets up to a stated amount, including in particular any money in identified specified accounts at the bank. The bank was served with copies of the orders. Several hours later the companies effected transfers of substantial sums from their respective accounts. The bank failed to stop those transfers, and the amounts remaining in credit in each of the accounts were considerably less than the outstanding indebtedness to the claimants. The claimants brought proceedings for negligence against the bank. The bank denied that it had owed any duty of care to the claimants to prevent the payments and that question was ordered to be tried as a preliminary issue. The judge relied on the principle that adverse parties to litigation owed no duty to one another unless there was an assumption of responsibility and held that it would be inconsistent to conclude that although a defendant given notice of a freezing order owed no duty of care to the claimant, that a bank holding the defendant's assets, upon being given notice of the order, by that notice, owed a duty of care to the claimant. The claimants appealed.

Held – The bank owed a duty to the claimants, once it had been notified of the freezing orders, to take care that funds in the frozen accounts should not be dissipated in breach of the freezing orders. The bank accepted that foreseeability existed and once formal notification of the order had been given the relationship between the claimants and the bank was a proximate one. The judge had been wrong in applying the analogy that an adverse party in litigation owned no duty of care to the other. It was fair, reasonable and just that the law should require a bank which received notice of a freezing order to take care not to allow a defendant to flout such an order. No policy consideration militated against the existence of such a duty and the imposition of such a duty did not involve any significant extension to the law of negligence. Accordingly, the appeal would be allowed (see [26]–[31], [34]–[36], [48]–[50], [54], [71], below)

Z Ltd v A [1982] 1 All ER 556 considered.

Decision of Colman J [2004] 2 All ER 789 reversed.

Notes

For the test for determining notional duty of care and for pure economic loss, see 33 *Halsbury's Laws* (4th edn reissue) paras 604, 613.

Cases referred to in judgments

Al-Kandari v JR Brown & Co (a firm) [1988] 1 All ER 833, [1988] QB 665, [1988] 2 WLR 671, CA.

Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse [1998] BCC 617, CA.

Business Computers International Ltd v Registrar of Companies [1987] 3 All ER 465, [1988] Ch 229.

Candler v Crane Christmas & Co [1951] 1 All ER 426, [1951] 2 KB 164, CA.

Caparo Industries plc v Dickman [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.

Dean v Allin and Watts (a firm) [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249.

Elguzouli-Daf v Comr of Police of the Metropolis, McBrearty v Ministry of Defence [1995] 1 All ER 833, [1995] QB 335, [1995] 2 WLR 173, CA.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 4 WLR 101, HL.

Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq) [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.

Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva [1980] 1 All ER 213n, CA.

Merrett v Babb [2001] EWCA Civ 214, (2001) 80 Con LR 43, [2001] QB 1174, [2001] 3 WLR 1.

Nippon Yusen Kaisha v Karageorgis [1975] 3 All ER 282, [1975] 1 WLR 1093, CA.

Phelps v London Borough of Hillingdon, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor) [2000] 4 All ER 504, [2001] 2 AC 619, [2000] 3 WLR 776, HL.

Reeman v Dept of Transport [1997] 2 Lloyd's Rep 648, CA.

Smith v Eric S Bush (a firm), Harris v Wyre Forest DC [1989] 2 All ER 514, [1990] 1 AC 831, [1989] 2 WLR 790, HL.

White v Jones [1995] 1 All ER 691, [1995] 2 AC 207, [1995] 2 WLR 187, HL.

Williams v Natural Life Health Foods Ltd [1998] 2 All ER 577, [1998] 1 WLR 830, HL.

Z Bank v D1 [1994] 1 Lloyd's Rep 656.

Z Ltd v A [1982] 1 All ER 556, [1982] 1 QB 558, [1982] 2 WLR 288, CA.

Appeal

The claimants, the Customs and Excise Commissioners, appealed from the decision of Colman J on 3 February 2004 ([2004] EWHC 122 (Comm), [2004] 2 All ER 789) determining, as a preliminary issue in proceedings for negligence brought by the claimants against Barclays Bank plc, that the bank, which had been notified of freezing orders relating to current accounts of certain of the bank's customers and had failed to prevent transfers of funds out of those accounts, did not owe the claimants a duty of care. The facts are set out in the judgment of Longmore LJ.

Phillip Sales and *Daniel Stilitz* (instructed by *HM Customs & Excise*) for the claimants.

Michael Brindle QC and *Richard Handyside* (instructed by *Lovells*) for the bank.

Cur adv vult

22 November 2004. The following judgments were delivered.

LONGMORE LJ.

INTRODUCTION

[1] In the first edition of his invaluable *Practice and Procedure of the Commercial Court* (1983), Mr Anthony Colman QC said (p 70) 'since 1975 a major part of the work of the Commercial Court has been the hearing of the applications for Mareva injunctions', cf (5th ed, 2000) p 109. He recorded that there were then about 20 applications per month. It has now fallen to Colman J (as he has become) to decide whether a bank, served with notice of a freezing injunction (as, since the advent of Civil Procedure Rules, it is now called), owes any duty of care to a claimant not to allow sums to be paid out of an account which is subject to such injunction (see [2004] EWHC 122 (Comm), [2004] 2 All ER 789, [2004] 1 WLR 2027). At [1] he correctly called it an unexplored and undecided point which 'goes to the very heart of the law of negligence'.

[2] The claimant Commissioners of Customs and Excise obtained freezing injunctions in respect of outstanding VAT against two companies both of which held current accounts with the defendant (the bank) which were at all material times in credit. The two orders each specifically prohibited disposal of or dealing with the debtor company's assets up to a stated amount including in particular any money in identified accounts at the bank. After the orders were made, the claimant's solicitors gave notice of them to the bank, sending a copy of the orders by fax.

[3] Some two hours later, each of the two debtor companies effected direct transfers of substantial sums from their respective accounts by use of the bank's so-called Faxpay system by which a customer can send direct payment instructions to the bank's payment centre as distinct from the customer's branch. The bank failed to stop these transfers. In the result the amounts remaining in credit in each of the two debtor's accounts were considerably less than the outstanding indebtedness to the claimants. The claimants now claim damages for negligence against the bank on the basis that they are unable to enforce judgments which they have subsequently obtained against the debtor companies as fully as if there had been no transfers out of their respective accounts at the bank.

[4] It appears that the withdrawals may have been permitted, in the case of one debtor company, due to operator error and, in the case of the other company, because the Faxpay system was able to bypass the bank's control facility. The bank, however, denies that it owed any duty of care to the claimants to prevent these payments. That issue was ordered to be tried as a preliminary issue on the assumption that the facts alleged in the particulars of claim were true.

[5] The two debtor companies were Brightstar Systems Ltd (Brightstar) and Doveblue Ltd (Doveblue) both of which were by the beginning of 2001 heavily indebted to the claimant in respect of VAT. The judge has summarised the essential facts to be assumed so neatly and comprehensively that I can adopt his account of them as my own.

ASSUMED FACTS IN RELATION TO BRIGHTSTAR

[6] On 26 January 2001 Pitchford J granted a freezing injunction up to a value of £1·8m. It provided specifically:

'1. The defendant must not remove from England and Wales or in any way dispose of or deal with or diminish the value of any of its assets which are in England and Wales whether in its own name or not and whether solely or jointly owned up to the value of £1,800,000·00. This prohibition includes the following assets in particular, namely any money in the accounts numbered 01311633 at HSBC Bank, and account number 70845302 at Barclays Bank Plc.'

[7] Under the heading 'guidance notes' there appeared the following:

'1. Effect of this order: It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be sent to prison, fined or have his assets seized.

2. Set off by banks: This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the defendant before it was notified of this order.

3. Withdrawals by the defendant: No bank need enquire as to the application or proposed application of any money withdrawn by the defendant if the withdrawal appears to be permitted by this order.'

[8] This is the standard wording for such freezing injunctions. Having recited that the judge had accepted the undertaking set out in Sch B to the order, the order included in Sch B the following undertaking:

'The claimants will pay the reasonable costs of anyone other than the defendant which have been incurred as a result of this order including the costs of ascertaining whether that person holds any of the defendant's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the claimants will comply with any order the court may make.'

[9] The claimants served a copy of the Brightstar order on the bank by fax at 12.33 on 29 January 2001.

[10] In an apparently standard form letter to the claimants dated 29 January 2001, but bearing a 'Letter Opened' stamp dated 31 January 2001, Ms Julie Fisher, legal adviser at the bank, stated:

'We confirm that the bank will abide by the terms of the order and would be grateful if all future correspondence concerning this matter could be forwarded to this Office quoting our reference shown above. Substantial costs are incurred in handling Freezing Orders. You will no doubt be aware that we are entitled to reimbursement and would direct your attention to the Practice Direction dated 28th October 1996 [*Practice Direction (Mareva and Anton Piller orders: forms)* [1997] 1 All ER 288, [1996] 1 WLR 1552], made by the Lord Chief Justice with the concurrence of the President of the Family Division. Please find enclosed a schedule of the work typically involved, for your information. In this case our costs to date amount to £150 and we shall be pleased to receive your early remittance in settlement. Cheques should be made payable to "Barclays Bank Plc". Where further work is required, for example on an amended Order, we reserve the right to claim reimbursement of any additional costs incurred.'

[11] At about 14.30 on 29 January the bank permitted three payments out of the Brightstar account and further debited the account with charges relating to

two such payments overseas. The total paid out and debited was £1,240,570. When the bank discovered what had happened, it informed the claimants by letter dated 31 January 2001, which explained these three substantial payments by reference to 'operator error'.

[12] On 8 May 2001 the claimants obtained judgment in default against Brightstar for £2,285,788·98. On 30 July 2001 they obtained a garnishee order absolute against the bank in the sum of £563,124·46. That was all that remained in the Brightstar account. The shortfall on the judgment debt exceeded the sum of £1,240,570, which had been paid out of the account. Brightstar has itself paid nothing. The claimants claim this latter sum plus such interest as would have accrued on that amount between the date when it was erroneously paid out and the date of the garnishee order.

ASSUMED FACTS IN RELATION TO DOVEBLUE

[13] On 30 January 2001 Cresswell J granted to the claimants a freezing injunction to a maximum amount of £3,928,130·00. Like the Brightstar order, this injunction specifically prohibited disposal of funds in the Doveblue account with the bank. It also included similar provisions and undertakings to those set out at [6]–[10], above. It was served on the bank by fax at about 11.38 on 30 January 2001.

[14] At about 14.00 on 30 January 2001 the bank permitted payments out of the Doveblue account which with charges totalled £1,064,289.

[15] By letter dated 31 January 2001, the day after the order had been served, Ms Julie Fisher on behalf of the bank wrote to the claimants acknowledging that the freezing order had been received and confirming that the bank would abide by the terms of the order. The letter contained identical paragraphs relating to the bank's handling costs to those in relation to Brightstar and stating similarly that the Bank's costs in the case of Doveblue amounted to £150 and asked for early remittance. However, the letter continued:

> 'Unfortunately a problem arose, shortly after the service of the Order, which we have been unable to resolve. The Order was served by fax at 11.38 am on 30th January 2001. Doveblue had the use of the Bank's "Faxpay" system, enabling it to make direct transfers without reference to the branch. Steps were taken to amend the instructions on that system so that Doveblue could no longer make such transfers. However, at approximately, 2.00 pm, before the amendment could be put in place, funds were transferred from Doveblue's account under the "Faxpay" system. The Bank took immediate steps to recall the payments. A number of discussions took place with the recipient Banks. Unfortunately, the recipient Banks were unwilling to repay the sums transferred on the grounds that payments were in the ordinary course of their customers' businesses.'

[16] On 23 February 2001 the claimants obtained judgment in default against Doveblue for £3,944,095·85. Doveblue has failed to pay any of this debt. On 31 May 2001 the claimants obtained a garnishee order absolute against the bank for £130,630·81, which was all that remained in Doveblue's account after the transfers out on 30 January. The shortfall of that amount from the judgment debt far exceeded £1,064,289 paid out of the account. The claimants claim this latter amount together with interest that would have accrued on it from the date of notice of the injunction to the date of the garnishee order.

THE JUDGMENT

[17] The judge approached his conclusion in stages. He first set out the various tests which the courts have used in recent years to determine whether there is a duty of care. These are (1) what is called 'the threefold test' of (a) foreseeability, (b) proximity and (c) whether it is fair reasonable and just to impose a duty of care (fairness), (2) the 'assumption of responsibility' test and (3) the 'incremental' test. These tests are often said to merge into each other and, in any event, provide a useful check on each other since each test should provide the same answer.

[18] The judge then applied the threefold test and concluded ([2004] 2 All ER 789 at [58]) that there was 'at least a provisional foundation for the proposition that there existed a proximity relationship between the bank and the commissioners'. He next considered whether the fact that the relationship arose in the course of litigation which provided remedies and sanctions for the loss of the money in the defendants' accounts displaced that provisional foundation; in the course of that consideration he reminded himself (at [66]) that a party or his representatives in litigation could not owe a duty to the opposite party in the litigation unless there was an express or implied assumption of responsibility to that opposite party. This then led him to his first conclusion (at [73]) that a bank holding assets of a defendant could not, by virtue of being served with notice of a freezing order, be under any greater duty than a defendant who was himself subject to such a freezing order.

[19] The question he had to resolve was, therefore, whether the bank had assumed such a responsibility and he held (at [74]) that there was no such assumption at the time of the order; the letters written by the bank could, however, be regarded as such an assumption but, since there was no reliance until receipt of those letters and the payments were made before such receipt, the judge's final conclusion was that the bank was under no duty at any relevant time (see [77]–[82]).

SUBMISSIONS

[20] Mr Philip Sales, for the commissioners, maintained that a duty of care arose on the part of the bank as soon as it was served with the freezing orders and submitted (inter alia):

(1) it was plainly a foreseeable result of the bank's compliance with their customers instructions that there would be breaches of the freezing orders and that the commissioners (and no one else) would, as a direct result, suffer loss;

(2) once the bank had been served with the freezing orders, the relationship between the parties was closely proximate. Indeed, the relationship between the parties was akin to a contractual one. The bank knew, or ought to have known, that the commissioners were relying directly upon it to protect their interests;

(3) the obligation to comply with the freezing orders was imposed by the court on the bank for the specific benefit of the commissioners. A duty of care will arise (provided it is fair, just and reasonable to impose such a duty) in favour of a claimant where a defendant is under an obligation (whether arising under contract, statute, by court order or otherwise) which is, to the defendant's knowledge, wholly or partly for the benefit of the claimant;

(4) in the present case, it was plainly fair, just and reasonable to impose a duty of care on the bank. It would be a serious injustice to the commissioners (and would undermine the intended protection for creditors which freezing orders are

granted to confer) if they were left without a remedy against the bank for its negligent release of the funds in the Brightstar and Doveblue accounts;

(5) in so far as a test of 'assumption of responsibility' is relevant to determining whether a duty of care should be imposed, that is a purely objective test which reflects the circumstances in which the law deems that responsibility should be held to have been assumed by a defendant to a claimant;

(6) the judge accordingly erred in superimposing the further requirement that, in order for an assumption of responsibility to arise, there must be shown to have been express representations, by word or conduct, which 'crossed the line' between the bank and the commissioners;

(7) the judge further erred in treating the relationship between the commissioners and the bank as indistinguishable to the relationship which exists between adversarial parties to litigation. At the relevant time, the parties were neither in litigation with one another, nor in any adversarial or antagonistic relationship. The court itself, by the orders it had made, required the bank to act as guardian of the commissioners' interest with respect to preservation of the funds in the accounts;

(8) by operating a banking business, the bank knew (or ought to have known) that it would be relied upon by parties obtaining freezing orders to preserve funds held in its accounts. Against that background, the learned judge ought to have held that the bank had assumed responsibility towards the commissioners as soon as it was served with the freezing orders. It is a feature of the operation of the banking systems—and banks must fully appreciate this—that in cases where they are given notice of freezing orders directed against accounts of their customers, they (the banks) are necessarily the only practical safeguard against dissipation of assets in those accounts by unscrupulous defendants, to the detriment of claimants with meritorious claims. Further or alternatively, the bank should have been taken to have assumed responsibility towards the commissioners at the latest when it took internal steps (albeit deficient ones) to comply with the freezing orders. Alternatively, in the case of Brightstar, there must have been a relevant assumption of responsibility as soon as the letter of 29 January 2001 was written.

[21] For the bank Mr Brindle QC only sought to support the judge's judgment in a qualified way. He agreed with Mr Sales that it was artificial to treat the bank's letters to the commissioners as an assumption of responsibility and he sought to present his argument on a broader front. He submitted:

(1) the threefold test for a duty of care was not satisfied;

(2) even if loss was foreseeable, the relationship between the bank and the commissioners was not sufficiently proximate;

(3) even if loss was foreseeable and there was a proximate relationship, it was not fair reasonable or just to impose a duty of care since the law itself gave a sufficient remedy (in the form of contempt proceedings) in the event of a bank paying away money at the request of a defendant subject to a freezing injunction;

(4) since, moreover, the requirement of an assumption of responsibility was a separate requirement that had to be fulfilled before a duty of care could be imposed in a case of economic loss, there could be no duty of care without such an assumption of responsibility;

(5) on no view could it be said that there was any assumption of responsibility by the bank by virtue of the bank being served with the freezing order;

(6) nor could it be said that the bank was assuming any responsibility when it wrote to the commissioners saying, in effect, no more than that it accepted it was bound by the court order so far as it affected the bank;

(7) any question of any later reliance on such assumption of responsibility was, therefore, irrelevant;

(8) if, however, it was relevant, it had not occurred; to this extent only the judgment was supported.

[22] Although the bank supported the judge's conclusion (at [73]) that the Bank's position was analogous to that of a party to litigation, it naturally did not support his further conclusion (at [78]–[80]) that the letters sent by the Bank on receipt of the court's order were to be considered an assumption of responsibility giving rise to a duty of care. It may therefore be said that neither party defended with any very great enthusiasm the actual reasoning by which the judge arrived at his final conclusion.

OVERVIEW

[23] The modern law of negligence derives primarily from four decisions of the House of Lords: *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207 and *Phelps v London Borough of Hillingdon, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504, [2001] 2 AC 619. *Caparo Industries plc v Dickman* laid down the threefold test of foreseeability, proximity and fairness and emphasised the desirability of incremental development, see in particular Lord Bridge of Harwich at [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618. *Henderson*'s case and *White v Jones* case both emphasised the concept of assumption of responsibility in cases where the negligent performance of services had caused economic loss. In the light of these authorities this court has held that an appropriate course for ascertaining whether there is a duty of care at least in an economic loss case is to look at any new set of facts by using each of the three approaches in turn viz the threefold test, the voluntary assumption of responsibility test and the incremental test:

> 'If the facts are properly analysed and the policy considerations are correctly evaluated the several approaches will yield the same result (see *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse* [1998] BCC 617 at 634 (para 7.19) per Sir Brian Neill)'.

[24] In these circumstances I propose to treat the issues in the following order:

(1) to examine the correctness of the judge's decision that there could not be proximity in the present case without an express assumption of responsibility, by virtue of the parties' position as quasi-adversarial litigants;

(2) if not, then to treat the matter afresh by applying the threefold test as the first approach to a duty of care;

(3) secondly to consider the incremental approach;

(4) to consider the impact of the assumption of responsibility approach;

(5) to draw the threads into a conclusion.

(1) NO PROXIMITY WITHOUT ASSUMPTION OF RESPONSIBILITY

[25] Mr Brindle, while purportedly agreeing we should apply each of the three approaches in turn and come to the same result in the end, concentrated on the assumption of responsibility test; he submitted that the bank never assumed any responsibility to the commissioners and that, therefore, the threefold test could not be satisfied either. This has the flavour of an argument pulling itself up by its own bootstraps and is not, in my judgment, the correct approach. The danger is that all arguments in this area of the law tend to be somewhat circular since each of the approaches is supposed to lead to the same conclusion and it is difficult, once a particular approach has led to a particular conclusion, to adopt another approach without assuming it will, at any rate probably, lead to the same conclusion. The judge (at [73]) squared this circle by deciding that there was no proximate relationship in law between the commissioners and the Bank 'unless there is super-added to the relationship conduct amounting to an assumption of responsibility by that party', thus imputing the requirement of such an assumption into the definition of proximity. For this purpose he relied on the principle that adverse parties to litigation owe no duty to one another unless there is an assumption of responsibility, as there was, for example, in *Al-Kandari v JR Brown & Co (a firm)* [1988] 1 All ER 833, [1988] QB 665 where the defendant solicitors had agreed to be the custodian of the passport of their client who was himself a defendant in matrimonial proceedings. The judge then said (at [73]):

> 'It would be completely inconsistent with this analysis to conclude that, although a defendant given notice of a freezing order owed no duty of care to the claimant, by application of the threefold test, a bank holding the defendant's assets, upon being given notice of the same order, by that very notice, did owe a duty of care to the claimant.'

[26] For my part I am, with respect, unable to agree with this passage of the judgment. First, the bank is not a party to the litigation nor is it in my view in a position which can be described as adverse or quasi-adverse to the commissioners in the litigation brought against the companies who have failed to pay their VAT. The bank does not wish to play any part in this litigation; its only interest is in not knowingly permitting the debtor companies to breach the order which the court has made. Its interest is, if anything, more in the nature of a wish to co-operate with the claimants rather than to take any adverse position to them. Of course the debtor companies are defendants in the litigation and are the customers of the bank but that does not make the bank an adverse or quasi-adverse party to the commissioners. Quite the contrary; once a bank is served with notice of a freezing order the customer's mandate is revoked with regard to the amount which is frozen in the customer's account, see *Z Ltd v A* [1982] 1 All ER 556 at 563, [1982] 1 QB 558 at 574 per Lord Denning MR and [1982] 1 All ER 556 at 572, [1982] 1 QB 558 at 586 per Kerr LJ.

[27] Secondly, the main reason why one party to litigation owes no duty to the other is that their relationship, once litigation begins, is governed by the CPR which provide remedies by way of court orders and various means by which such orders can be enforced. Moreover the main remedy any claimant has against any defendant is to proceed to judgment (as has happened in the present cases). None of these considerations applies to a bank which is served with notice of a freezing order and wants as little to do with the litigation as possible.

[28] For these reasons the judge's method of squaring the duty of care circle, despite its undoubted ingenuity, does not seem to me to be right; there is, therefore, no alternative to considering the three approaches afresh.

(2) THE THREEFOLD APPROACH

[29] The bank accepts that the first element of foreseeability exists. That is plainly correct; if the bank fails to put in operation any mechanism for preventing the defendants from withdrawing money from their accounts, it is plain that the commissioners may not be able to collect the whole of the payable VAT.

[30] As far as proximity is concerned, once one has rejected the analogy of the rule of law that an adverse party in litigation owes no duty of care to the other, the relationship is about as proximate as one can envisage. Notice of the order has been served on the bank where the defendants have their accounts. The bank may not be particularly willing to have a relationship to the commissioners; but once notice of the freezing order has been served, the bank cannot but be aware that the commissioners have a very active interest in trying to ensure that moneys in the debtor companies' accounts are not transferred outside the jurisdiction. No doubt formal notification of the court's order is necessary for any proximity to arise but once that notification is given the relationship is plainly a proximate one rather than a remote one.

[31] It is the third requirement of fairness that is more debatable. The courts have recognised that the fairness part of the test is something of a 'label' attached by the court if it decides that public policy requires a duty to care to be imposed. I can only say that it seems eminently fair, reasonable and just that the law should require a bank which receives notice of a freezing order to take care not to allow a defendant to flout such an order. The purpose of the order is to preserve a defendant's assets and the purpose of serving the order on the bank in the present case was to secure its co-operation to that end. The reason why the defendants' accounts were identified by name and number in the freezing orders was to enable the bank more readily than otherwise to prevent the defendants' assets from being dissipated. The courts recognise that freezing orders do create burdens and problems for banks but that is why banks are entitled to charge claimants a reasonable sum for their co-operation; that charge must partly be a recognition that the bank should take care that their clients' assets should not be dissipated. The fact, moreover, that the court makes the freezing order in the first place shows that the court's concern is that a defendant's assets should not be dissipated. The court's order is liable to be made futile unless banks do, in fact, take reasonable care to ensure that sums of money in defendants' accounts are preserved until proceedings against them are concluded.

[32] The problems caused for banks by freezing orders were very fully considered by the Court of Appeal shortly after freezing orders were first introduced (or as Lord Denning MR might have said 'rediscovered') in *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093 and *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n. That was in *Z Ltd v A* [1982] 1 All ER 556, [1982] 1 QB 558 already referred to, in which various banks instructed counsel to lay before this court a number of problems to which freezing order applications were giving rise. No doubt the most pressing concern of all was that banks might find themselves in contempt of court if freezing orders were not properly policed and that case did much to allay the bank's fears of contempt proceedings, because it was said that 'a third party with notice of the terms of an injunction should only be liable when he knows

that what he is doing is a breach of the terms of that injunction' (see [1982] 1 All ER 556 at 568, [1982] 1 QB 558 at 580 per Eveleigh LJ). Nevertheless it was assumed on all sides that a bank, once served with a freezing order, would take such steps as were reasonably open to it to ensure that it was not rendered futile by a defendant's instructions to pay money away from his account. As Lord Denning MR said ([1982] 1 All ER 556 at 562, [1982] 1 QB 558 at 572):

> 'Even though the order has not then been drawn up, even though it has not then been served on the defendant, it has immediate effect on every asset of the defendant covered by the injunction. Every person who has knowledge of it must do what he reasonably can to preserve the asset.'

Moreover, in the context of difficulties in relation to cheque and credit cards, which were held could be met by making clear in the freezing order that it would not preclude the debiting of a defendant's account in respect of transactions effected prior to the date of service of the order on the bank, Kerr LJ said ([1982] 1 All ER 556 at 577, [1982] 1 QB 558 at 592):

> 'However, once the bank has been served, it will no doubt consider it prudent to take steps to withdraw such facilities from the defendant in so far as it is in its power to do so.'

[33] These citations show that the court, in that case, expected the bank to do what was reasonable to preserve a defendant's assets and they underline (what one might think is anyway the case) the fact that, in the absence of some powerful policy consideration, it would be fair, just and reasonable for banks to be expected to exercise reasonable care to help to preserve money in a defendant's account at the time notice of a freezing injunction is served.

[34] Is there then any policy consideration which might militate against the existence of such a duty? I have already said that I do not think that the involvement (such as it is) of a bank in litigation proceeding between parties with an adverse interest as between themselves is such a policy consideration. The only other possible policy consideration is one which I would reject for much the same reasons, namely that the law of contempt provides a remedy for breach of the order and the law should not impose any other (possibly competing) sanction. But there is no reason why the existence of the law of contempt should militate against the imposition of such a duty. The court in *Z Ltd v A* was at pains to state that contempt proceedings will usually be inappropriate. It is true that immediately after the passage I have cited from Lord Denning MR above he goes on to say:

> 'He must not assist in any way in the disposal of [any asset of the defendant]. Otherwise he is guilty of a contempt of court.' (See [1982] 1 All ER 556 at 562, [1982] 1 QB 558 at 572.)

But that requires there to be 'assistance' and Lord Denning does not suggest that negligence could be a ground for contempt proceedings. Eveleigh LJ was considerably more emphatic. Apart from remarking that a third party can only be liable for contempt when he knows that what he is doing is a breach of the terms of the injunction he said—

> 'Carelessness or even recklessness on the part of banks ought not in my opinion to make them liable for contempt unless it can be shown that there was indifference to such a degree that was contumacious ... it seems to me

a to be undesirable that those who are not immediate parties should be in danger of being held in contempt of court unless they can be shown to have been contumacious.' (See [1982] 1 All ER 556 at 570, [1982] 1 QB 558 at 583.)

Neither Lord Denning nor Kerr LJ expressly associated themselves with these dicta and in the very few cases where proceedings for contempt have been issued b against a bank it seems that courts may have utilised a slightly lower standard of liability for contempt, see eg *Z Bank v D1* [1994] 1 Lloyd's Rep 656. But the whole thrust of the judgments in *Z Ltd v A* is that banks should not be faced with contempt proceedings save in the plainest of cases.

[35] To my mind this militates in favour of the imposition of a duty of care rather than against it. On no view does any possible liability for contempt cover c the same field as the claimed duty of care; neither counsel submitted that it did. But if there is no room for a duty to take reasonable care to preserve the defendant's assets, there might be pressure for the law of contempt to be utilised. Even if that meant that contempt proceedings might be launched only to be defeated after the cost of a court hearing, that would be highly undesirable; any d temptation to use the law of contempt speculatively in this area should be firmly discouraged. But that is no reason to place any arbitrary restriction on the application of tortious liability. Quite the opposite.

(3) THE INCREMENTAL APPROACH

[36] For much the same reasons, the third approach to duty of care, viz the e incremental approach, yields a similar result. It was evidently contemplated in *Z Ltd v A* that the banks could and would exercise reasonable care to preserve a defendant's assets and not allow them to be dissipated. It is but a short step to hold that they should be liable to a claimant who suffers loss if such reasonable care is not exercised. Moreover the sort of liability envisaged is not so very f different from the kind of liabilities to which banks are well accustomed, eg liability to their own customer if money is paid away in error.

(4) ASSUMPTION OF RESPONSIBILITY

[37] What then of the second approach, that of 'assumption of responsibility', the phrase which derives from the speeches in *Hedley Byrne & Co Ltd v Heller & g Partners Ltd* [1963] 2 All ER 575, [1964] AC 465. It was here that Mr Brindle for the bank took his major stand saying that there was no such assumption of responsibility either when the freezing order was served or when the bank wrote letters which acknowledged service of the order. In the absence of such assumption of responsibility, he submitted that no duty of care to avoid h economic loss could arise.

[38] I have already observed that Mr Brindle's emphasis on assumption of responsibility has an element of relying on the answer you expect to get at the time of posing the question since it is using the absence of an assumption of responsibility to 'trump' the inquiry. Each of the three approaches should lead to j the same answer but, if a negative answer to the question whether the bank assumed responsibility to the commissioners is to be decisive, one need never rely on the other approaches at all.

[39] Nevertheless Mr Brindle skilfully analysed the authorities in an attempt to show that, at any rate in case of economic loss, the presence of an assumption of responsibility is a vital requirement before a duty of care can be imposed and that its absence renders otiose any inquiry based on the other approaches.

[40] There is, however, an initial difficulty quite apart from the fact that each of these approaches should lead to the same conclusion. It is the frank acceptance by the courts that all the approaches utilise what may be called 'labels' which are conclusionary rather than steps in the arguments. Thus in the passage from *Caparo Industries plc v Dickman* already referred to ([1990] 1 All ER 568 at 574, [1990] 2 AC 605 at 618) Lord Bridge said in terms that the concepts of proximity and fairness are not—

> 'susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which ... the law recognises pragmatically as giving rise to a duty of care of a given scope.'

Lord Roskill likewise said:

> 'Phrases such as "foreseeability", "proximity", "neighbourhood", "just and reasonable", "fairness", "voluntary acceptance of risk", or "voluntary assumption of responsibility" will be found used from time to time in the different cases. But ... such phrases are not precise definitions. At best they are but labels or phrases descriptive of ... very different factual situations ...' (See [1990] 1 All ER 568 at 581–582, [1990] 2 AC 605 at 628.)

[41] This 'label' aspect is particularly problematic for the phrase 'assumption of responsibility' since some authorities have gone out of their way to say that it is a conclusory phrase used to describe the result of the imposition of a duty of care rather than an essential step in the reasoning to be used in progressing the argument on the question of whether a duty of care should arise. This appears most clearly from *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831 in which the House of Lords decided that a surveyor instructed by a building society owed a duty of care to the intending purchaser of a house who might well (and, in fact, did) rely on the report commissioned by the building society. There was a disclaimer of liability which was held to fall foul of the Unfair Contract Terms Act 1977 but it was difficult, in any event, to say that the surveyor assumed a responsibility to the intending purchaser; it was also a case of economic loss; nevertheless the surveyor was held liable. Lord Griffiths said that he did not think that voluntary assumption of liability was a helpful or realistic test for liability and observed that, if the accountant in *Candler v Crane Christmas & Co* [1951] 1 All ER 426, [1951] 2 KB 164 (which had been approved in the *Hedley Byrne* case had been asked if he was voluntarily assuming responsibility for his advice to the purchaser of the shares, he would have replied that his responsibility was limited to the person who employed him. He added:

> 'The phrase "assumption of responsibility" can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts on the advice.' (See [1989] 2 All ER 514 at 534, [1990] 1 AC 831 at 862.)

[42] Mr Brindle was able to show, however, that this rather dismissive attitude to the requirement of assumption of responsibility was not considered decisive in *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145 where the House of Lords

decided that economic loss to Lloyd's names, suffered as the result of negligent underwriting on the part of the managing agents of syndicates to which the names subscribed, was recoverable precisely because the managing agents had in an objective sense assumed responsibility to the names for taking care in relation to the selection of the risks which had been underwritten. Lord Goff of Chieveley said ([1994] 3 All ER 506 at 520–521, [1995] 2 AC 145 at 180–181) that the criticism of the concept of assumption of responsibility in *Smith v Bush* was made in a case where the court was concerned to contain the category of persons to whom a duty of care was owed but that in cases where that problem did not arise there was no reason not to have recourse to the concept which had 'after all' been adopted by all the speeches in the *Hedley Byrne* case. He then said:

> 'Furthermore, especially in a context concerned with a liability which may arise under a contract or in a situation "equivalent to contract," it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff ... In addition, the concept provides its own explanation why there is no problem in cases of this kind about liability for pure economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages [to] that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further inquiry whether it is "fair just and reasonable" to impose liability for economic loss ...' (See [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181.)

So in a *Hedley Byrne* type of case of economic loss, 'assumption of responsibility' is apparently the only necessary criterion. It is to be objectively assessed and its presence may be conclusive of liability; it does not, in my judgment, necessarily follow that its absence will be conclusive of the absence of a duty of care. The present case, moreover, is only doubtfully a *Hedley Byrne* type of case viz one of negligent misstatement or the negligent performance of services. The commissioners are not relying on any statement by the bank nor are they saying that the bank's services to its customer have been negligently performed. They do say that the bank has a duty to preserve the money in the defendants' accounts but that is not accurately described as a performance of services; it is more a duty to assist in the monitoring of an order of the court.

[43] *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207 was another case where the concept of 'assumption of responsibility' provided the solution to the problem before the House; that was the case where a solicitor was held liable to an intended beneficiary of a will when the solicitor had negligently failed to carry out his client's instructions before the client died. The solution to the problems posed by the claim which was preferred by Lord Goff was—

> 'to extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who ... may ... be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.' (See [1995] 1 All ER 691 at 710, [1995] 2 AC 207 at 268.)

Once again, the presence of an assumption of responsibility was held to be a helpful and realistic test of liability and, even, the decisive factor. The case is not an authority for the proposition that there can be no duty of care in the absence of such assumption of responsibility. That is not to deny that there will be some categories of case where an assumption of responsibility will be required; *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830 where the plaintiff sought to impose liability on a director of a company which had gone into liquidation is a good example. But that is a long way from the present case.

[44] Lord Goff's approach to assumption of responsibility is mirrored in the last of the four recent House of Lords cases mentioned at [23], above, *Phelps v London Borough of Hillingdon, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504, [2001] 2 AC 619, in which it was held that local authorities could, in theory, be vicariously liable for failure of their educational psychologists to diagnose or treat dyslexia in children. The four cases before the House were very different from the present case on their facts but Lord Slynn of Hadley giving a speech, with which the other six Law Lords sitting largely agreed, said—

> '... where an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that the parents acting for the child and the teachers will follow that advice, prima facie a duty of care arises. It is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is, however, clear that the test is an objective one: *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181. The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law.' (See [2000] 4 All ER 504 at 518, [2001] 2 AC 619 at 654.)

Thus while an assumption of responsibility may, on occasion, be sufficient for the imposition of a duty of care, as indicated by Lord Goff in *Henderson*'s case and, occasionally, required as in *Williams*'s case, at [37] it cannot be said that it is always a necessary ingredient; it is rather the case that the law will use the phrase when it decides that there is to be a duty, see *Merrett v Babb* [2001] EWCA Civ 214 at [37], (2001) 80 Con LR 43 at [37], [2001] QB 1174, per May LJ.

[45] Mr Brindle submitted that *Phelps*'s case should be distinguished because it was a case of personal injury not a case of economic loss; he submitted further that an assumption of responsibility was indeed necessary for the imposition of a duty of care in many cases of economic loss. It is true that in *Phelps*'s case the House did decide that a claim for failure to diagnose or treat a congenital defect such as dyslexia could constitute a 'claim for personal injuries to a person' for the purposes of the provision in the Supreme Court Act 1981 which enabled a court to order pre-action discovery. But there is no suggestion that this was considered significant in those passages of the speeches which considered whether a duty of care should be imposed. Lord Slynn in particular treated that question in general terms and thought that the concept of assumption of responsibility was useful as a term for the imposition of a duty of care in an appropriate case. In any real

sense, moreover, the claims mounted by the children whose dyslexia had not been diagnosed or treated would be mainly for economic rather than for physical damage, the distinction between the two, in a case such as *Phelps*, not being very easy to discern.

[46] There will still be a question of the time when the duty of care arises. If one is attached to the idea of assumption of responsibility, one could say that the duty will arise in the present case when the bank acknowledged service of the order of the court. That would not be right, in my judgment, because all the bank was doing in these letters was to recognise that they had a duty to comply with the court order by reason of the existence of the order; they were not in any real sense assuming a responsibility apart from the fact that the order had been served upon them. I would prefer to say that the law imposes a duty of care by virtue of the fact that the order had been served upon them rather than by virtue of the bank having written a letter acknowledging service of the order.

[47] If, however, it be said that an express or deliberate assumption of responsibility is necessary, I would hold that no such responsibility came into existence on the despatch of the letters, nor indeed when they were received.

(5) CONCLUSION

[48] I would, therefore, conclude, applying the threefold test approach, that a duty ought to be imposed on the bank, towards claimants who have obtained a freezing order, to take care that funds of a person whose account has been frozen pursuant to that order should not be dissipated in breach of that order. I would not be deterred by the apparent absence of any express or deliberate assumption of responsibility on the part of the bank since I would hold that the law ought to decide that such responsibility should be imposed and that that, in accordance with *Phelps*'s case, is sufficient. I do not believe that the absence of an express assumption of responsibility should be fatal to the conclusion reached by relying on the first approach. I further conclude, applying the third (incremental) approach, that the imposition of such a duty of care is not to impose on banks liabilities different in kind from the sort of liabilities to which banks have become used at the hands of their customers and others for many years.

[49] In these circumstances I would allow this appeal and make a declaration in appropriate terms.

LINDSAY J.

[50] I agree and wish to add brief comments on only three subjects.

[51] Firstly, Longmore LJ has at [44], above referred to Lord Slynn of Hadley's speech in *Phelps v London Borough of Hillingdon, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504 at 518, [2001] 2 AC 619 at 654 and to *Merrett v Babb* [2001] EWCA Civ 214 at [37], (2001) 80 Con LR 43 at [37], [2001] QB 1174. Such citations illustrate that the expression 'an assumption of responsibility' can be used to describe those circumstances in which the law recognises that a duty of care is present. But to regard the expression as serving no other purpose than providing some such synonym for the existence of a duty of care would be to overlook much of its utility. It is useful as it draws attention to the subjective facts: has the defendant, in his conduct with the claimant, done or said anything by which, in effect, he says to the claimant 'I'll see to it'. His saying so is neither conclusive or necessary in every case but it is always likely to be relevant. The expression is useful, too, in requiring there to be an examination of the objective situation: there will be collocations of facts which can as fairly

require the defendant to be treated as if he had said 'I'll see to it' as he would have been had he said it. Lastly, the expression draws attention to the possibility of a negative: was there a subjective disavowal of any assumption of responsibility? We have not been required to look into how the case would have taken shape had the bank disavowed liability at the moment it was served with the respective orders. It would, at lowest, be surprising had the bank then been heard to say 'We do not accept that we can be relied upon carefully to honour the court's order'. Whilst conceptually there can, surely, be circumstances where no amount of disavowal would prevent the surrounding circumstances from imposing a duty of care, in so saying I would certainly not wish to be taken to be indicating any view, either way, as to what the outcome would have been had there some express disavowal by the bank in the case before us. But the expression 'assumption of responsibility' is a useful reminder that an express or implied disavowal of such an assumption is always likely to be material and could often be conclusive. For these reasons I would not wish 'assumption of responsibility' to be merely subsumed within other tests as to a 'duty of care' or to be abandoned as a separate head of inquiry.

[52] Secondly, Longmore LJ refers at [25], above to Mr Brindle's argument that, as all three tests can be expected to arrive at the same result, the fact (as he would have had it) that the assumption of responsibility test was failed necessarily meant that the threefold test must also have been failed. On the facts of this case, no such shortcut is permissible either to conclude that there was or that there was not a duty of care. In a case such as the one at hand, where the debate concerns an area in which a duty of care has not previously been found, each of the tests is best regarded as a check on the conclusion provisionally reached upon the application of the other two. It is thus only when one test has been verified as correctly conducted by a finding that it leads to the same conclusion as do the others that it can safely be taken to be reliable. Thus even were the assumption of responsibility test to go the bank's way, which it does not, it would, even so, be impossible to assert, merely on that account, that so also, without needing to apply it, should the threefold test or the incremental test. The case would, even then, have been that the incremental approach and the threefold test, had they been applied, *could* have shown that the provisional result of the assumption of responsibility test had been a false reading. Thus there is here no such shortcut as the bank's argument suggested.

[53] Thirdly, Longmore LJ has referred at [30], above to 'proximity' as part of the threefold test. Proximity, in this context, requires a regard to be had to all surrounding circumstances and amongst those relevant (as is mentioned at [10], and [15], above) are the facts that the bank knew of, drew the claimants' attention to and plainly intended, if necessary, to rely upon the Practice Direction of 28 October 1996 (*Practice Direction (Mareva and Anton Piller orders: forms)* [1997] 1 All ER 288, [1996] 1 WLR 1552) as to recovery of its handling costs from those who had obtained the freezing order. It did so, moreover, not in language that reflected the comparative extra 'distance' between parties that would obtain upon regard being paid to the fact that recovery of such costs, if not consensually provided for, could only be by way of the court's intervention at the prompting of the bank. Rather it did so in the peremptory way one might expect had the bank enjoyed a direct route to recovery equivalent or akin to that between parties to a contract. If I may speak of 'distance' as the opposite of 'proximity' then I see the facts that the bank had apparently standard form paragraphs or letters to be sent to those who obtained freezing orders and which they sent to the claimant in both the Brightstar and the Doveblue cases as diminishing the 'distance' between the parties.

PETER GIBSON LJ.

[54] I also agree that this appeal should be allowed. I add a judgment of my own in deference to the careful and lucid judgment of the judge and to the admirable arguments of Mr Sales for the commissioners and Mr Brindle QC for the bank.

[55] Nearly 30 years have elapsed since the Mareva injunction was first recognised as an available and useful remedy for claimants fearful that they would be robbed of the fruits of success in litigation by the dissipation by defendants of their assets. That remedy has been developed by the courts and its use extended from the Commercial Court to all the divisions of the High Court as well as to the courts of other common law countries. The practice of identifying in the freezing order bank accounts holding moneys of the defendants and notifying the banks concerned in accordance with the detailed guidance given by this court in *Z Ltd v A* [1982] 1 All ER 556, [1982] 1 QB 558 has become standard. Such is the prevalence of the remedy that it would be astonishing if errors had not been made by banks after notification of the freezing order, yet the industry of counsel has not produced any case in which a court has previously considered whether a duty of care is owed to the claimant by the bank so notified of the order. That cannot be explained on the basis that the contempt jurisdiction provides an adequate remedy to the claimant: plainly it does not. If and in so far as contumaciousness is required, as Eveleigh LJ thought in *Z Ltd v A* [1982] 1 All ER 556 at 570, [1982] 1 QB 558 at 583, for a bank to be found to be in contempt of an order notified to it, that may well be impossible to establish against the bank, and in any event the purpose of the contempt jurisdiction is not to compensate the claimant but to procure obedience to court orders by appropriate sanctions. The absence of any reported case may be an indication of the perceived difficulties in the path of claimants like the commissioners suing in negligence, or it may reflect the readiness hitherto of banks, whose error has allowed moneys to be transferred out of accounts the subject of a freezing order, to accept responsibility for the error.

[56] In the present case, the judge was deciding a preliminary issue and the facts are only assumed. But it is clear from the bank's letter dated 31 January 2001 in the Brightstar case that its error, after it was served with the freezing order, resulted in the three payments out of the account which had been specified in the order:

> 'At approximately 2.30 pm on 29th January 2001 the relationship manager was informed that a "Faxpay" request for the authorisation of three payments had been made. Although he confirmed that these payments could not be made, as a result of operator error at the bank's "Faxpay" centre, the funds were unfortunately transferred.'

In the Doveblue case, there was no acknowledgment by the bank of error, but one notes that more than two hours had elapsed between the notification of the freezing order and the payments out of the account specified in the order. It is not suggested that the bank was in contempt in either case.

[57] It is impossible to reconcile all the judicial statements on the correct methodology to be applied to novel situations in which a person is alleged to owe a duty of care to another. It is clear that the courts take a more cautious approach to imposing that duty where economic loss is claimed than in relation to physical damage. Throughout this area considerations of legal policy predominate in the

determination of whether the law recognises a duty of care. Whilst eminent judges have from time to time suggested that the adoption of one test precludes the need to apply another test, I respectfully agree with the pragmatic suggestion of the editors of *Clerk & Lindsell on Torts* (18th edn, 2000) p 346 (para 7-95), that the most helpful approach is that taken by Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse* [1998] BCC 617 at 634 (para 7.19) to use in turn the threefold test (stated by Lord Griffiths in *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514 at 536, [1990] 1 AC 831 at 865), the assumption of responsibility test (expounded by Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145) and the incremental approach (explained by Phillips LJ in *Reeman v Dept of Transport* [1997] 2 Lloyd's Rep 648 at 677).

THE THREEFOLD TEST

[58] On the threefold test, foreseeability is rightly conceded. The judge would also have concluded that the test of proximity was satisfied but for the application of what he called the general principle that non-compliance with a court order should be dealt with only within the remedies and sanctions of the rules of procedure and this, he considered, was determinative also of the requirement of fairness, justice and reasonableness. The essence of the judge's reasoning, to be found at [2004] EWHC 122 (Comm) at [72], [73], [2004] 2 All ER 789 at [72], [73], [2004] 1 WLR 2027, was that because an adverse party in litigation, or his legal representative, owes no duty of care to the opposite party unless he actually assumes responsibility (by words or conduct which 'cross the line'), and because the defendant against whom a freezing order is made does not occupy a relationship of proximity vis-à-vis the claimant, a bank given notice of that order and holding the defendant's assets does not occupy a relationship of proximity vis-à-vis the claimant, and it is not fair, just or reasonable that it should owe a duty of care which its customer did not owe.

[59] I respectfully disagree with that reasoning. The bank is not in the same position as its customer who is an adverse party in hostile litigation. As Mr Sales pointed out by reference to *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465 at 472, [1988] Ch 229 at 239 per Scott J, *Al-Kandari v JR Brown & Co (a firm)* [1988] 1 All ER 833 at 838, [1988] QB 665 at 675 per Bingham LJ and *Elguzouli-Daf v Comr of Police of the Metropolis, McBrearty v Ministry of Defence* [1995] 1 All ER 833 at 844–845, [1995] QB 335 at 352 per Morritt LJ, there is an inherently antagonistic relationship between adverse litigants which makes it inappropriate for the law to recognise a duty of care by one adverse party, or his legal representative, to another party. The safeguards, as Scott J said, in such a case must be found in the rules and procedures that govern litigation.

[60] The commissioners and the bank were not parties to litigation at the relevant time. They were not in an antagonistic relationship. The bank, by being put on notice of the freezing orders, was placed in the position of being required by the court to prevent any transfer of money out of the specified accounts. The plain intention was to safeguard the commissioners' interests against dissipation by Brightstar and Doveblue of their assets. As the judge rightly said ([2004] 2 All ER 789 at [57])—

> 'the Bank knows as soon as it receives notice of a freezing injunction that if it mistakenly releases assets in breach of the order, the party in whose

favour the order was made may suffer loss irremediable by operation of the contempt procedure'.

[61] Further, the relationship between the commissioners and the bank had some features which approximate to a contractual relationship. The commissioners and the bank knew that on the making of the freezing orders the commissioners would have to reimburse the reasonable costs of the bank. The standard letter sent out by the Bank on receipt of the notice of the freezing order set out its standard terms of business as the basis on which the bank had handled and would continue to handle freezing orders.

[62] I am not persuaded that an actual assumption of responsibility is a necessary ingredient of the threefold test. Insofar as the judge relied on the observations of Lord Steyn in *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577 at 582, [1998] 1 WLR 830 at 835 for the necessity in the present case to find words or conduct which 'cross the line', in my judgment he was wrong to do so, as that case was plainly distinguishable. It was a case where the question was whether, in addition to the principal defendant (a company), the director of the company had also assumed a personal responsibility. In those particular circumstances it became necessary to see whether there had been dealings between the director and the claimant such as would give rise to a personal liability (see the analysis of *Williams*'s case in *Merrett v Babb* [2001] EWCA Civ 214 at [45], (2001) 80 Con LR 43 at [45], [2001] QB 1174 per May LJ). Those circumstances are far removed from the present case. No doubt if there are communications which 'cross the line', proximity is readily shown, but on the facts of this case for the reasons given the test of proximity is in my judgment established.

[63] Would it be fair, just and reasonable in the circumstances for there to be a duty of care? In arguing for a negative answer to that question, Mr Brindle pointed to three factors: the bank is already subject to the contempt jurisdiction, the bank has no means of limiting its potential liabilities and the freezing orders set out their effect on persons notified of the orders without mention of any liability in tort. I do not find any of those factors cogent. The contempt jurisdiction does not provide an adequate or any remedy for the commissioners. The bank ought to limit its exposure by taking proper steps to ensure compliance with court orders notified to it. The absence from the order of any reference to a potential claim in tort cannot preclude such a claim being brought. The weightiest factor in favour of an affirmative answer to the question is the absence otherwise of an adequate remedy for the commissioners in respect of loss flowing from the errors of the bank. I can see no sufficient reason why a bank, which makes a mistake leading to the dissipation by the defendant of its assets which the freezing order was designed to prevent, should not owe a duty of care to the claimant. Practical justice requires the recognition of such a duty.

ASSUMPTION OF RESPONSIBILITY

[64] The relevant question is not whether the defendant has actually assumed responsibility but as May LJ said in *Merrett v Babb* (2001) 80 Con LR 43 at [41]—

> 'whether the defendant is to be taken to have assumed responsibility to the claimant to guard against the loss for which damages are claimed ... . The question in each case is whether the law recognises that there is a duty of care.'

With respect to the judge, to make the answer to that question dependent on the bank's letter, whereby it confirmed that the bank would abide by the terms of the freezing order, is unsatisfactory, as Mr Brindle in effect accepted.

[65] For the reasons already given in relation to the overlapping threefold test, I would hold that there was such assumption of responsibility when the bank received notice of the freezing orders. The law should recognise that a duty of care on the bank arises at that point.

THE INCREMENTAL APPROACH

[66] If one makes a comparison between the present case and established categories of negligence, the recognition that a person in the position of the bank owes a duty of care to a claimant obtaining a freezing order does not, in my view, involve any significant extension to the law of negligence, the circumstances of the present case involving no more than a small extension of situations already covered.

[67] It is sufficient to refer briefly to two cases.

[68] In the *Al-Kandari* case solicitors were held liable in negligence to the claimant for having allowed their client, the claimant's husband, to gain possession of his passport which they were holding to the order of the court. They were liable for psychological injury to the claimant which flowed from the husband consequently kidnapping the children of the marriage and removing them from the jurisdiction. This court rejected the argument that the solicitors' duty to hold the passport was owed to the court and not to the claimant, Bingham LJ saying at [1988] 1 All ER 833 at 839, [1988] QB 665 at 676, 'I have no doubt that in this situation the defendants owed the plaintiff a duty of care, since the purpose of holding the passport at all was to protect her lawful rights'.

[69] In *Dean v Allin and Watts (a firm)* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249 solicitors for the borrowers of moneys were held by this court to owe a duty of care to the claimant lender, even though there was a conflict of interest between the borrowers and the lender, in respect of the provision of an effective security, the benefit of which, to the solicitors' knowledge, the borrowers wished to confer on the lender.

[70] The cross-check of looking at other cases on negligence seems to me to allow the recognition of a duty of care in the present case. In each of the two cases, as here, the purpose of the defendant's involvement was known to the defendant and the defendant's conduct defeated that purpose. In each of the two cases, as here, the fact that a duty was owed to another did not prevent a duty of care from arising.

CONCLUSION

[71] For these reasons, as well as those given by Longmore LJ, I would allow this appeal, set aside the order of the judge and declare, as requested by the commissioners, that the bank owed the commissioners a duty of care at the time when monies were paid out of the Brightstar and Doveblue accounts in breach of the freezing order.

Appeal allowed.

Kate O'Hanlon Barrister.

Wilson v Robertsons (London) Ltd

[2005] EWHC 1425 (Ch)

CHANCERY DIVISION
LADDIE J
27 JUNE, 5 JULY 2005

Consumer credit – Agreement – Form and content of agreement – Pledges – Pawnbroking agreements – Redemption period – Antedated agreements – Whether antedated agreements with redemption period running from antedated dates enforceable – Consumer Credit Act 1974, s 116.

Consumer credit – Agreement – Form and content of agreement – Pledges – Pawnbroking agreements – Total amount of credit – Total charge for credit – Item entering into total charge for credit not to be treated as credit – Whether agreement with document fee treated as part of total amount of credit enforceable – Consumer Credit Act 1974, s 9(4).

The defendant was a pawnbroker and the claimant was one of its customers. The claimant claimed that certain pawnbroking agreements were unenforceable because some of the agreements had been backdated, creating redemption periods of three months which were shorter than were required by s 116[a] of the Consumer Credit Act 1974, the effect of which was that a pawnbroking agreement had to contain a term which allowed the borrower a minimum of six months within which to redeem the pawn. The 1974 Act further provided that it was not possible to contract out of that protection for the borrower. The claimant also claimed that the total amount of credit stated in the agreements was incorrect (rendering those agreements unenforceable) as a 'document fee' had been included in each amount. Section 9(4)[b] of the 1974 Act provided that for the purposes of the Act 'an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment'. The claimant claimed that a document fee was an item entering into the total charge for credit and so could not be treated as part of the total amount of credit. The judge tried those issues, in effect as preliminary issues, and found in favour of the defendant. The claimant appealed. The defendant contended, inter alia, (i) that as each backdated agreement was for the benefit of the claimant, being a second agreement relating to the same unredeemed pawned item by which each second agreement absorbed the last three months of the first agreement into the second agreement, allowing the claimant to roll over the interest due, made with the knowledge and understanding of the claimant, and reducing the amount that had to be paid immediately in order to prevent her pawned item from being sold, there was no reason why the parties could not have properly agreed that the item should be treated as pawned under the new agreement from a particular date; (ii) that s 116(1) referred to the six month period running from the date on which the pawn 'was taken' and did not state that the period should run from the date of execution of the agreement; and (iii) that s 9(4), which referred expressly to

a Section 116 is set out at [17], below
b Section 9, so far as material, is set out at [32], below

charges for credit for which time was allowed for payment, should be construed as limited to such charges, and so did not apply to document fees for which no time was allowed for payment.

Held – (1) It was not open to the parties to agree to antedate an agreement as the effect would be to contract out of the statutory minimum six month redemption period. Even if there were good consideration and the benefits to the borrower were substantial, the prohibition on contracting out still applied. The natural meaning of 'taken' in s 116(1) of the 1974 Act was that it referred to the date on which the pawn was taken by the lender under the agreement. It could not be earlier than the date on which the agreement was entered into by the parties (see [24]–[28], below).

(2) Although the document fee was part of the credit made available to the borrower, yet it might still not be allowed to be 'treated as credit' for the purpose of s 9(4) of the 1974 Act. If it was also 'an item entering into the total charge for credit' then it had to be ignored for the purpose of determining the total amount of credit under the section. Section 9(4) covered all charges, including, but not limited to, those for which time was allowed for payment. Accordingly, the total amount of credit was not stated correctly. The appeal would therefore be allowed (see [29], [40], [46], [48], [49], below); *Wilson v First County Trust Ltd* [2003] 4 All ER 97 applied.

Notes

For credit, for total charge for credit, and for redemption period, see 9(1) *Halsbury's Laws* (4th edn reissue) paras 83, 91, 212

For the Consumer Credit Act 1974, ss 9, 116, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 25, 102.

Case referred to in judgment

Wilson v First County Trust Ltd [2001] QB 407, [2001] 2 WLR 302; *rvsd* [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568.

Appeal

Penelope Wilson appealed from the decision of Judge Rose on 13 April 2005 dismissing her claims brought against Robertsons (London) Ltd that 7 open pawnbroking agreements and 20 closed pawnbroking agreements made between Mrs Wilson and the respondent were unenforceable or enforceable only with an order of the court. The facts are set out in the judgment.

Mrs Wilson appeared in person.

Matthew Cook (instructed by *Lester Aldridge*, Southampton) for the respondent.

Cur adv vult

5 July 2005. The following judgment was delivered.

LADDIE J.

[1] This is the judgment in an appeal brought by Mrs Penelope Wilson from the judgment of Judge Rose dated 13 April 2005. The respondent, Robertsons (London) Ltd, is a jeweller and pawnbroker. Mrs Wilson was a customer of the respondent between April 1995 and April 1999, having pawned a number of items

with the respondent. Some of these items were pawned on a number of occasions.

[2] Mrs Wilson has made extensive use of pawnbroking services over the years. She has also been involved in other litigation. Indeed, an important case in relation to the effects of the Consumer Credit Act 1974, namely *Wilson v First County Trust Ltd* [2001] QB 407, [2001] 2 WLR 302 (*FCT*) is one which involves her.

[3] As appears from the skeleton argument of Mr Matthew Cook, who appears for the respondent, in the current proceedings Mrs Wilson has made claims in respect of 7 open and 20 closed pawnbroking agreements. She claims that they are unenforceable or only enforceable with an order of the court (which should not be given) as a result of a number of defects. First it is said that there was a failure to include the amount of credit in the agreements (or, more precisely, the correct amount of credit). This rendered the agreements unenforceable. Furthermore, because of this failure, the figure for Annual Percentage Rate (APR) was wrongly stated in the agreements. This defect was said to arise from the fact that all of the agreements included provision for payment of a 'document fee'. Mr Cook referred to this as the document fee issue and I shall do likewise.

[4] Second, Mrs Wilson refers to the fact that the end of the redemption period was wrongly stated by one day on some of the agreements. There is no dispute that this is so. The dispute is as to the consequences of it.

[5] Third, some of the agreements had been backdated with the consequence that there was a failure to ensure that the pawned goods were redeemable for a period of six months after they were taken. This is referred to as the backdating issue.

[6] Mrs Wilson also contends that the agreements are exorbitant and contravene ordinary principles of fair dealing in that the interest rates charged were in excess of 80%. Various other issues have been raised, particularly in relation to the relief to which Mrs Wilson is entitled if she succeeds on her primary claims. As will be explained below, the latter are not before me on this appeal.

[7] As Mr Cook explains in his skeleton argument, there were a number of issues which potentially called for consideration by Judge Rose at the trial. If they were all considered at the hearing before him, the trial was likely to take a long time. However, some of the issues were dependent upon the conclusions reached by Judge Rose in respect of earlier issues. Consequently, since most of the issues did not call for evidence, the judge concluded, with the agreement of both parties, that the most sensible way to proceed would be to deal with the case on an issue by issue basis. The result was that the hearing before the judge became, in effect, a hearing to determine certain preliminary issues, the remainder of the issues being reserved to be considered by the judge at a later date. Whether, in the long run, this was a course which was likely to save costs is not something which was discussed before me and I will say nothing more about it.

[8] Before the judge four issues were carved out for consideration: (1) whether the agreements contained defects as alleged; (2) if defects existed, what effect did they have on enforceability; (3) if and to the extent agreements were unenforceable, what sums were payable and to whom; and (4) were the agreements extortionate credit bargains.

[9] In relation to (1), the judge found for the respondent on the document fee issue, so that the amount of credit, interest charge, APR and total charge for

credit were correctly stated. The agreements were therefore not unenforceable on these grounds. In relation to the redemption date, as indicated above, it was accepted by the respondent that this defect existed in certain agreements. In relation to the backdating issue, again the judge held in favour of the respondent.

[10] As far as (2) is concerned, because of the findings under (1), the only issue to be considered was the effect of the misdating. Apparently the parties agreed that the misdating of the agreements by a single day did not render the agreements irredeemably unenforceable, but only unenforceable without permission of the court. Mr Cook explains that Mrs Wilson had not sought any remedy on this basis and, despite the judge offering to allow her permission to amend to seek a remedy, she chose not to do so. As I understand it, that continues to be her position before me. Thus she does not seek to assert that the agreements which have this defect are unenforceable.

[11] Item (3) did not arise, save possibly in relation to a gold ring, and the issue was adjourned to a further hearing due to lack of time.

[12] In relation to item (4), the judge concluded that the agreements were extortionate credit bargains and that the sums due should be recalculated on the basis of an APR of 50%.

[13] Mrs Wilson raises a number of issues in her notice of appeal. In substance, three matters are live before me namely the document fee and backdating issues and a complaint concerning the way in which the trial was conducted. I can dispose of the last of these quite shortly.

THE CONDUCT OF THE TRIAL

[14] Mrs Wilson's notice of appeal asserts that—

> 'not enough time was allowed for the hearing to enable [her] claim to be properly and fully considered by the court and for her to be given a full and fair hearing as required by the Human Rights Act 1998.'

[15] Although Mrs Wilson did not formally drop this ground of appeal, she said virtually nothing about it before me. I have seen nothing to suggest that Judge Rose did anything other than comply with the obligation on him arising under the CPR to deal with the matters before him in a proportionate way. There is nothing to support the suggestion that Mrs Wilson was not given a full and fair hearing. I reject this ground of appeal.

THE BACKDATING ISSUE

[16] Before considering the facts and arguments arising in relation to this issue, it is well to have in mind the legislative background against which it and the document fee issue are to be assessed. In *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, the House of Lords explained that the 1974 Act was, like the Moneylenders Act 1927 before it, designed to tackle a significant social problem. The activities of some moneylenders have given the moneylending business a bad reputation. Something had to be done to protect the borrower, who frequently, indeed normally, would be in a weak bargaining position. Protection of borrowers is the social policy behind the legislation. Part of that policy is to be achieved by setting stringent rules which have to be complied with by the lender if his moneylending agreement is to be enforceable. The strictness of the discipline imposed on lenders is illustrated by the following passage in the speech of Lord Nicholls of Birkenhead:

'[72] Undoubtedly, as illustrated by the facts of the present case, s 127(3) may be drastic, even harsh, in its adverse consequences for a lender. He loses all his rights under the agreement, including his rights to any security which has been lodged. Conversely, the borrower acquires what can only be described as a windfall. He keeps the money and recovers his security. These consequences apply just as much where the lender was acting in good faith throughout and the error was due to a mistaken reading of the complex statutory requirements as in the cases of deliberate non-compliance. These consequences also apply where, as in the present case, the borrower suffered no prejudice as a result of the non-compliance as they do where the borrower was misled. Parliament was painting here with a broad brush.

[73] The unattractive feature of this approach is that it will sometimes involve punishing the blameless pour encourager les autres. On its face, *considered in the context of one particular case*, a sanction having this effect is difficult to justify. The Moneylenders Act 1927 adopted a similarly severe approach ...

[74] Despite [criticism in the Crowther report (*Report of the Committee on Consumer Credit*, under the presidency of Lord Crowther, March 1971) (Cmnd 4596)] I have no difficulty in accepting that in suitable instances it is open to Parliament, when Parliament considers the public interest so requires, to decide that compliance with certain formalities is an essential prerequisite to enforcement of certain types of agreements. This course is open to Parliament even though this will sometimes yield a seemingly unreasonable result in a particular case. Considered overall, this course may well be a proportionate response in practice to a perceived social problem. Parliament may consider the response should be a uniform solution across the board. A tailor-made response, fitting the facts of each case as decided in an application to the court, may not be appropriate. This may be considered an insufficient incentive and insufficient deterrent. And it may fail to protect consumers adequately.'

[17] Against that background, I turn to consider the facts and law in relation to this issue. Section 116 of the 1974 Act provides:

'(1) A pawn is redeemable at any time within six months after it was taken.

(2) Subject to subsection (1), the period within which a pawn is redeemable shall be the same as the period fixed by the parties for the duration of the credit secured by the pledge, or such longer period as they may agree.

(3) If the pawn is not redeemed by the end of the period laid down by subsections (1) and (2) (the "redemption period"), it nevertheless remains redeemable until it is realised by the pawnee under section 121, except where under section 120(1)(a) the property in it passes to the pawnee.

(4) No special charge shall be made for redemption of a pawn after the end of the redemption period, and charges in respect of the safe keeping of the pawn shall not be at a higher rate after the end of the redemption period than before.'

[18] Mrs Wilson asserts and Mr Cook agrees that the effect of these provisions is to provide that a pawnbroking agreement must contain a term which allows the borrower a minimum of six months within which to redeem the pawn.

Section 173 of the 1974 Act provides that it is not possible to contract out of this protection for the borrower.

[19] The relevant facts in this case may be illustrated by reference to two agreements entered into by Mrs Wilson under which she pawned to the respondent the same Lady's Cartier wristwatch. The first is contract no 61360. It is dated 22 May 1995 and it sets a monthly interest rate of 4·5%. It sets a full period of redemption of six months, that is until 21 November 1995. In fact the watch was not redeemed within that period but the respondent had not disposed of it when the second agreement, no 66330, was entered into. The latter was signed by Mrs Wilson on 22 March 1996. However it was antedated by three months to 21 December 1995. The six-month redemption period was fixed as 20 June 1996, that is to say six months from the antedated date, not from the actual date of signing. From the latter date, the redemption period was only three months. Under the new agreement the monthly rate of interest was 5%.

[20] Mrs Wilson argued before the judge and before me that the new agreements were unenforceable because they did not give her the statutory minimum redemption period.

[21] Judge Rose dealt with this as follows:

> 'A question remains of novation of the agreement. Mrs Wilson contends that she entered into a number of agreements rolled over one into another. Effectively the agreements were for a period of six months. Occasionally she could not redeem within that time and was therefore under pressure to repay in default of which the goods would have been sold. She entered into a number of agreements to pay off outstanding amounts by entering into further, fresh, agreements. These did not reflect the true position because they were backdated. It is said that this took place to assist her, but this is disputed. If she entered into a new agreement she would owe 10 or 11 months' interest. To assist her they were backdated so that any payment was only of six months' interest, the rest was rolled over into the new agreement. Mrs Wilson says that renders the agreements unenforceable. I know of no reason in law why parties cannot agree to backdate when they clearly intend to do so and there was ample consideration for the advantage gained, this being the deferment of the debt in the present case. This was done with the knowledge of both parties and it seems to me to be utterly wrong to set aside the agreement she freely entered. I find, as a matter of fact and law that there was no defect in the agreements for this reason.'

[22] Mr Cook explains the reference in this passage to the assistance given by this arrangement to Mrs Wilson as follows. Had the first agreement come to an end, Mrs Wilson would have been liable to pay the interest due under it in order to redeem the watch. What the second agreement does is to absorb the last three months of the first agreement into the second agreement and thereby allow her to roll over the interest due. He says that this was done with her full knowledge and understanding, did not disadvantage her in any way and was to her advantage since it reduced the amount that had to be paid immediately in order to prevent her pawned goods being sold. He accepts that Mrs Wilson is correct to state that, until the new agreement is entered into, the watch is pawned under the old agreement. However he says that there is no reason why the parties cannot properly agree that it shall be treated as pawned under the new agreement from a particular date, particularly when this does not result in any overlap between the agreements or any double charging.

[23] I am not sure that the claim that there is no double charging is correct. As I understand the effect of s 116(4), under contract no 61360 the monthly interest rate was 4·5% and it had to stay at that rate even after the six-month redemption period had expired. What contract no 66330 does is to charge an extra 0·5% per month in respect of this excess period. Either it is prohibited under the first agreement or it amounts to double charging under the second. But I shall ignore that for the purpose of this judgment since it was not raised by Mrs Wilson or argued by Mr Cook. I shall assume that the interest terms were identical in the two agreements.

[24] It seems to me that, however one looks at it, contract no 66330 was entered into on 22 March 1996. From that date there was only a three-month redemption period. Mr Cook's argument that it is open to the parties to agree to antedate the agreement is, in substance, an argument that it is possible to contract out of the statutory minimum six-month redemption period by deeming a smaller period to be six months. However it is not open to the parties to contract out of this minimum period. With respect to the judge, it is neither here nor there that Mrs Wilson knew what she was doing or that there was ample consideration for the agreement. The prohibition on contracting out applies even if there is good consideration and benefits to the borrower for doing so are substantial. What the 1974 Act does is put in place bright lines over which the parties, and in particular the lender, must not step. In particular there is a bright line that the borrower must be given a minimum of six months to redeem. No matter how attractive it may be in the circumstances of a particular case, the parties are not allowed to enter into an agreement like this with less than six months for the redemption period and they are not allowed to contract out of this. That is what has happened here.

[25] Mr Cook argues that the parties could have avoided this problem by entering into a modifying agreement for contract no 61360. That may well be so, but the fact that there would have been an acceptable alternative route to achieving the respondent's goal does not make it permissible to enter into an agreement which does not meet the mandatory requirements of the 1974 Act. If anything it means that keeping the respondent to the strict letter of the statute cannot be seen as imposing an unreasonable hardship on it.

[26] Mr Cook also places particular reliance on the fact that s 116(1) refers to the six-month period running from the date on which the pawn 'was taken'. He argues that there is significance in the fact that the legislation does not state that the period should run from the date of execution of the agreement. He says that the watch was put in the hands of the respondent on the date of contract no 61360, namely 22 May 1995 and remained there thereafter. It was therefore legitimate to treat it as taken at the date on which contract no 66330 was deemed to commence, namely 21 December 1995.

[27] It is not clear that this was an argument which was put before Judge Rose and it does not figure in his judgment nor is it raised in any respondent's notice. But in any event, I think there is nothing in it. If one considers 'taken' to refer to the time when the pawn first passes into the lender's possession, that would have been in May 1995. The six-month minimum period would have expired before contract no 66330 was entered into, so it would not help the respondent. Alternatively, if one is allowed to select whatever date one likes for the date on which the pawn is taken, this is simply a way of contracting out of the statutory six-month period, something which is not open to the parties.

[28] As I understand it, there is no definition of 'taken' in the 1974 Act. It seems to me that the natural meaning of it in the context is that it refers to the date on which the pawn is taken by the lender under the agreement. It cannot be earlier than the date on which the agreement is entered into by the parties.

[29] It follows that Mrs Wilson's appeal on this issue succeeds.

THE DOCUMENT FEE ISSUE

[30] This is an altogether more difficult point. The respondent has two types of charges to which it subjects its borrowers. One is interest. Of course the amount payable under this will depend upon the rate of interest charged and the period of the loan. The other is a fixed fee, called a document fee, which the respondent imposes at the date of signature of the agreement. It is payable immediately. How this is dealt with can be illustrated by reference to contract no 61360 for the Cartier watch. The loan made to Mrs Wilson was said to be £400. The interest rate was 4·5% per month. The period to redemption was set at six months. Therefore the total interest payable on redemption was £108 (ie 4·5% x 6 x £400). However Mrs Wilson did not receive £400 on entering into the agreement. She was paid £392, a document fee of £8 having been immediately deducted from the £400 loan. On redeeming the pawned item, Mrs Wilson had to pay the principal amount of the loan, that is to say £400, together with the accrued interest due. The contract records the total charge for credit for the full period of the transaction (ie six months) as £116—that is to say the £108 interest charge plus the £8 document fee. The APR figure is based on the latter total charge.

[31] There is no dispute between the parties that, pursuant to Sch 6 to the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, there exists a mandatory requirement that each of the agreements between Mrs Wilson and the respondent contains 'a term stating the amount of credit'. If that is not present, or the amount stated is incorrect, the agreement is unenforceable. Contract no 61360 states the amount of credit to be £400. Mrs Wilson says that the correct figure should be £392. The respondent accepts that if Mrs Wilson is correct, the contract is unenforceable.

[32] Section 9 of the 1974 Act provides:

> '(1) In this Act "credit" means a cash loan, and any other form of financial accommodation ...
>
> (4) For the purposes of this Act, an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment.'

[33] Mrs Wilson's argument is that the total amount of credit in her agreement must not include anything which is 'an item entering into the total charge for credit'. The document fee is such an item. It cannot be treated as part of the total amount of credit. Therefore in contract no 61360, the total amount of credit should have been stated as £392. Similar criticisms are made of the other agreements which are in issue.

[34] The argument may be summarised simply as follows. Credit has to be treated separately from any charges made for obtaining that credit. It is not permissible to include any of the latter charges as part of the credit. There cannot be any overlap. So, what can be legitimately put forward as credit must not include anything which is properly identified as a charge for credit.

[35] There is no dispute that this approach is supported by Professor Goode in his work *Consumer Credit Law and Practice* in which he says:

> '24.144
>
> **Item forming part of total charge for credit**
>
> Under the CCA 1974, s 9(4) an item entering into the total charge for credit is not treated as credit, *even though time is allowed for its payment*. At first sight such a provision seems superfluous, for how could a charge incurred by the debtor for credit extended to him be considered to accommodate him financially? Certainly, s 9(4) reflects the fundamental notion that credit involves financial assistance to the debtor, not charges or expenses he incurs ... It follows that the definition of "total charge for credit" is of crucial importance, for it is the starting point in computing the amount of the credit. Those items financed by the creditor which form part of the total charge for credit must be identified and stripped out before the amount of the credit itself is determined. All other items financed by the creditor go to make up the amount of the credit ... For the present it suffices to reiterate that the credit represents the amount of financial accommodation provided by the creditor, whilst the total charge for credit denotes the totality of the charges incurred by the debtor to the creditor or third parties under the transaction (so far as not excluded by the regulations), whether or not the services or facilities in respect of which such charges have been imposed are being financed by the creditor, supplied on credit by a third party concerned in the transaction or paid for by the debtor himself.
>
> **24.145**
>
> The rule that the credit charge is excluded in computing the amount of the credit applies whether the charge is an add-on charge or is a discount deducted at the outset from the agreed amount of the loan. The difference is that in the former case the charge is not added in computing the credit, whereas in the latter case it is deducted. Thus on a loan of £5,000 repayable with interest of £1,000 by 12 instalments of £500, the credit is £5,000. The interest of £1,000 is not part of the credit. If the lender makes an advance of £5,000 for a year at a discount of 10% deductible at the outset, the real amount of the loan, representing the amount of the credit for the purpose of the CCA 1974, is £4,500, the remaining £500 is the credit charge.'

[36] Thus, for example, the lender cannot take part of the interest charge, turn it into a lump sum and add it to, and have it treated as part of, the amount of credit. All charges for credit, no matter what their form, have to be stripped out to reveal the sum which is the amount of credit. Mrs Wilson says that those principles, when applied to the facts of this case, demonstrate that the total amount of credit was wrongly stated. It is accepted that the £8 document fee is part of the charges for credit—it is included as part of such charges for the purpose of calculating the APR—so it must be stripped out of the sum made available to Mrs Wilson. The result is that the amount of credit is £392, not £400.

[37] Mrs Wilson argues that this is also consistent with the *FCT* case [2001] QB 407, [2001] 2 WLR 302. In the latter Mrs Wilson agreed to borrow £5,000 from FCT and lodged her motor car as security. FCT charged a document fee of £250. Mrs Wilson did not have the funds available to pay that. She and FCT therefore agreed that that sum be added to the loan, which was recorded as being for £5,250. Mrs Wilson argued successfully that the contract was unenforceable

because the £250 had to be stripped out of the sum of £5,250 because it was an item which was part of the charge for credit. a

[38] In the Court of Appeal, reference was made to the Consumer Credit (Total Charge for Credit) Regulations 1980, SI 1980/51 which, by reg 4, provides that amongst the items to be included in the computation of the total charge for credit are: b

> '(a) the total of the interest on the credit which may be provided under the agreement; and (b) other charges at any time payable under the transaction by or on behalf of the debtor ... whether to the creditor or any other person ...'

[39] On behalf of Mrs Wilson it was argued first that the £250 added to the loan was not 'credit' within the meaning of s 9 of the 1974 Act. This was rejected. As Sir Andrew Morritt V-C said ([2001] QB 407 at 414–415, [2001] 2 WLR 302 at 309–310): c

> '15 Accordingly the crucial issue is what was the amount of the credit provided to Mrs Wilson by FCT. The word "credit" is defined in section 9(1) as including a cash loan and any other financial accommodation. Though the subsection uses the familiar technique of definition by inclusion I find it hard to envisage anything properly described as credit not included in either "a cash loan" or "any other form of financial accommodation". It was submitted by counsel for Mrs Wilson that the amount of £250 by which the loan was increased to enable Mrs Wilson to pay the document fee was not "credit" for the purposes of the Act. He relied on the fact that such amount was never available to Mrs Wilson to spend as she might think fit but was applied immediately in the discharge of her liability to pay the document fee on the issue of the loan agreement. d e
>
> 16 I do not accept this submission. The term "credit" is used in connection with a restricted use credit. Such a credit, as defined in section 11, is one under which the borrower is not able to use the loan for any purpose he pleases. To accept counsel's suggested limitation on the term would make it inapplicable to a restricted use credit to which it is evidently intended to apply. It is unnecessary to decide whether it was a cash loan applied immediately in the discharge of the borrower's liability because, obviously, it did constitute financial accommodation to Mrs Wilson.' f g

[40] By the same reasoning, the document fee here can be viewed as 'credit'. That is not disputed. The important point to realise is that although the document fee is part of the credit made available to the borrower, yet it may still not be allowed to be 'treated as credit' for the purpose of s 9(4). If, notwithstanding the fact that it is credit, it is also an 'an item entering into the total charge for credit', then it must be ignored for the purpose of determining the total amount of credit under the section. This was considered in *FCT*. Sir Andrew Morritt V-C said ([2001] QB 407 at 416, [2001] 2 WLR 302 at 310–311): h j

> '19 It is apparent ... that section 9(4) must be applied without too narrow an interpretation of the word "item". If a charge for credit is correctly recognised in accordance with the detailed regulations to which I have referred then any cash loan or other financial accommodation made or afforded by the creditor to the debtor for the purpose of discharging the liability for that charge should not be treated as part of that credit to which

a the total charge for credit relates. It may be, though it is unnecessary to any decision in this case, that the loan made to pay the charge is itself a separate credit which should be made the subject of a regulated agreement to which the Act applies, whether as a linked transaction within section 19 or otherwise.'

b [41] Mrs Wilson argues that the same analysis applies to the £8 document fee charged under contract no 61360. What she borrowed was, in substance, £392, which was the sum paid to her by the respondent, together with an £8 document fee which was added to the loan and deducted at source. Although the £8 was loaned to her, it was also an item which was part of the charge for credit and should have been excluded from the calculation of the total amount of credit.

c [42] Mr Cook accepts that, from a practical point of view, the financial position here is the same as that in *FCT*. However he says that there are crucial differences. He points out that Judge Rose concluded that, as a matter of fact, the loan was for £400 and not for £392, as demonstrated by the valuation of the pawned item, the value upon which the document fee was calculated (ie the d document fee was variable and was calculated on the basis that it was for an item valued at £400) and that the fact that there was no suggestion that any amount was added to the loan to cover the document fee. He suggests that the judge was right to distinguish this case from *FCT* on these facts. In the latter case the car was valued at £5,000 and the £250 document fee was added to it.

[43] Second, he says that, although s 9(4) does provide limitations as to the e amount that can be included in the loan—

> 'it expressly refers to charges for credit for which time is allowed for payment. This is clearly not the case in the context of a fee that is immediately payable. There is simply nothing in s 9(4) which refers to immediately payable document fees or purports to make them unlawful.'

f

[44] He says that, in determining the meaning of the provisions of s 9, the court must pay regard to the consequences of Mrs Wilson's arguments, were they to be correct. He argues that such consequences would be extreme. In effect it would mean that lenders could not charge transaction or document fees which were immediately payable, since the loan amount would always be treated as the g original agreed loan amount minus the fee immediately payable. He says that this would be startling in view of the large number of lenders who currently charge such immediately payable document fees.

[45] I do not accept these arguments. I can deal with the last of these points first. Even were it true that a large number of other pawnbrokers were caught by h Mrs Wilson's arguments, that is no reason to conclude that she is wrong. Indeed Mrs Wilson, who appears to be something of an authority on pawnbroking, tells me that many pawnbrokers now do not charge document fees. But even if that is not accurate, I can see nothing sacrosanct in document fees. The respondent accepts that they are part of the total cost of borrowing. If they cannot be charged, j there is nothing to suggest that the same sums may not be recovered in another way, for example by increasing slightly the rate of interest charged (subject, of course, to those charges not becoming extortionate).

[46] I do not accept Mr Cook's first argument for the following reason. It does not matter how the parties arrive at the loan figure. The distinction drawn between this case and *FCT* would result in document fees being chargeable if the valuation of the pawned item is stated to be the same as that of the total loan but

not if the document fee is added to the valuation. The distinction would be one of terminology only. In substance the same transaction could be dressed up in a way which would allow the document fee to be charged. Although the 1974 Act is concerned, amongst other things, with ensuring that certain formalities are complied with, that does not mean that one should adopt a construction which would reward semantic differences which have no impact on the underlying transaction.

[47] I also do not accept Mr Cook's second argument. He says that, because the subsection 'expressly refers to charges for credit for which time is allowed for payment', it must be construed as limited to such charges. A document fee is not such a charge because no time is allowed for payment. If this is what the subsection means, it seems to me that *FCT* must have been wrongly decided. Mr Cook accepts that he cannot challenge the latter decision at this level, though he reserves the right to do so elsewhere. Furthermore the argument is based on an inaccurate reading of s 9(4). The subsection does not purport to limit the exclusion only to charges for which time is allowed for payment. On the contrary it says that it covers charges 'even though' time is allowed for payment. In other words it covers all charges, including, but not limited to, those for which time is allowed for payment. It seems to me that this emphasises that charges for which no time is allowed for payment are covered.

[48] In the end I think the issue which I have to consider here can be approached in the following way. If one asks what credit was given to Mrs Wilson, the answer is £400. But she only received £392 in her hand. If one asks why she did not receive, the full £400, the answer is that £8 of that sum was deducted immediately at source for a document fee, that is to say as part of the charge made for credit. Because the sum was deducted immediately at source its character can be assessed at that time. It seems to me that Professor Goode was right to say that such charges have to be stripped out in order to calculate the total amount of credit. For that reason Mrs Wilson is right to argue that the total amount of credit in the case of contract 61360 was £392, not £400. It follows that this contract and all the other contracts are defective in that they do not state correctly the total amount of credit. They are unenforceable as a consequence.

[49] For these reasons, I allow Mrs Wilson's appeal on this issue as well.

[50] I will hear the parties on what steps should now be taken to further progress this action.

Appeal allowed.

Celia Fox Barrister.

R v Mushtaq

[2005] UKHL 25

HOUSE OF LORDS

LORD STEYN, LORD HUTTON, LORD PHILLIPS OF WORTH MATRAVERS, LORD RODGER OF EARLSFERRY AND LORD CARSWELL

16, 17 FEBRUARY, 21 APRIL 2005

Criminal evidence – Admissions and confessions – Direction to jury – Right to fair trial – Judge ruling that evidence of confession not obtained by oppression or other improper means – Whether summing up should include direction jury to disregard confession if they conclude that confession might have been obtained by oppression or other improper means – Police and Criminal Evidence Act 1984, s 76(2) – Human Rights Act 1998, Sch 1, Pt I, art 6(1).

The defendant was charged with conspiracy to defraud and with possessing material designed or adapted for the making of a false instrument. In the course of his trial, the prosecution sought to lead evidence of an interview with the police, in which he had made statements which amounted to a confession. The defence applied to exclude the interview evidence under s 76(2)[a] of the Police and Criminal Evidence Act 1984 which provided that if, in any proceedings where the prosecution proposed to give in evidence a confession made by an accused person, it was represented to the court that the confession was or might have been obtained by oppression of the person who made it, or in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence, the court should not allow the confession to be given in evidence against him except in so far as the prosecution proved to the court beyond reasonable doubt that the confession (notwithstanding that it might be true) had not been so obtained. The judge held a voir dire and then refused the defence application. Subsequently, in the trial itself, the police officers were examined and cross-examined in front of the jury and the same allegations were put to them as in the voir dire. The defendant did not give evidence. In his summing up the judge directed the jury, inter alia, that 'it is for you to assess what weight should be given to the confession. If you are not sure, for whatever reason, that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true, you may rely on it, even if it was, or may have been, made as a result of oppression or other improper circumstances'. The defendant was convicted. He appealed against conviction on the ground that the judge's summing up had contained a misdirection in that he had directed the jury that they could proceed in a manner that was incompatible with the defendant's right against self-incrimination implied into the right to a fair trial guaranteed by art 6(1)[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The Court of Appeal dismissed the appeal and the defendant appealed to the House of Lords. The question before the House was whether in view of art 6 of the convention, a

a Section 76, so far as material, is set out at [30], below

b Article 6, so far as material, is set out [49], below

judge who had ruled pursuant to s 76(2) of the 1984 Act that evidence of the alleged confession had not been obtained in consequence of anything said or done which was likely to render unreliable any confession, was required to direct the jury that, if they concluded that the alleged confession might have been so obtained, they had to disregard it.

Held – (1) (Per Lord Steyn, Lord Phillips of Worth Matravers and Lord Rodger of Earlsferry) The logic of s 76(2) of the 1984 Act required that the jury should be directed that, if they considered that the confession was, or might have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. The rule against admitting an improperly obtained confession was based upon the principle that a man could not be compelled to incriminate himself and upon the importance that attached in a civilised society to proper behaviour by the police towards those in their custody, as well as upon the potential unreliability of such a confession. Those three considerations lay behind s 76(2) and it was inconsistent with the purpose of that provision to affirm that the jury were entitled to rely on a confession where they considered that it was, or might have been, obtained by oppression or other improper means. Accordingly, the judge had misdirected the jury (see [1], [27], [45]–[47], below); *R v Bass* [1953] 1 All ER 1064 and *Lam Chi-ming v R* [1991] 3 All ER 172 applied, *Chan Wei-Keung v R* [1967] 1 All ER 948 disapproved

(2) (Per Lord Steyn, Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry and Lord Carswell) The direction given in the instant case was a direction that, in reaching their verdict and so, for the purposes of art 6(1) of the convention, determining the criminal charges against the defendant, the jury were entitled to take into account a confession which they considered had been, or might have been, obtained by oppression or any other improper means in violation of his right against self-incrimination. Such a direction was an invitation to the jury to act in a way that was incompatible with the defendant's right against self incrimination under art 6(1) and as such was incompatible with that right (see [1], [27], [53], [54], [72], [73], below).

(3) There had been no evidence, in the instant case, of oppression, or of any other improper means, for the prosecution to disprove or for the jury to consider. The direction to the jury as to what they might do if they found that the confession had been obtained by oppression or any other improper means had therefore been unnecessary. Accordingly, the direction could not have affected the fairness of the defendant's trial or the safety of his conviction. The appeal would therefore be dismissed (see [1], [25], [27], [58]–[60], [66], [75], below).

Notes

For extra-judicial confessions: admissibility and procedure, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 1124, 1125, and for the right to a fair trial and the presumption of innocence, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 134, 142.

For the Police and Criminal Evidence Act 1984, s 76, see 18 *Halsbury's Statutes* (4th edn) (2005 reissue) 245.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 706.

Cases referred to in opinions

Ajodha v The State [1981] 2 All ER 193, [1982] AC 204, [1981] 3 WLR 1, PC.
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2003] 3 All ER 1213, [2004] 1 AC 546, [2003] 3 WLR 283.
Bartlett v Smith (1843) 11 M & W 483, 152 ER 895, Ct of Exch.
Basto v R (1954) 91 CLR 628, Aus HC.
Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.
Chalmers v HM Advocate 1954 JC 66, HC of Just.
Chan Wei-Keung v R [1967] 1 All ER 948, [1967] 2 AC 160, [1967] 2 WLR 552, PC.
Chitambala v R [1961] R & N 166, Fed SC of Southern Rhodesia.
Funke v France (1993) 16 EHRR 297, [1993] ECHR 10828/84, ECt HR.
G v UK (1983) 35 DR 75, E Com HR.
Ibrahim v R [1914] AC 599, [1914–15] All ER Rep 874, PC.
Lam Chi-ming v R [1991] 3 All ER 172, [1991] 2 AC 212, [1991] 2 WLR 1082, PC.
Lego v Toomey (1972) 404 US 477, US SC.
Miailhe v France (No 2) (1997) 23 EHRR 491, [1996] ECHR 18978/91, ECt HR.
Minter (Pauper) v Priest [1930] AC 558, [1930] All ER Rep 431, HL.
Murray v UK (1996) 22 EHRR 29, E Com HR.
Prasad v R [1981] 1 All ER 319, [1981] 1 WLR 469, PC.
R v Bass [1953] 1 All ER 1064, [1953] 1 QB 680, [1953] 2 WLR 825, CA.
R v Burgess [1968] 2 All ER 54n, [1968] 2 QB 112, [1968] 2 WLR 1209, CA.
R v McAloon [1959] OR 441, Ont CA.
R v McCarthy (1980) 70 Cr App R 270, CA.
R v Murray [1950] 2 All ER 925, [1951] 1 KB 391, CA.
R v Ovenell, R v Walter A Cartwright Ltd [1968] 1 All ER 933, [1969] 1 QB 17, [1968] 2 WLR 1543, CA.
R v Prager [1972] 1 All ER 1114, [1972] 1 WLR 260, CA.
R v Sat-Bhambra (1989) 88 Cr App R 55, CA.
R v Ward [1993] 2 All ER 577, [1993] 1 WLR 619, CA.
Saunders v UK (1997) 2 BHRC 358, ECt HR.
Schenk v Switzerland (1991) 13 EHRR 242, [1988] ECHR 10862/84, ECt HR.
Wong Kam-ming v R [1979] 1 All ER 939, [1980] AC 247, [1979] 2 WLR 81, PC.

Cases also cited or referred to in list of authorities

Balloch v HM Advocate 1977 JC 23, HC of Just.
Edwards v UK (1993) 15 EHRR 417, [1992] ECHR 13071/87, ECt HR.
Khan v UK (2000) 8 BHRC 310, ECt HR.
Park v R [1981] 2 SCR 64, Can SC.
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.
R v Cowan [1995] 4 All ER 939, [1996] QB 373, [1995] 3 WLR 818, CA.
R v Crown Court at Guildford, ex p Siderfin [1989] 3 All ER 7, [1990] 2 QB 683, [1990] 2 WLR 152, DC.
R v Davey [1960] 3 All ER 533, [1960] 1 WLR 1287, CCA.
R v Dimsey (No 2) [2001] UKHL 46, [2001] 4 All ER 786, [2002] 1 AC 509, [2001] 3 WLR 843.
R v Francis, R v Murphy (1959), 43 Cr App Rep 174, CCA.
R v Livingstone [1993] Crim LR 597, CA.
R v Myers [1997] 4 All ER 314, [1998] AC 124, [1997] 3 WLR 552, HL.
R v Richens [1993] 4 All ER 877, CA.

R v Schot [1997] 2 Cr App R 383, CA.
R v Shard Amad Ali [1999] NZCA 292.
R v Walhein (1952) 36 Cr App R 167, CCA.
R v Warickshall (1783) 1 Leach 263, 168 ER 234, CCR.
R v Watson [1980] 2 All ER 293, [1980] 1 WLR 991, CA.
R v Watson [1988] 1 All ER 897, [1988] QB 690, [1988] 2 WLR 1156, CA.
Sinclair v R (1946) 73 CLR 316, Aust HC.
Thompson v Crowe 1999 SLT 1434, HC of Just.

Appeal

The defendant Ashfaq Ahmed Mushtaq appealed with leave of the House of Lords Appeal Committee given on 2 December 2003 from the decision of the Court of Appeal (Kay LJ, Holland and Andrew Smith JJ) on 30 July 2002 ([2002] EWCA Crim 1943, [2002] All ER (D) 470 (Jul)) dismissing his appeal against his conviction before Judge Behar and a jury at the Crown Court at Kingston-upon-Thames on 23 March 2001 of conspiring to defraud and possessing material designed or adapted for the making of a false instrument. The Court of Appeal certified the point of general public importance set out at [5], below. The facts are set out in the opinion of Lord Rodger of Earlsferry.

Lawrence McNulty and *James Collins* (instructed by *Pillai & Jones*) for the appellant.
David Perry and *Sarah Whitehouse* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration.

21 April 2005. The following opinions were delivered.

LORD STEYN.

[1] My Lords, I have read the opinion of my noble and learned friend Lord Rodger of Earlsferry. I am in complete agreement with it. I would also make the order which Lord Rodger proposes.

LORD HUTTON.

[2] My Lords, the facts of this case and the course of the appellant's trial have been fully set out in the opinion of my noble and learned friend Lord Rodger of Earlsferry and I gratefully adopt his account. The procedure adopted at the trial whereby the judge conducted a voir dire to decide whether the confession was admissible before it was put in evidence before the jury and the police officers were subsequently cross-examined before the jury when allegations of oppressive conduct were put to them, was described and approved in 1972 in para 67 of the Eleventh Report of the Criminal Law Revision Committee *Evidence (General)* (Cmnd 4991):

> 'The fact that the judge has decided at the trial within the trial that the confession is admissible will not prevent the defence from cross-examining the witnesses for the prosecution, or themselves giving evidence, at the trial proper about the way in which the confession was obtained with the object of convincing the jury that they should pay no attention to it. Even if the

a same evidence is given as that given at the trial within the trial, this will not prevent the jury from taking a different view from that which the judge took at the trial within the trial—even on the question, for example, whether there was any threat or inducement. This is in accordance with the present law. It would be wrong in our opinion to make any provision designed to require the jury to accept the judge's finding that a confession was not b obtained in the ways mentioned, as this would be to usurp their function of deciding what weight to give to the confession. But the relevance of the issue for the jury will be only as to weight; and they will be under no obligation to disregard a confession, believed by them to be true, if it should so happen that (differing from the judge) they think that the test for admissibility was not satisfied. We have no doubt that the purpose for which c the jury should consider the way in which a confession was obtained should be only that of deciding what weight to give to it. This is the present law and it will remain the law under [cl 2 of the Draft Criminal Evidence Bill annexed to the report].'

d [3] The law is clear that where a judge has ruled on a voir dire that a confession is admissible the jury is fully entitled to consider all the circumstances surrounding the making of the confession to decide whether they should place any weight on it, and it is the duty of the trial judge to make this plain to them. In *R v Murray* [1950] 2 All ER 925, [1951] 1 KB 391 the trial judge ruled on a voir dire that the confession was admissible and later in the trial refused to allow e counsel for the prisoner to cross-examine the police witnesses again in the presence of the jury as to the manner in which the confession had been obtained, and in his summing up he told the jury that they must accept from him that the confession was a voluntary one obtained from the prisoner without duress, bribe or threat. On appeal the Court of Criminal Appeal quashed the conviction and f Lord Goddard CJ stated ([1951] 1 KB 391 at 392):

'The recorder was wrong in the course which he took. It was quite right for him to hear evidence in the absence of the jury and to decide on the admissibility of the confession; and, since he could find nothing in the evidence to cause him to think that the confession had been improperly g obtained, to admit it. But its weight and value were matters for the jury, and in considering such matters they were entitled to take into account the opinion which they had formed on the way in which it had been obtained. [Counsel for the defence] was perfectly entitled to cross-examine the police again in the presence of the jury as to the circumstances in which the h confession was obtained, and to try again to show that it had been obtained by means of a promise or favour. If he could have persuaded the jury of that, he was entitled to say to them: "You ought to disregard the confession because its weight is a matter for you" ... It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury; for if j he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury.'

[4] In the present case the material part of the direction by the judge to the jury was as follows:

'Now I come on to deal with the question of a confession which is absolutely central and crucial to this case. In the course of the tape recorded interviews; and you heard part of them played, the defendant made statements which you may think were clearly adverse to his case. In short, he admitted, you may think, that he played a part in the conspiracy alleged and that he was paid to do so and in law; as in ordinary English language, an acknowledge of guilt of that kind is a confession. The defendant's case is that although he made the confession, it is not true and in deciding whether you can safely rely upon that confession you have to decide two matters. Firstly, did the defendant, in fact, make the confession? Well, that is not in issue in this case, is it? That he made it? So there is no difficulty about that. But if you are sure that he did make a confession, then you go on to consider the second question which you may think is the important one, are you sure that the confession is true and when deciding this you should have regard to all the circumstances in which it came to be made and consider whether there were any circumstances which might cast doubt upon its reliability. You should decide whether it should be made voluntary (sic) or was or may have been made as a result of oppression or other improper circumstances. Now it is right to say that a number of matters were put to Mr Whittick and Mr Finnegan which amounted, you may think, to very serious allegations of oppression and impropriety, those allegations were all denied and no evidence whatsoever has been called to support or to substantial that (sic) allegations. Nevertheless, it is for you to assess what weight should be given to the confession. If you are not sure for whatever reason that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true you may rely on it even if it was or may have been made as a result of oppression or other improper circumstances.'

This part of the direction was based on a model direction suggested by the Judicial Studies Board and the last three sentences were taken verbatim from that model.

[5] The question certified by the Court of Appeal is:

'Whether, in view of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), a judge, who has ruled pursuant to s 76(2) of the Police and Criminal Evidence Act 1984 that evidence of an alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have been so obtained, they must disregard it.'

[6] Mr McNulty's submission is that where the defendant makes the case that his confession was obtained by oppression or other improper conduct, then the judge, who will already have ruled on the voir dire that the confession is admissible, must direct the jury:

'It has been suggested on the defendant's behalf that his confession in this case was compelled as a result of improper compulsion exerted upon him by the investigating officers. You should consider whether it was so obtained and you should disregard it unless you are sure that it was not made as a result of improper compulsion.'

Mr McNulty's submission is based on art 6(1) of the convention which provides:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...'

[7] Before considering Mr McNulty's submission it is relevant to consider some of the common law principles relating to the admissibility of a confession and its consideration by a jury. It is clear that there are two principal reasons underlying the rule that a confession obtained by oppression should not be admitted in evidence. One reason, which has long been stated by the judges, is that where a confession is made as a result of oppression it may well be unreliable, because the confession may have been given, not with the intention of telling the truth, but from a desire to escape the oppression imposed on, or the harm threatened to, the suspect. A further reason, stated in more recent years, is that in a civilised society a person should not be compelled to incriminate himself, and a person in custody should not be subjected by the police to ill treatment or improper pressure in order to extract a confession: see *Wong Kam-ming v R* [1979] 1 All ER 939 at 946–947, [1980] AC 247 at 261 and *Lam Chi-ming v R* [1991] 3 All ER 172 at 178, [1991] 2 AC 212 at 220.

[8] These two reasons also underlie the decision of the European Court of Human Rights (the European Court) in *Saunders v UK* (1997) 2 BHRC 358 that the requirement of fairness contained in art 6 of the convention includes the right to silence and the right not to incriminate oneself. The European Court stated (at 373–374):

> '68. The Court recalls that, although not specifically mentioned in art 6 of the convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under art 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of art 6 ... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in art 6(2) of the convention.
>
> 69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.'

[9] In the course of the submissions made to the House reference was made to the judgment of the Court of Criminal Appeal in *R v Bass* [1953] 1 All ER 1064, [1953] 1 QB 680 and the judgment of the Privy Council in *Chan Wei-Keung v R* [1967] 1 All ER 948, [1967] 2 AC 160. In *R v Bass* (where Lord Goddard CJ was also a member of the court) Byrne J stated ([1953] 1 All ER 1064 at 1066, [1953] 1 QB 680 at 684):

> 'It is to be observed, as this court pointed out in *R v Murray* ([1950] 2 All ER 925, [1951] 1 KB 391), that, while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the

principle as stated by Lord Sumner, and he should further tell them that, if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it.' a

[10] In *Chan Wei Keung v R* the Privy Council disapproved the ruling in *R v Bass* that where the judge has ruled that a confession is voluntary he should then tell the jury that if they are not satisfied that the confession was made voluntarily, they should give it no weight at all and disregard it. The Privy Council so decided for the reason stated by the High Court of Australia in *Basto v R* (1954) 91 CLR 628 at 640: b

'That a statement may not be voluntary and yet according to circumstances may be safely acted upon as representing the truth is apparent if the case is considered of a promise of advantage being held out by a person in authority. A statement induced by such a promise is involuntary within the doctrine of the common law but it is plain enough that the inducement is not of such a kind as often will be really likely to result in a prisoner's making an untrue confessional statement.' c

d

In making this observation the High Court would, no doubt, have had in mind the way in which the common law had developed so that, as stated by the Criminal Law Revision Committee in para 57 of their report:

'Any threat or inducement, however mild or slight, uttered or held out by a person in authority makes a resulting confession inadmissible. The authorities are firm that there is no exception even for trivial inducements.' e

[11] However, it is clear from the judgment of the Privy Council, which approved the judgment of Lord Goddard CJ in *R v Murray*, that the Board fully accepted and indorsed the principle that a jury are fully entitled to have regard to all the circumstances in deciding whether they should give any weight to a confession. And in the judgment of the Court of Appeal in *R v Burgess* [1968] 2 All ER 54n, [1968] 2 QB 112, applying the approach laid down in *Chang Wei Keung v R*, Lord Parker CJ stated ([1968] 2 All ER 54n at 55, [1968] 2 QB 112 at 117–118): f

'The position now is that the admissibility is a matter for the judge; that it is thereafter unnecessary to leave the same matter to the jury; but that the july should be told that what weight they attach to the confession depends on all the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit.' g

This division of functions between the judge and the jury, admissibility a matter for the judge, weight a matter for the jury, is not only the law in the United Kingdom, it is the law in Australia (*Basto v R* (1954) 91 CLR 628), in Canada (*R v McAloon* [1959] OR 441), and in the United States of America (*Lego v Toomey* (1972) 404 US 477). h

[12] In my respectful opinion Parliament in passing s 76(2) of the Police and Criminal Evidence Act 1984 (PACE) had no intention of altering the well-established principle that the admissibility of a confession is a matter for the judge and the weight of the confession is a matter for the jury. The wording of s 76(2) is based on cl 2(2) of the draft Criminal Evidence Bill annexed to the Eleventh Report of the Criminal Law Revision Committee which states: j

'If, in any proceedings where the prosecution proposes to give in evidence a confession made by the accused, it is represented to the court that the confession was or may have been made in consequence of oppressive treatment of the accused or in consequence of any threat or inducement, the court shall not allow the confession to be given in evidence by the prosecution (whether by virtue of this section or otherwise) except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true)—(a) was not obtained by oppressive treatment of the accused; and (b) was not made in consequence of any threat or inducement of a sort likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof.'

It is clear from para 67 of the report (set out in [2], above) that the Committee considered that the jury should only concern themselves with weight.

[13] I consider that the position under the common law in relation to s 76(2) is correctly stated by Mirfield on *Silence, Confessions and Improperly Obtained Evidence* (1997) pp 51, 52:

'It is the judicial function to decide all questions of admissibility relating to a confession, the jury function to determine whether or not the confession is true ... It would seem quite clear, in principle, that the voluntariness of the confession, as opposed to its truthfulness, is not an issue for the trier of fact. Of course, evidence of the circumstances in which the confession was made may go to the former issue as well as to the latter. Hence, it is open to the accused to cross-examine before the jury witnesses who gave evidence on the *voir dire*. Equally, the accused himself is entitled to give evidence before them about the circumstances in which the confession came to be made. It by no means follows, as the Court of Criminal Appeal held in [*R v Bass* [1953] 1 All ER 1064, [1953] 1 QB 680], that the jury should be directed by the judge that, if not themselves satisfied that the confession was made voluntarily, they should disregard it. There seems to be no good reason for the accused to have two bites of the cherry in relation to the issue of admissibility. Fortunately, the law does not now seem to be as stated in [*R v Bass*]. There are five pre-Act decisions, two in the Privy Council and three in the Court of Appeal,[3] which expressly or impliedly reject the *Bass* view. Their effect is that the jury should be directed to consider the evidence of the circumstances in which the confession was made in deciding upon the weight and value to be attached to that confession. In other words, the jury may perfectly properly convict on the basis of a confession they believe to have been acquired by, say, oppression, as long as they believe it to be true. None of this powerful authority has been called into question in any reported decision under the 1984 Act, and it seems clear that the law, in this respect, remains unaltered.

[3] *Chan Wei-Keung v R* [[1967] 1 All ER 948], [1967] 2 AC 160; [*Prasad v R* [1981] 1 All ER 319, [1981] 1 WLR 469]; [*R v Burgess* [1968] 2 All ER 54n, [1968] 2 QB 112]; [*R v Ovenell, R v Walter A Cartwright Ltd* [1968] 1 All ER 933, [1969] 1 QB 17]; [*R v McCarthy* (1980) 70 Cr App R 270]. See also [*Ajodha v The State* [1981] 2 All ER 193 at 201, [1982] AC 204 at 221] (*per* Lord Bridge) for a *dictum* to similar effect. An argument that the statement of the law to be found in *McCarthy*, ((1980) 70 Cr App R 270 at 272), supported the *Bass* view was rejected in [*Prasad v R* [1981] 1 All ER 319 at 322, [1981] 1 WLR 469 at 473].'

[14] The law is clear that the judge, and not the jury, must determine disputed facts relating to the question whether a statement can be taken into account as evidence. In *Bartlett v Smith* (1843) 11 M & W 483 at 486, 152 ER 895 at 897 Lord Alderson CB said:

> 'Where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. If the opposite course were adopted, it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not.'

And in *Minter (Pauper) v Priest* [1930] AC 558 at 581–582, [1930] All ER Rep 431 at 440 Lord Atkin said:

> 'The question is one of admissibility of evidence: and on all such questions it is for the judge to decide after hearing, if necessary, evidence on both sides bearing on any contested question of fact relevant to the question.'

If a judge directed a jury that, even if they were satisfied that a confession was true, they must exclude it from their consideration if they concluded that it might have been obtained by oppression, the jury, in my opinion, would not themselves be deciding what weight to give to the confession, rather they would be determining facts relevant to the question whether it could be taken into account as evidence.

[15] Section 82(3) of PACE provides:

> 'Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.'

In *R v Sat-Bhambra* (1989) 88 Cr App R 55 the Court of Appeal held that where a judge had ruled under s 76(2) that a confession was admissible, he could subsequently decide to exclude the confession pursuant to s 82(3) if fresh evidence caused him to change his mind. But such a decision is taken by the judge on an assessment of the facts by him and not by the jury, and is not an exception to the principle that the jury are only concerned with the weight of a confession which is not excluded by the judge from their consideration.

[16] Furthermore the division of functions has, as the Court of Appeal noted in its judgment in the present case, significant advantages for ensuring that justice is done. First, it ensures that if the judge rules that a confession is inadmissible, the jury will never become aware of that confession which, notwithstanding that it is inadmissible, the jury might have difficulty in putting out of their minds in deciding on guilt or innocence if they became aware of it. Secondly, because the evidence given on the voir dire for the defendant is never revealed to the jury, the defendant is not inhibited in the voir dire from giving evidence which supports his case in relation to admissibility but which might well harm his case before the jury on the issue of guilt or innocence. Thirdly, in ruling that a confession is admissible, the judge will give reasons for his decisions which are open to scrutiny by an appellant court.

[17] Mr McNulty's submits that where the defendant alleges that a confession has been obtained by oppression or other wrongful conduct there is a breach of art 6(1) unless the jury is specifically directed that they should reject and disregard the confession unless they are sure that it was not obtained by such conduct. Counsel bases this submission on the argument that unless such a direction is

given the jury, who will be considering the weight to be given to the confession, may decide that the confession is true even if they are not sure that it was not obtained by oppression or other improper conduct and such a decision would constitute a breach of art 6(1) because, even if a confession is true, a defendant has a right not to be compelled to incriminate himself.

[18] As I have observed in para 8 the decision of the European Court in *Saunders v UK* (1997) 2 BHRC 358 at 361 recognises that there are two elements in the protection given to a defendant in respect of a confession. One element is that a confession obtained by oppression may be untrue and therefore reliance on it may lead to a miscarriage of justice. The other element is that, even if the confession is true, in a civilised society a person should not be compelled to incriminate himself against his will. The argument advanced by Mr McNulty is that both elements must be upheld and protected by the jury. He supports this argument by reference to s 6 of the Human Rights Act 1998 which provides:

> '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ...
>
> (3) In this section "public authority" includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.'

Counsel submits that if a jury accepts, and convicts in reliance on, a confession which they are satisfied is true where they are not satisfied that it was not obtained by oppression or other improper conduct, they will be acting in a way which is incompatible with the convention right to a fair trial.

[19] My Lords, I am unable to accept this submission. In my opinion it is artificial to regard the jury as a distinct tribunal or court to be viewed as separate from the trial judge or as a 'public authority' separate and distinct from the court of which they form a part. I consider that in a trial conducted with a jury the 'tribunal established by law' referred to in art 6(1) is the judge and the jury. In this mode of trial under the common law procedure it is the judge who protects the defendant's right not to incriminate himself by being compelled to make a confession (even if it is true) against his will, and the judge also protects the accused against the danger that a confession may go before the jury which may well be untrue because it was obtained by oppression or improper conduct. In addition the jury provide further protection to the defendant because they will be entitled to reject the confession as unreliable on the ground that there is a reasonable possibility that it is untruthful if (contrary to the view which the judge will have formed on the voir dire) they are not satisfied that it was not obtained by oppression or improper conduct. The division of functions, admissibility a question for the judge, weight a question for the jury, has been recognised throughout the common law world.

[20] The European Court has made it clear that it is for national law to lay down rules relating to the admissibility of evidence. In *Schenk v Switzerland* (1991) 13 EHRR 242 at 265–266 the European Court states:

> '46. While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that

unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr. Schenk's trial as a whole was fair.' a

In *Miailhe v France (No 2)* (1997) 23 EHRR 491 at 511 the European Court states:

'43. It is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence. It must nevertheless satisfy itself that the proceedings as a whole were fair, having regard to any possible irregularities before the case was brought before the courts of trial and appeal and checking that those courts had been able to remedy them if there were any. b

44. The Court points out that in the instant case the ordinary courts did, within the limits of their jurisdiction, consider the objections of nullity raised by Mr Miailhe and dismissed them.' c

[21] English law lays down that the decision as to the admissibility of evidence, including the decision whether to exclude it because it was obtained unfairly, is to be taken by the judge alone and that the jury are only concerned with the weight of the evidence. This division of functions was considered and d recognised to be fair by the European Commission of Human Rights in *G v UK* (1983) 35 DR 75. In its decision the Commission stated (at 79–80):

'Nevertheless, where the sole evidence against an accused is acquired in circumstances where he is not provided with access to independent legal advice, and where the accused later denies the propriety of that evidence, the e guarantee of a fair trial contained in Article 6, para. 1 of the Convention requires a procedure whereby the validity of the evidence and its fitness for inclusion in the trial must be examined. In this connection the Commission recalls that, although there are differing practices as to the availability of access to legal advice for persons arrested, but not yet charged with a f criminal offence, in the various member states of the Council of Europe, and, as to the sufficiency of a confession as evidence for a conviction, the European systems of criminal law all incorporate various safeguards; either controlling the manner of obtaining evidence, or for assessing its subsequent probative value at the trial, where a defendant makes a substantial allegation of its impropriety. In the present case the applicant contended at his trial that g his confession statement had not been made voluntarily. In particular, he alleged that he had been denied access to his solicitor *and that he had been threatened by the investigating policeman* ... After hearing the evidence in question in the "voir dire" procedure, the Judge ruled that the applicant's confession statement had been given voluntarily and that the Judges' Rules h had not been infringed during his questioning. This decision was not decisive for the outcome of the applicant's trial, however, since the Judge's ruling extended only to the admissibility of the evidence, the probative value of which remained for the jury to evaluate when the witnesses were examined and cross-examined before them. In these circumstances, the j Commission finds that *the system of guarantees for evaluating the admissibility of challenged evidence,* the probative value of which was subsequently and separately examined by a jury, was such as to provide the applicant, who was represented by counsel throughout the proceedings, with a fair trial within the meaning of Article 6, para. 1 of the Convention.' (My emphases.)

In my respectful opinion the guidance afforded by this decision is not weakened because the applicant did not expressly refer to the right against self-incrimination, but he did allege that the investigating police officer had threatened him. Moreover the Commission stated that it was considering 'the system of guarantees for evaluating the admissibility of challenged evidence'.

[22] Therefore I consider that the division of functions does not offend art 6 of the convention and that the Court of Appeal was right to state in [2002] EWCA Crim 1943 at [34], [2002] All ER (D) 470 (Jul) at [34]:

> 'In a criminal trial, it is the court acting collectively that has the shared responsibility of ensuring a fair trial. The judge and the jury are, by the system employed, given distinct functions to perform which will collectively protect the rights of the person standing trial. In fulfilling their distinct functions, both the judge and the jury must recognise the need to ensure that the accused receives a fair trial but that does not require the jury to take upon themselves functions that the law properly entrusts to the judge. Provided each fulfils its role the accused will receive a fair trial.'

[23] The question certified by the Court of Appeal is whether 'in view of art 6 of the convention', a judge 'is required to direct the jury, if they conclude that the alleged confession may have been [obtained by oppression] they must disregard it'. I would answer this question in the negative because, for the reasons which I have given, I consider that the defendant's right not to incriminate himself against his will is protected by the judge and his right not to be convicted on the basis of a confession which may be untrue because it may have been obtained by oppression is protected both by the judge and also subsequently by the jury if the judge admits the confession.

[24] Therefore I agree with the decision of the Court of Appeal that the last sentence of the judge's direction was a correct reflection of the law. However the Court of Appeal in [39] and [40] of their judgment referred to the last sentence of the direction:

> 'If, on the other hand, you are sure that it is true you may rely on it [even if it was or may have been made as a result of oppression or other improper circumstances].'

And stated that the jury would have received more assistance if the words in square brackets had been omitted. I also agree with this criticism because I think that the words might to some extent deflect the jury from concentrating on the question whether, if there was a reasonable possibility of oppression, it would be safe to rely on the confession as being truthful.

[25] I would add that if, like the majority of the House, I had been of opinion that the judge's direction was a misdirection, I would have agreed with their view that as the appellant had given no evidence before the jury in support of his allegations of oppression, the reliance of the jury on the confession implicit in their verdicts was not unsafe.

[26] For the reasons which I have given I would answer the certified question in the negative and would dismiss the appeal.

LORD PHILLIPS OF WORTH MATRAVERS.

[27] My Lords, for the reasons given by my noble and learned friend Lord Rodger of Earlsferry I also would answer the certified question in the affirmative and dismiss the appeal.

LORD RODGER OF EARLSFERRY.

[28] My Lords, on 23 April 2001 in the Crown Court at Kingston-upon-Thames, the appellant, Ashfaq Ahmed Mushtaq, was convicted of conspiring to defraud (count 1) and of possessing material designed or adapted for the making of a false instrument (count 3). Count 1 related to a conspiracy to defraud the major clearing banks and other financial institutions by manufacturing, selling and distributing counterfeit credit cards. Count 3 related to the appellant having in his custody or control an unembossed and unsigned credit card without lawful authority or excuse. The appellant was acquitted on count 2, which was a more serious charge relating to the possession of the credit card. On 20 April 2001 he was sentenced to a total of three years six months' imprisonment. He has served his sentence.

[29] In the course of the appellant's trial, the prosecution led evidence that various incriminating items with the appellant's fingerprints on them were found at an address at 32 Monega Road, which was said to be the centre of operations of the conspiracy in count 1. There was also evidence that, when the police searched the appellant's house, they found an incomplete credit card in his jacket. That was the subject of count 3. In addition, the prosecution sought to lead evidence of a statement which the appellant made to police officers who interviewed him at Snow Hill Police Station after the search of his home. In the statement the appellant gave a number of answers that amounted to a confession to count 1. He also admitted that he had the credit card, which was the subject of count 3, in his custody and control. His explanation was that he had found it in the street by chance two days before.

[30] The appellant accepted that he had made the statements in the interview. Mr McNulty nevertheless made an application to exclude the evidence of those statements under s 76(2) of the Police and Criminal Evidence Act 1984 (PACE):

> 'If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.'

For the sake of brevity, I shall, for the most part, refer to the means described in paras (a) and (b) of s 76(2) as 'oppression or any other improper means'. Section 82(3) provides:

> 'Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.'

Mr McNulty's submission was that the judge should not allow the appellant's answers to be given in evidence against him on the ground that the admissions were obtained as a result of oppression by police officers.

[31] The background to this submission was the fact that, at the time of his arrest, the appellant's wife was critically ill in hospital. Her condition had caused her to become blind some seven days before. It was the appellant's practice to visit the hospital twice a day to give his wife food, as she had lost the ability to feed herself and she did not trust the hospital staff to provide her with food that complied with her religious requirements. As a result of his arrest early in the morning, the appellant had missed his first visit of the day and did not wish to have his wife told the reason for his absence in case it might cause her anxiety that could aggravate her illness. The appellant had informed the police of these matters at the time of his arrest.

[32] Before determining counsel's application, the judge held a voir dire. The police officers concerned were cross-examined to the effect that they had threatened to refuse bail and to exaggerate his involvement in the crime under investigation if he did not make full admissions in the absence of his solicitor. The appellant also gave evidence. Having considered the evidence, the judge rejected the s 76 submission and ruled that evidence of the interviews should be placed before the jury.

[33] Subsequently, in the trial itself the police officers were examined and cross-examined in front of the jury and the same allegations were put to them as in the voir dire. The appellant did not give evidence.

[34] In his summing up the judge directed the jury in these terms:

> 'The defendant's case is that, although he made the confession, it is not true. And, in deciding whether you can safely rely upon that confession you have to decide two matters. Firstly, did the defendant, in fact, make the confession? Well, that is not in issue in this case, is it?—that he made it? So there is no difficulty about that. But, if you are sure that he did make a confession, then you go on to consider the second question which you may think is the important one: are you sure that the confession is true? And, when deciding this, you should have regard to all the circumstances in which it came to be made and consider whether there were any circumstances which might cast doubt upon its reliability. You should decide whether it should be made voluntary (sic) or was, or may have been, made as a result of oppression or other improper circumstances. Now it is right to say that a number of matters were put to Mr Whittick and Mr Finnegan which amounted, you may think, to very serious allegations of oppression and impropriety. Those allegations were all denied and no evidence whatsoever has been called to support or to substantiate that allegation. Nevertheless, it is for you to assess what weight should be given to the confession. If you are not sure, for whatever reason, that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true, you may rely on it, even if it was, or may have been, made as a result of oppression or other improper circumstances.'

Following the judge's summing up, containing these directions on the confession evidence, the jury convicted the appellant on counts 1 and 3.

[35] The appellant was granted leave to appeal against his conviction on the ground that the last three sentences of the passage from the judge's summing up contained a misdirection in as much as the judge directed the jury that they could proceed in a manner that was incompatible with the appellant's right against self-incrimination under art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). On 30 July 2002 the Court of Appeal (Criminal Division) (Kay LJ, Holland and Andrew Smith JJ) dismissed his appeal ([2002] EWCA Crim 1943, [2002] All ER (D) 470 (Jul)). On 19 September 2003 the court certified the following point of general public importance:

> 'Whether in view of art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, a judge, who has ruled pursuant to s 76(2) of the Police and Criminal Evidence Act 1984 that evidence of the alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have so been obtained, they must disregard it.'

The House granted leave to appeal.

[36] The point of principle raised by the certified question and argued before the House is indeed of general importance. But I cannot help noticing at the outset that, since the appellant did not give evidence and the police officers denied all the suggestions of oppressive behaviour in conducting the interview that were put to them in cross-examination, it appears that there was actually no evidence of oppression before the jury. If that was indeed the position, there was no need for the judge to give any direction on what the jury should do if they found that there was, or might have been, oppression. I return to the point below. Since, however, the question of law has been fully argued, the House should deal with it.

[37] The starting point is the proposition that only admissible evidence should be placed before the jury. Some evidence is, by its very nature, inadmissible in law and so, when objection is taken to the leading of such evidence, the judge can rule on it without having to carry out any factual investigation. Evidence of a confession is different, however, since the admissibility of that evidence depends on whether the confession was voluntary. The position is now regulated by s 76(2) of PACE. Where the admissibility of a confession is challenged, the judge cannot allow it to be given in evidence against the defendant except in so far as the prosecution proves to the judge beyond reasonable doubt that it was not obtained by oppression or other improper means. Therefore, where the defendant objects to the alleged confession being given in evidence, witnesses are examined on a voir dire, in the absence of the jury, to establish the circumstances. The appropriate prosecution witnesses are examined and cross-examined on the matter and the defendant himself may give evidence and be cross-examined on it. The judge then decides whether to admit or exclude the confession. If the confession is excluded, the jury hears nothing about it. Where the judge decides that the confession is to be given in evidence, if the defendant's counsel wishes, the circumstances in which it was obtained will again be explored in evidence before the jury so that they can decide what weight or value to attach to it: see

R v Murray [1950] 2 All ER 925 at 927, [1951] 1 KB 391 at 393 per Lord Goddard CJ, *Chan Wei-Keung v R* [1967] 1 All ER 948 at 954, [1967] 2 AC 160 at 172 per Lord Hodson. There are sometimes greater or lesser differences between the evidence as led and considered by the judge in the voir dire and the evidence given in the trial which the jury have to consider.

[38] These aspects of the system as it presently operates are not in dispute. Similarly, the advantages of that system for a defendant are not in doubt. Where the judge decides to exclude the confession, the voir dire procedure avoids any risk that the jury might be prejudiced by hearing disputed evidence about the defendant having made a confession, even if they were subsequently told to disregard it. Often the only person who can speak to the circumstances, apart from the police officers, will be the defendant. The voir dire system allows him to give his evidence on this limited but important matter as to the admissibility of the confession, without infringing his right to elect not to give evidence in the trial of the general issue: see *Wong Kam-ming v R* [1979] 1 All ER 939 at 943–944, [1980] AC 247 at 257 per Lord Edmund Davies, citing with approval *Chitambala v R* [1961] R & N 166 at 169–170 per Clayden AFCJ. Moreover, even where the confession is admitted, the circumstances can be explored again in evidence before the jury who can be invited to take them into account in deciding the weight and value to be attached to the statement. To that extent, at least, the defendant gets a second bite at the cherry.

[39] The appellant submits, however, that the present practice is defective because the jury is limited to considering the circumstances for the purpose of deciding the weight and value to be attached to the confession. Rather, they should be directed that, if, having heard all the evidence, they find that the confession was, or may have been, obtained by oppression or any other improper means, they must disregard it.

[40] For the Crown Mr Perry submitted that such a direction would amount to an invitation to the jury to determine afresh the admissibility of the evidence of the confession. As was recognised by Parliament in enacting s 76(2), that question was one for the judge alone. Before admitting the confession, he had to be satisfied to the criminal standard that it had not been obtained by oppression or other improper means. This was a tougher test than in many comparable systems. Moreover, if, after the judge had made his ruling in favour of admitting the evidence, circumstances emerged which led him to change his mind, then he had power, under s 82(3) of PACE, to take such steps as were necessary to prevent injustice. As Lord Lane CJ explained in *R v Sat-Bhambra* (1989) 88 Cr App R 55 at 62:

> 'He may, if he thinks that the matter is not capable of remedy by a direction, discharge the jury; he may direct the jury to disregard the statement; he may by way of direction point out to the jury matters which affect the weight of the confession and leave the matter in their hands.'

Given the available safeguards, the approach advocated by the appellant was unnecessary and might cause difficulties where a co-defendant sought to rely on the confession. More importantly, it was wrong in principle. In a trial, the role of the jury was to determine the facts on the basis of the evidence that had been admitted, not to determine whether the evidence should have been presented to them. More particularly, they were concerned with determining what weight and value they should attribute to confession evidence, rather than with deciding whether it should have been admitted in the first place. Therefore, if, having

considered all the circumstances, including any which pointed to the confession having been obtained by oppression or other improper means, the jury decided that what the defendant had said was true, they should indeed be free to take it into account. Directing the jury that they had to ignore such evidence would perplex them and run counter to the aim that verdicts should be based on the real facts of the case as revealed by the evidence.

[41] My Lords, when considering the competing submissions, it is as well to bear in mind that the direction proposed by the appellant would be unlikely to affect the outcome of many cases, precisely because the test applied by the judge under s 76(2) is so strict. The judge can admit confession evidence only where he is satisfied beyond a reasonable doubt that it was not obtained by oppression or any other improper means. If there is anything in the evidence that gives rise to a reasonable doubt, he must exclude the confession. So the proposed direction would bite only where, despite the judge's view that, beyond a reasonable doubt, the confession was not obtained by oppression or any other improper means, the jury decided that it was, or might have been, obtained in that way. This is not likely to happen in a large proportion of cases.

[42] It is important to notice that the Crown argument does not depend on any supposition that the jury will have come to a mistaken view as to the way that the confession was obtained. On the contrary, the Crown's contention is that in cases where the jury have *rightly* concluded that the confession was obtained by oppression or other improper means, they are to be told that they can still rely on it if they think that it is true.

[43] Mr Perry argued that the appellant's proposed approach would involve the jury in decisions as to the admissibility of evidence. That argument is not, strictly speaking, accurate and, put that way, it may tend to conceal the true nature of the alteration in the roles of the judge and jury that may be involved. The decision as to whether the evidence should be admitted is for the judge and for the judge alone. It is taken by him at the end of the voir dire. If he rules that the confession should be given in evidence, the relevant evidence is admitted and led by the prosecution. The jury play no part in that step. In an ideal world, perhaps, the judge's decision to admit the confession would mean that the jury were not concerned at all with the circumstances in which it had been made. But, as Lord Justice Clerk Thomson observed in *Chalmers v HM Advocate* 1954 JC 66 at 83, this seems to be a situation where logic must yield, since the jury cannot be asked to accept as an item of evidence a statement made by an accused, while being prevented from considering the circumstances under which it was made. So the jury must be able to take account of those circumstances in deciding what weight and value to attach to the confession. The appellant wants to go a significant step further. He seeks a direction that, if the jury come to the conclusion on the evidence that the confession was, or may have been, obtained by oppression or some other improper means, they *must* disregard it. In so far as the direction is one to disregard the evidence that has been admitted, it is no different from the kind of direction which, very importantly, Lord Lane CJ envisaged that the judge might give if, after admitting the evidence of a confession, he changed his mind and directed the jury to disregard it: see *R v Sat-Bhambra* (1989) 88 Cr App R 55 at 62. The difference is, however, that the trigger for the proposed direction is not the judge's but the jury's assessment of the circumstances in which the confession was obtained. Moreover, the effect of

the proposed direction is that the jury must disregard a confession which has been admitted by the judge and given in evidence and which they might be disposed to accept as true. Viewed in that way, the proposed direction encroaches upon, rather than increases, the jury's freedom to assess and deploy the evidence placed before them.

[44] At various points during the hearing before the House, it was emphasised that under the present system if a jury think that a confession was, or may have been, obtained by oppression, they are unlikely to accord it any weight or value. So there was no real difference between a situation where a jury give no weight or value to a confession in this way and one where they are told that they must disregard it. For all practical purposes, the present system achieved what the appellant was seeking.

[45] That argument falls short if the rule against admitting an involuntary confession is not based simply on its potential unreliability. And it is indeed clear that, according to the more modern analysis at least, the rule rests on a rather wider basis. Giving the opinion of the Privy Council in *Lam Chi-ming v R* [1991] 3 All ER 172 at 178, [1991] 2 AC 212 at 220, Lord Griffiths said:

> 'Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary.'

Therefore, even if a jury would be unlikely to rely on a confession which they considered had been obtained by compulsion, the question still remains whether, having regard to the principle that a man cannot be compelled to incriminate himself and having regard to the importance attached to proper behaviour by the police, the jury are *entitled* to rely on a confession which they consider was, or may have been, obtained by oppression or other improper means.

[46] Since the three considerations mentioned by Lord Griffiths lie behind s 76(2), it respectfully seems to me that it is inconsistent with the very purpose of that provision to affirm that the jury are entitled to rely on a confession in such circumstances. Under s 76(2), if an objection to a confession is raised, the judge must exclude it unless he is satisfied beyond a reasonable doubt that it was not obtained by oppression or any other improper means. The evidence is excluded because, for all the kinds of reasons explained by Lord Griffiths, Parliament considers that it should not play any part in the jury's verdict. It flies in the face of that policy to say that a jury are entitled to rely on a confession even though, as the ultimate arbiters of all matters of fact, they properly consider that it was, or may have been, obtained by oppression or any other improper means.

[47] In my view, therefore, the logic of s 76(2) of PACE really requires that the jury should be directed that, if they consider that the confession was, or may have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it. In giving effect to the policy of Parliament in this way, your Lordships are merely reverting to the

approach laid down by the Court of Criminal Appeal (Lord Goddard CJ, Byrne and Parker JJ) in *R v Bass* [1953] 1 All ER 1064, [1953] 1 QB 680. Giving the judgment of the court, Byrne J ([1953] 1 All ER 1064 at 1066, [1953] 1 QB 680 at 684) quoted the well-known words of Lord Sumner in *Ibrahim v R* [1914] AC 599 at 609–610, [1914–15] All ER Rep 874 at 877:

> 'It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE.'

He then added:

> 'It is to be observed, as this court pointed out in *R v Murray* ([1950] 2 All ER 925, [1951] 1 KB 391), that, while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner, and he should further tell them that, if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it.' (See [1953] 1 All ER 1064 at 1066, [1953] 1 QB 680 at 684.)

It seems clear that the court saw the direction to disregard the confession in such circumstances as part and parcel of the jury's exercise of attributing the appropriate weight to the confession: in circumstances where they found that it had not been voluntary, for reasons going back to the time of Lord Hale, they should give it no weight and should disregard it.

[48] I recognise, of course, that in adopting this approach, the House is departing from the law as laid down by the Privy Council in *Chan Wei-Keung v R* [1967] 1 All ER 948, [1967] 2 AC 160 where the judgment of Byrne J in *R v Bass* was first criticised through the medium of the judgments in the High Court of Australia in *Basto v R* (1954) 91 CLR 628 and then disapproved. I recognise, equally, that the approach in *Chan Wei Keung v R* has not hitherto given rise to difficulties in practice. Nevertheless, for the reasons which I have given, it appears to me that the approach which I have indicated is required in a system which contains s 76(2) of PACE.

[49] If there were any doubt about the proper approach, however, it would be removed by art 6(1) of the convention, the relevant part of which provides:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

It is well known that among the rights implied into art 6(1) is a right against self-incrimination. It is equally well established that this implied right may be

modified or restricted to serve a legitimate aim in the public interest. *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681 may serve as authority for both propositions.

[50] At the hearing of the appeal the Crown did not dispute the existence of the implied right against self-incrimination under art 6(1), nor did they argue that, in the present case, it should yield to any countervailing public interest. Rather, the Crown's contention was that the convention right had been fully respected by the operation of ss 76(2) and 82(3) which gave the judge full power to prevent the jury from using a confession that might have been obtained in violation of the right against self-incrimination, while leaving the evaluation of the evidence to the jury. When the judge and jury performed their respective, distinct, roles in this way, the court as a whole complied with the requirements of art 6(1).

[51] In support of his submission Mr Perry referred to the decision of the European Commission of Human Rights in *G v UK* (1983) 35 DR 75, which antedates s 76(2) of PACE. The applicant went to a police station along with his girlfriend who was to be interviewed on an unspecified matter. He was arrested and questioned about a burglary. He made a confession, but he claimed that he had done so because the police had refused to let him see his solicitor and had eventually said that he would not be allowed to see him until he had made a confession. At the applicant's trial, the evidence relating to the obtaining of the confession was heard by the judge on a voir dire. At the end of the voir dire the judge ruled that the applicant's confession statements had been given voluntarily and that the judges' rules had not been breached. He accordingly admitted them. The Commission held that there had been no breach of art 6(1). Referring to the judge's decision to admit the evidence, the Commission said (at 80):

> 'This decision was not decisive for the outcome of the applicant's trial, however, since the Judge's ruling extended only to the admissibility of the evidence, the probative value of which remained for the jury to evaluate when the witnesses were examined and cross-examined before them. In these circumstances, the Commission finds that the system of guarantees for evaluating the admissibility of challenged evidence, the probative value of which was subsequently and separately examined by a jury, was such as to provide the applicant, who was represented by counsel throughout the proceedings, with a fair trial within the meaning of Article 6, para. 1 of the Convention.'

As can be seen from this passage, the question which the Commission were considering was whether the procedure adopted at the trial provided an adequate guarantee for evaluating the admissibility of challenged evidence. They decided that it did. The applicant had not advanced any argument relating to the right against self-incrimination implied in art 6(1). This is perhaps not surprising since the existence of the implied right only really became clear some years later in *Funke v France* (1993) 16 EHRR 297, *Murray v UK* (1996) 22 EHRR 29 and *Saunders v UK* (1997) 2 BHRC 358. However that may be, the fact is that the Commission did not deal with the right against self-incrimination and so the decision does not afford guidance in the circumstances of the present case.

[52] Before the Court of Appeal, and in his written case before the House, Mr McNulty sought to argue that the jury, as a separate entity, fell to be regarded as a 'public authority' for the purposes of s 6(3) of the 1998 Act. It is, however,

for the court, comprising both the judge and jury, that the United Kingdom government is responsible in international law before the European Court. This can be seen from the well-known cases where the European Court has considered allegations of bias on the part of a jury and the way that the judge dealt with them. It is accordingly appropriate to treat the court made up of both judge and jury as the public authority for the purposes of s 6: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2003] 3 All ER 1213, [2004] 1 AC 546.

[53] In terms of s 6(1) of the 1998 Act it is therefore unlawful for the judge and jury to act in a way which is incompatible with a defendant's right against self-incrimination as implied into art 6(1). Here the judge directed the jury that, if they were sure that the appellant's confession was true, they might rely on it, 'even if it was, or may have been, made as a result of oppression or other improper circumstances'. This was a direction that, in reaching their verdict and so, for art 6(1) purposes, determining the criminal charges against the appellant, the jury were entitled to take into account a confession which they considered was, or might have been, obtained by oppression or any other improper means in violation of his right against self-incrimination. Such a direction was an invitation to the jury to act in a way that was incompatible with the appellant's right against self-incrimination under art 6(1). As such, the direction was itself incompatible with that right.

[54] It follows, both on the basis of s 76(2) when viewed without regard to the convention and on the basis of the appellant's art 6(1) convention right against self-incrimination, that the judge misdirected the jury when he said that, if they were sure that the confession was true, they might rely on it, even if it was, or might have been, made as a result of oppression or other improper circumstances.

[55] It is only fitting to acknowledge that, in giving this direction, the judge was following the guidance from the Judicial Studies Board that was current at the time. That guidance was modified to reflect the comments of the Court of Appeal in this case. Clearly, neither version will afford appropriate guidance in the light of the decision by the House today. Having indicated the approach which should be applied in principle, I would not usurp the function of the Judicial Studies Board by attempting to draft model directions to give effect to that approach. I would only observe that there is often no dispute that, if what the defendant said happened did indeed happen, the confession should be excluded under one or other of the paragraphs in s 76(2) of PACE. The only real dispute is as to whether the defendant's account as found in the evidence is true. In such a clear-cut case it may well be enough for the judge to indicate that, if the jury consider that the confession was, or may have been, obtained in the way described by the defendant, they must disregard it.

[56] Mr McNulty submitted that, if the House reached the view that there had been a misdirection in relation to the confession, the appellant's conviction could not be regarded as safe and should accordingly be quashed. Like the Court of Appeal, I would reject that submission.

[57] As I mentioned at the outset, this was a case where the appellant chose not to give evidence. The only defence evidence was about his wife's illness: it came from her and, in the form of a statement, from a consultant neurologist. There was accordingly no evidence from the appellant or from any witness for

the defence about the circumstances in which he had come to make the confession. The only evidence about the interview in which he made the confession was from the police officers, Det Con Whittick and Det Sgt Finnegan, and from the records relating to the interview which gave the times when various stages began and ended. Many allegations of improper conduct were put to the officers in cross-examination: for example, that they had coached the appellant as to what he should say in the 15-minute gap before the interview began; that they had threatened to make out that the appellant was the Mr Big of the organisation and that he would get a heavier sentence; that they had threatened to object to bail for the appellant, with all the particular repercussions arising from his wife's illness. It would be fruitless to narrate all of the allegations since they were all denied, despite what the judge described as 'vigorous' cross-examination. In his summing up the judge went through the evidence of Det Con Whittick and Det Sgt Finnegan in considerable detail, but at the end he said this:

> 'Well, I have gone through that in some detail because it is right that you should be reminded of the evidence and in doing so I have referred to threats and inducements allegedly made and given by Mr Whittick and allegedly permitted by Sgt Finnegan and those allegations were very forcefully put to the officers and they were very strenuously denied, you may think. It is easy enough, you may think, to make allegations of this kind, but the question you have to ask yourselves here is: where is the evidence to support them? The only evidence called for the defence, apart from a non-controversial statement that was read out, was that of Mrs Mushtaq and, of course, she was not able to give evidence as to threats or inducements, was she? So ask yourselves: where is the evidence? Of course, the prosecution have to prove their case, but there it is.'

[58] Mr McNulty did not challenge this passage in the summing up. What it shows is that in this case there was no evidence whatever of oppression, or of any other improper means, for the prosecution to disprove or for the jury to consider. The direction to the jury as to what they might do if they found that the confession had been obtained by oppression or any other improper means was, accordingly, unnecessary and unduly favourable to the appellant. In those circumstances, the fact that the judge did not go further in his direction cannot possibly affect the fairness of the appellant's trial or the safety of his conviction.

[59] For these reasons, I would answer the certified question in the affirmative and dismiss the appeal.

LORD CARSWELL.

[60] My Lords, I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hutton and Lord Rodger of Earlsferry. I am in full agreement with the conclusion which they have reached, that the appeal should be dismissed, but because they have followed slightly differing routes to that conclusion and would give different answers to the certified question, I wish to express my own reasoning in short compass.

[61] It has long been recognised that the content of a confession made by an accused person has to be evaluated with great care in order to determine whether it can safely be accepted as an admission against his interest. The approach of the law to that evaluation has varied over the years and the rules applied by the

courts have to be kept under review to ensure that they reflect the standards accepted by each generation. a

[62] It has to be borne in mind that a confession which has been properly obtained may nevertheless be untrue. The unhappy example of Judith Ward (*R v Ward* [1993] 2 All ER 577, [1993] 1 WLR 619) serves as a reminder of this. Conversely, if a confession has been obtained by means which the law condemns as improper, it is quite possible that it may nevertheless be true—a fact b which would cause no surprise to anyone with experience of criminal practice. Improper compulsion creates a risk, however, that the confession may be untrue, which makes it unsafe to rely upon it, and the more considerable the compulsion or oppression, the greater the risk that the confession is unreliable. One may add to this risk the two further factors which have influenced the law in rejecting c confessions obtained by compulsion, the right against self-incrimination and the need to exercise a degree of controlling discipline over undesirable police practices.

[63] The stage which the long process of development of English criminal law governing confessions has reached is the statutory provision contained in s 76(2) d of the Police and Criminal Evidence Act 1984 (PACE), which is mirrored in the Police and Criminal Evidence (Northern Ireland) Order 1989, art 74(2), SI 1989/1342 (NI 12):

> 'If, in any proceedings where the prosecution proposes to give in evidence e a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, f
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.' g

For convenience I shall use the term 'oppression' in this opinion as a compendious term to include all of the exclusionary matters set out in paras (a) and (b) of s 76(2).

[64] Oppression is not defined in PACE but its meaning has been discussed in a number of decided cases, summarised in *Archbold, Criminal Pleading, Evidence and Practice* (2005 edn) paras 15-358–15-360. For present purposes I am content to h use the definition propounded by Lord MacDermott in an address to the Bentham Club in 1968 and adopted by the Court of Appeal in *R v Prager* [1972] 1 All ER 1114 at 1119, [1972] 1 WLR 260 at 266: j

> '... questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have stayed silent.'

[65] Central to the issues in this appeal is a proper understanding of the respective roles of the judge and jury in dealing with evidence which the prosecution seeks to adduce of confession statements made by accused persons. As Lord Hutton has emphasised throughout his opinion, admissibility of a confession is a matter for the judge, while the jury's concern is with the weight to be given to its contents. I do not understand Lord Rodger to cast any doubt on the universality of application of this principle.

[66] I fully agree with the conclusion reached by both Lord Hutton and Lord Rodger, affirming that contained in [41] of the judgment of the Court of Appeal [2002] EWCA Crim 1943, [2002] All ER (D) 470 (Jul), that the verdict was not unsafe and that the appeal should accordingly be dismissed. The issue of more immediate importance, which is defined in the certified question, is the direction which a trial judge should give a jury in a case such as the present, and I shall focus on that issue.

[67] The certified question is posed in the following terms:

> 'Whether in view of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), a judge who has ruled pursuant to s 76(2) of the Police and Criminal Evidence Act 1984 that evidence of the alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have been so obtained, they must disregard it.'

In order to answer this it is necessary to consider, not only the direction given by the judge, which derives from the specimen directions recommended by the Judicial Studies Board, but the type of direction which has found favour in previous decided cases. One must then determine whether any of these fully satisfies the requirements of the common law, s 76(2) of PACE and art 6(1) of the convention. I may say at once that, for the reasons which I shall give, I consider that the Judicial Studies Board direction, both in the form adopted by the judge and in its amended form, should not in my view be regarded as sufficient to meet those requirements. I also think that the decisions of the Privy Council in *Chan Wei-Keung v R* [1967] 1 All ER 948, [1967] 2 AC 160 and the High Court of Australia in *Basto v R* (1954) 91 CLR 628 should no longer be followed. In its narrowest terms, I think that the question is whether it is sufficient for a judge to warn the jury that they may consider that they should give no weight to a confession and disregard it if they conclude that it may have been obtained as the result of oppression; or whether the judge must go further and direct them that if they so conclude they are *required* to disregard it.

[68] In my opinion the requirements of the common law, if they stood alone, would be satisfied by returning to the wording of the direction set out in the decision of the Court of Criminal Appeal in *R v Bass* [1953] 1 All ER 1064, [1953] 1 QB 680, in which Byrne J, giving the judgment of the court, stated:

> '... while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as

stated by Lord Sumner [in *Ibrahim v R* [1914] AC 599 at 609–610, [1914–15] All ER Rep 874 at 877], and he should further tell them that, if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it.' (See [1953] 1 All ER 1064 at 1066, [1953] 1 QB 680 at 684.)

In order to accommodate to the wording of s 76(2) of PACE a reference to oppression would have to be substituted for the word 'voluntarily'.

[69] One may observe that the *Bass* direction is not expressed in mandatory terms, and it cannot in my opinion be said that the common law authorities require a judge to go so far as to direct the jury that they *must* give such a confession no weight and disregard it. It was argued on behalf of the appellant that such a mandatory direction is required both by s 76(2) and by art 6 of the convention. I would not myself accept that s 76(2) requires the judge to direct the jury to disregard a confession which was or may have been obtained by oppression, as Lord Rodger has stated in [47], above. It seems to me that the reference to the court in that subsection is intended to mean the judge. I therefore am of opinion that s 76(2) does not deal with the jury's function in considering the weight to be attached to a confession.

[70] I therefore turn to consider art 6(1) of the convention, which requires a fair hearing (itself a basic principle of the common law), and to the jurisprudence of the European Court of Human Rights (the European Court) which expands on the requirements of that provision. Section 6(1) of the 1998 Act makes it unlawful for a public authority, which is defined in s 6(3) as including a court or tribunal, to act in a way which is incompatible with a convention right.

[71] In the case law of the European Court, as developed in its decisions in *Funke v France* (1993) 16 EHRR 297, *Murray v UK* (1996) 22 EHRR 29 and *Saunders v UK* (1997) 2 BHRC 358, it has become accepted that the right not to incriminate oneself is a constituent element of a fair procedure under art 6(1)—see, in particular para 69 of the court's judgment in *Saunders v UK* (1997) 2 BHRC 358 at 374. This principle is, of course, clearly recognised as part of the common law: see, eg, *Lam Chi-ming v R* [1991] 3 All ER 172 at 178, [1991] 2 AC 212 at 220 per Lord Griffiths.

[72] The issue then resolves itself into asking whether in the light of that principle it is compatible with the convention right to a fair hearing contained in art 6(1) for the possibility to be left open that the jury may take into account a confession made by an accused person and rely upon it in assessing his guilt on a charge of a criminal offence if they consider that the content is true, notwithstanding the fact that they consider that it has been or may have been obtained as the result of oppression.

[73] My Lords, I find myself impelled to the conclusion that it is not so compatible. When a confession has been obtained by oppression, that is a form of the compulsion which the European Court has stated firmly constitutes a breach of the right of an accused person not to incriminate himself. If, as the law holds, it is open to a jury to accept and act upon a confession in circumstances where it has been or may have been obtained as a result of oppression, then it seems to me inescapable that that is incompatible with his art 6 rights. It must follow that the direction given by the judge in the present case and the amended model direction recommended by the Judicial Studies Board will not suffice to meet these requirements.

[74] I do not consider that this conclusion constitutes an invasion of the principle that admissibility of a confession is a matter solely for the judge and that the jury is not concerned with that, but only with the weight to be attached to it. I would regard the court for the purposes of s 6(3)(a) of the 1998 Act as being a composite of the judge and the jury, each with its own functions. If the result of the process of discharge of its function by either constituent element is the use against an accused person of a confession obtained as a result of oppression, that is incompatible with his art 6 rights. Such a conclusion in my view does not invest the jury with any function in relation to admissibility of the confession and leaves the respective roles of the judge and jury distinct and inviolate. If a piece of evidence is inadmissible, it is ruled out and is not part of the evidence in the case. As such it will not go before the jury at all and will not be considered by it. A confession of the nature with which we are concerned will have been admitted by the judge's prior ruling and so does form part of the evidence placed before the jury and considered by them. If they consider that it may have been obtained by oppression, a view which they are entitled to adopt notwithstanding the judge's earlier ruling, then by virtue of the judge's direction it must be disregarded and may not be given any weight. That does not in my opinion amount to giving the jury a say in the admission of evidence or detract from the integrity of the principle that it is the province solely of the trial judge.

[75] I therefore consider that the judge should direct the jury in more prescriptive terms than the *Bass* direction, to the effect that unless that they are satisfied beyond reasonable doubt that the confession was not obtained as a result of oppression, they must disregard it. I would answer the certified question in the affirmative, although, for the reasons I have given, I would dismiss the appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Mark v Mark

[2005] UKHL 42

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD PHILLIPS OF WORTH MATRAVERS AND BARONESS HALE OF RICHMOND

23, 24 MAY, 30 JUNE 2005

Domicile – Acquisition of domicile of choice – Unlawful residence – Whether person whose residence unlawful capable of acquiring domicile of choice – Domicile and Matrimonial Proceedings Act 1973, s 5(2).

Divorce – Jurisdiction – Habitual residence – Unlawful residence – Whether person whose residence unlawful capable of being habitually resident – Domicile and Matrimonial Proceedings Act 1973, s 5(2).

The husband and wife were both Nigerian nationals, each having a domicile of origin in Nigeria. The wife had been granted multiple entry visas which allowed her to enter the United Kingdom for periods of up to six months at a time until March 1997. In 1993 the husband was exiled from Nigeria, and the parties established a matrimonial home in the United Kingdom. He was granted a work permit expiring in April 1998 and given leave to remain until then. The wife at first relied on her multiple entry visa to enter and leave the United Kingdom but was eventually given limited leave to remain until April 1998 as the dependant spouse of a work permit holder. Shortly before that date the husband applied for and was granted indefinite leave to remain. The wife subsequently became an overstayer, and her continued presence in the United Kingdom was an offence under the Immigration Act 1971. The husband returned to Nigeria in September 1998. In July 2000 the wife issued a divorce petition and application for ancillary relief. Section 5(2)[a] of Domicile and Matrimonial Proceedings Act 1973 provided that the court had jurisdiction to entertain proceedings for divorce if, but only if, either of the parties to the marriage was domiciled in England and Wales on the date when the proceedings were begun or was habitually resident in England and Wales throughout the period of one year ending with that date. In her petition the wife relied only upon her habitual residence to found the jurisdiction of the court, but her petition was later amended to include a claim that she had acquired a domicile of choice. The husband applied unsuccessfully for a stay of the English proceedings on the basis that he had initiated proceedings in Nigeria. He then took the point that the English court had no jurisdiction under s 5(2) of the 1973 Act because the wife's residence in the United Kingdom had been unlawful. On the trial of that issue, it was held that the wife could not rely upon her unlawful presence as a basis for establishing habitual residence in England and Wales, but that she could rely upon it as a basis for the acquisition of a domicile of choice, and accordingly the court had jurisdiction. The Court of Appeal dismissed the husband's appeal, holding that the wife had not only acquired a domicile of choice in England and Wales before July 2000 but also had been habitually resident throughout the requisite period. The husband appealed.

a Section 5, so far as material, is set out at [26], below

Held – (1) Residence for the purpose of s 5(2) of the 1973 Act need not be lawful residence. The purpose of the 1973 Act was to provide an answer to the question of when the connection with England and Wales of the parties and their marriage was sufficiently close to make it desirable that domestic courts should have jurisdiction to dissolve the marriage. In the context of the 1973 Act the question of whether the residence was habitual was a factual one; ordinary or habitual residence referred to a person's abode in a particular place or country which he had adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. In the instant case, the wife was habitually resident for the purpose of the divorce proceedings (see [1]–[3], [14], [27], [33]–[36], below); *Shah v Barnet London BC* [1983] 1 All ER 226 applied.

(2) There was no reason in principle why a person whose presence was unlawful could not acquire a domicile of choice in England and Wales. The concept of domicile was not that of a benefit to the propositus but was a neutral rule of law for determining that system of personal law with which the individual had the appropriate connection. Recognising the connection despite the illegality of a person's presence did not therefore offend against any general principle that a person could not be permitted to acquire a benefit from his own criminal conduct. There was no reason of public policy to deny the acquisition of a domicile of choice in such cases. Residence and the formation of the animus manendi were issues of fact. A person could be resident in a place where he had no right to be and could also form an intention to remain in a place despite considerable uncertainty as to whether that would be possible. The intention was required only to be bona fide in the sense of being genuine and not pretended for some other purpose. In the instant case the wife had acquired a domicile of choice in England and Wales by the time that she presented her petition for divorce. The appeal would therefore be dismissed (see [1]–[3], [13], [14], [44]–[47], [49], [51], [52], below).

Notes

For domicile of choice, and for residence in general, ordinary residence, and habitual residence, see 8(3) *Halsbury's Laws* (4th edn reissue) paras 41–43 and paras 57–59.

Section 5(2) of the Domicile and Matrimonial Proceedings Act 1973 was repealed and substituted by the Family Law Act 1996, s 66(1), (3), Sch 8, Pt I, para 26, Sch 10, with effect from 1 March 2001, subject to savings in s 66(2) of, and para 5 of Sch 9 to, the 1996 Act.

For the Domicile and Matrimonial Proceedings Act 1973, s 5, see 27 *Halsbury's Statutes* (4th edn) (2000 reissue) 1031.

Cases referred to in opinions

Abdul Manan, Re [1971] 2 All ER 1016, [1971] 1 WLR 859, CA.
Adlam v Law Society [1968] 1 All ER 17, [1968] 1 WLR 6.
Bell v Kennedy (1868) LR 1 Sc & Div 307, HL.
Boldrini v Boldrini and Martini [1932] P 9, [1931] All ER Rep 708.
Cruh v Cruh [1945] 2 All ER 545.
Donelly, Ex p 1915 WLD 29, Witwatersrand Local Div.
Gordon, Ex p 1937 WLD 35, Witwatersrand Local Div.

Ikimi v Ikimi [2001] EWCA Civ 873, [2001] 2 FCR 385, [2002] Fam 72, [2001] 3 WLR 672.
IRC v Lysaght [1928] AC 234, [1928] All ER Rep 575, HL.
Jablonowski v Jablonowski (1972) 28 DLR (3d) 440, Ont HC.
Levene v IRC [1928] AC 217, [1928] All ER Rep 746, HL.
Lim v Lim and Titcumb [1973] VR 370, Vic SC.
May v May and Lehman [1943] 2 All ER 146.
Parker v Principal Immigration Officer [1926] CPD 255, SA SC.
Puttick v Attorney General and Puttick [1979] 3 All ER 463, [1980] Fam 1, [1979] 3 WLR 542.
R v Secretary of State for the Home Dept, ex p Margueritte [1982] 3 All ER 909, [1983] QB 180, [1982] 3 WLR 754, CA.
Salacup, In the marriage of (1993) 17 Fam LR 141, Aus Fam Ct.
Shah v Barnet London BC [1983] 1 All ER 226, [1983] 2 AC 309, [1983] 2 WLR 16, HL.
Smith v Smith 1962(3) SA 930, Fed SC.
Solomon v Solomon (1912) 29 WN (NSW) 68.
Szechter (orse Karsov) v Szechter [1970] 3 All ER 905, [1971] P 286, [1971] 2 WLR 170.
Udny v Udny (1869) LR 1 Sc & Div 441, HL.
Wood v Wood (1977) 4 RFL (2d) 182, PEI SC.
Zanelli v Zanelli (1948) 64 TLR 556, CA.

Cases referred to in list of authorities

Ah Yin v Christie (1907) 4 GLR 1428, Aus HC.
Airey v Ireland (1979) 2 EHRR 305, [1979] ECHR 6289/73, ECt HR.
Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FCR 385.
Armstrong v Armstrong [2003] EWHC 777 (Fam), [2003] 2 FLR 375.
Ashingdane v UK (1985) 7 EHRR 528, [1985] ECHR 8225/78, ECt HR.
Attias v Pons (1977) 2 RFL (2d) 318, Que CA.
Bashir v Bashir (1 February 1995), Aus Fam Ct.
Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp [1981] 1 All ER 289, [1981] AC 909, HL.
C v S (minor: abduction: illegitimate child) [1990] 2 All ER 961, sub nom *Re J (a minor) (abduction: custody rights)* [1990] 2 AC 562, [1990] 3 WLR 492, HL.
Cabral v State Board of Control (1980) 112 Cal App 3d 1012, Cal CA.
Cachia v Faluyi [2001] EWCA Civ 998, [2002] 1 All ER 192, [2001] 1 WLR 1966.
Canea Catholic Church v Greece (1997) 27 EHRR 521.
Chen v Secretary of State for the Home Dept Case C-200/02 [2005] All ER (EC) 129, [2005] QB 325, [2004] 3 WLR 1453, ECJ.
Craignish, Re, Craignish v Hewitt [1892] 3 Ch 180.
De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, [1998] 3 WLR 675, PC.
Di Paolo v Office National de l'Emploi Case 76/76 [1977] ECR 315.
Dick, marriage of, Re (1993) 15 Cal App 4th 144, Cal CA.
DPP v Jones [1999] 2 AC 240, [1999] 2 All ER 257, [1999] 2 WLR 625, HL.
F (a minor) (child abduction), Re [1992] 1 FLR 548, CA.
Fasbender v A-G, Kramer v A-G [1922] 2 Ch 850.
Ferrier-Watson v McElrath (2000) Fam LR 169, Aus Fam Ct.
Fogarty v UK (2001) 12 BHRC 132, ECt HR.
Forbes v Forbes (1854) Kay 341, 69 ER 145.

Fuld (decd) (No 3), In the estate of, Hartley v Fuld [1965] 3 All ER 776, [1968] P 675, [1966] 2 WLR 717.
Garthwaite v Garthwaite [1964] 2 All ER 233, [1964] P 356, [1964] 2 WLR 1108, CA.
Gateshead Metropolitan BC v L [1996] 3 All ER 264, [1996] Fam 55, [1996] 3 WLR 426.
Gingi v Secretary of State for Work and Pensions [2001] EWCA Civ 1685, [2002] 1 CMLR 587.
Gofor Investments Ltd v Roberts (1975) 29 P & CR 366, CA.
Goode v Martin [2001] EWCA Civ 1899, [2002] 1 All ER 620, [2002] 1 WLR 1828.
Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve Case C-184/99 [2003] All ER (EC) 385, [2002] ICR 566, [2001] ECR I-6193, ECJ.
Holman v Johnson (1775) 1 Cowp 341, 98 ER 1120, [1775–1802] All ER Rep 98.
Kapur v Kapur [1984] FLR 920.
Knoch v Bundesanstalt für Arbeit Case C-102/91 [1992] ECR I-4341, ECJ.
Le Mesurier v Le Mesurier [1895] AC 517, [1895–9] All ER Rep 836, PC.
Lord v Colvin (1859) 4 Drewry 366, 62 ER 141.
M (Abduction: Habitual Residence), Re [1996] 2 FCR 333, CA.
M v M (abduction: England and Scotland) [1997] 2 FLR 263, CA.
Macleod, Ex p [1946] CPD 312, SA SC.
Martínez Sala v Freistaat Bayern Case C-85/96 [1998] ECR I-2691, ECJ.
Matthews v Ministry of Defence [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435.
McKerr, Re [2004] UKHL 12, [2004] 2 All ER 409, [2004] 1 WLR 807.
Miller v Teale (1954) 92 CLR 406, Aus HC.
Nessa v Chief Adjudication Officer [1999] 4 All ER 677, [1999] 1 WLR 1937, HL.
Owusu v Jackson Case C–281/02 [2005] 2 WLR 942, ECJ.
Paterson v Casse (1995) 125 FLR 207, Aus Fam Ct.
Plyler v Doe (1982) 72 L Ed 2d 786, US SC.
Polanski v Conde Nast Publications Ltd [2005] UKHL 10, [2005] 1 All ER 945, [2005] 1 WLR 637.
Pyx Granite Co Ltd v Ministry of Housing and Local Government [1959] 3 All ER 1, [1960] AC 260, [1959] 3 WLR 346, HL.
R (on the application of Bidar) v Ealing London Borough Council Case C-209/03 [2005] 2 WLR 1078, ECJ.
R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
R v Immigration Appeal Tribunal, ex p S [1998] Imm AR 252.
R v Lord Chancellor, ex p Witham [1997] 2 All ER 779, [1998] QB 575, [1998] 2 WLR 849, DC.
R v Secretary of State for the Home Dept, ex p Puttick [1981] 1 All ER 776, [1981] QB 767, [1981] 2 WLR 440, DC.
R v Secretary of State for the Home Dept, ex p Leech [1993] 4 All ER 539, [1994] QB 198, [1993] 3 WLR 1125, CA.
Rampal v Rampal (No 2) [2001] EWCA Civ 989, [2001] 2 FCR 552, [2002] Fam 85, [2001] 3 WLR 795.
Skinner v Greary [1931] 2 KB 546, [1931] All ER Rep 302, CA.
St Joseph's Hospital and Medical Center v Maricopa County (1984) 688 P 2d 986, Ariz SC.
Stransky v Stransky [1954] 2 All ER 536, [1954] P 428, [1954] 3 WLR 123.
Stubbings v UK [1997] 3 FCR 157, ECt HR.

Swaddling v Adjudication Officer Case C-90/97 [1999] All ER (EC) 217, ECJ.
Tickner v Hearn [1961] 1 All ER 65, [1960] 1 WLR 1406, CA.
Tinnelly & Sons Ltd v UK (1998) 4 BHRC 393, ECt HR.
Tinsley v Milligan [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.
V (Abduction: Habitual Residence), Re [1996] 3 FCR 173.
Vexatious Actions Act 1896, Re, Re Boaler [1915] 1 KB 21, [1914–15] All ER Rep 1022, CA.
White v Tennant (1888) 31 W Va 790, W Virg Sup Ct of Apps.
Whicker v Hume (1858) 7 HL Cas 124, 11 ER 50, [1843–60] All ER Rep 450.
Wilson v First County Trust Ltd [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568.

Appeal

David Alechenu Bonaventure Mark (the husband) appealed with permission of the House of Lords Appeal Committee given on 26 May 2004 from the decision of the Court of Appeal (Thorpe, Waller and Latham LJJ) on 19 February 2004 ([2004] EWCA Civ 168, [2004] 1 FCR 385) dismissing his appeal from the decision of Hughes J on 14 August 2002 ([2002] EWHC 1715 (Fam)) in divorce proceedings between Victoria Preye Mark (the wife) and the husband that the court had jurisdiction in those proceedings under s 5(2) of the Domicile and Matrimonial Proceedings Act 1983 on the basis that the wife was domiciled in England and Wales on the date the proceedings were begun. The facts are set out in the opinion of Baroness Hale of Richmond.

Charles Howard QC, Philip Marshall and *Deepak Nagpal* (instructed by *Hughes Fowler Carruthers*) for the husband.
Chima Umezurike, Razak Atunwa and *Adedamola Aderemi* (instructed by *Osibanjo & Co*) for the wife.
Michael Nicholls (instructed by the *Treasury Solicitor*) for the Queen's Proctor as advocate to the court.

Their Lordships took time for consideration.

30 June 2005. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond. For the reasons they give, with which I agree, I would dismiss this appeal.

LORD HOFFMANN.

[2] I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD.

[3] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with it, and for the reasons that she gives I would dismiss the appeal. I should like however to add a few comments of my own on the question whether, if a domicile of choice is to

be acquired, a person must be lawfully present in the country where he or she intends to remain indefinitely.

[4] The answer to this question is, I think, to be found in the distinction to which Lord Westbury drew attention at the start of his speech in *Udny v Udny* (1869) LR 1 Sc & Div 441 at 457:

> 'The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend.'

[5] Translated into language with which we are familiar today, the point that Lord Westbury was making was that cases where a question of public law is in issue must be distinguished from cases where the issue is one of private law. Public law issues raise questions which concern what Lord Westbury described as the person's political status. The criteria by which status for the purpose of these questions is to be judged may differ from country to country, according to the rules that it lays down as to who may lawfully enter or lawfully remain there. Private law issues, on the other hand, are referred to the law of the person's domicile. The criteria for the determination of a person's domicile are governed by a single principle which ought to be capable of being applied universally. The importance of this distinction has not always been recognised.

[6] As Mr Nicholls for the Queen's Proctor observed in his written case, the proposition that to acquire a domicile of choice a person must be lawfully present in the country with the intention of remaining indefinitely can be traced back to the Roman jurists. In *Ex p Donelly* 1915 WLD 29, a husband had been convicted of drugs offences in South Africa and after serving a period of imprisonment was deported to the United States of America. The wife then applied in South Africa for leave to sue her husband for restitution of conjugal rights or for divorce. Holding that the court had no jurisdiction, Mason J said at 30:

> 'A person, it is true, may select any place he likes as his domicile, provided, says the *Digest* (50, 1, 31), it has not been prohibited for him. Now in the present case the husband cannot have a true domicile in fact in South Africa; he is liable to instant punishment and deportation if he returns.'

The decision in that case was followed, on similar facts, in *Ex p Gordon* 1937 WLD 35. In these two cases it was held that the effect of the husband's deportation was to extinguish his domicile of origin. But the line of reasoning that was adopted would have prevented a domicile of choice from being acquired in the first place if the person was unable to enter the country lawfully: see *Solomon v Solomon*

(1912) 29 WN (NSW) 68 in which was held that unlawful residence in New South Wales prevented the acquisition of a domicile of choice there.

[7] The *Digest* 50, 1, 31, in a fragment attributed to Marcellus, does indeed state:

> *'Nihil est impedimento, quo minus quis ubi velit habeat domicilium, quod ei interdictum non sit.* [There is no restriction on the place where a person may have his domicilium, so long as it is not prohibited for him.]'

But it is much less clear whether, when Marcellus used the word domicilium in this passage, he was talking about what Lord Westbury described as the person's civil law status, which is the private law context in which we now use the expression 'domicile'.

[8] The chapter of the *Digest* in which the fragment appears is headed *'Ad municipalem et de incolis'*. A *municipium* in Roman law was a town, particularly a town in Italy, which possessed the right of Roman citizenship but was governed by its own laws. Chapter 50 deals with the rights of persons resident in a *municipium* and describes the rules by which it was determined whether a person had a domicilium there. As for *incolae*, the following definition is provided: *Incola est, qui in aliqua regione domicilium suum contulit, quem Graeci παροικου appellant.* [An *incola* is a person who has taken up his *domicilum* in a place, whom the Greeks call a *παροικος*.]: *Digest*, 50, 16, 239. The Greek word *παροικος* was regarded by Justinian as having the same meaning as the Latin word *colonus*: Justinian, 1, 34, 1. As Buckland, *A Textbook of Roman Law* (3rd edn, 1963), p 86, note 14 explains, persons resident in a community had widely different civil rights from the point of view of *civitas* according to their classification in society. These rights included the use of public facilities such as baths, and the right to invoke the civil jurisdiction of the magistrate. Leaving aside those residents who because they were *cives* were specially privileged, there were various other classes of residents such as *coloni*, or *incolae*, whose rights were more or less restricted according to the class in which the person was placed. These disabilities related to matters of public as well as private law. Persons resident in the Latin colonies, for example, were on a level with Romans in the ordinary relations of private law, but they could not serve in Roman legions or hold a Roman magistracy: (pp 92–93).

[9] It would not be surprising to find that there was a rule in Roman law that a person had to be lawfully resident in the community before he could acquire a domicilium there, as the law did not distinguish between the public and the private law consequences of his presence in the community. But I think that the concept embraced by the word domicilium in Roman law is more accurately reflected today, as it is in civilian jurisdictions, by the words 'home' or 'residence' than by the word 'domicile'. The word 'home' in art 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), for example, is expressed in other languages as 'suo domicile', 'proprio domicile' and 'suo domicilio'. With us the word 'domicile' has acquired a narrower meaning. It refers to what Lord Westbury described as a person's civil status for the purpose of determining various rights in private law.

[10] In *Puttick v Attorney General and Puttick* [1979] 3 All ER 463, [1980] Fam 1 the petitioner had been permitted to enter the United Kingdom. She sought a declaration that a marriage which she had celebrated following her arrival in this country was a valid and subsisting marriage, as she had acquired a domicile of

choice in England. Baker P held that, as her leave to enter had been obtained by the fraudulent production of an invalid passport, she was barred from acquiring a domicile of choice here. He cited ([1979] 3 All ER 463 at 477, [1980] Fam 1 at 19), in support of this view, the following passage in *Dicey and Morris on the Conflict of Laws* (9th edn, 1973), p 96:

> 'It has been held that a domicile of choice cannot be acquired by illegal residence. The reason for this rule is that a court cannot allow a person to acquire a domicile in defiance of the law which that court itself administers.'

[11] This passage has been retained in the current edition: *Dicey and Morris* (13th edn, 2000), vol 1, p 118 (para 6-037). The editors cite *Puttick's* case as authority for it, as well as cases from Australia and South Africa. As Anton and Beaumont *Private International Law* (2nd edn, 1990), p 140 point out however, these propositions are perfectly understandable where the issue is one of public law. But they find no similar justification in matters of private law. *Dicey and Morris*, p 118 (para 6-037) states that it is an open question whether the courts of one country would hold that a person could acquire a domicile of choice in some other country by residence there which was illegal under the law of the second country. The better view would seem to be that, as our courts do not apply the public policy of a foreign state, the illegality of the residence under that state's law would not be regarded here as inconsistent with the acquisition of a domicile of choice in that country.

[12] In *Szechter (orse Karsov) v Szechter* [1970] 3 All ER 905, [1971] P 286, Simon P held that the parties, who had been given leave to stay in the United Kingdom for a limited period, had acquired a domicile of choice in England by residing here with the intention of making this country their permanent home. Following *Boldrini v Boldrini and Martini* [1932] P 9, [1931] All ER Rep 708 and *Cruh v Cruh* [1945] 2 All ER 545, he said that it was immaterial that their intentions were liable to be frustrated by the decision of the Secretary of State for the Home Department as to permission for their continued residence here (see [1970] 3 All ER 905 at 912, [1971] P 286 at 294). This is a clear indication that, under our law, a domicile of choice is not lost if the residence becomes unlawful at some later date.

[13] In my opinion illegality is relevant to the question whether the person intended to reside in a country with the intention of remaining there indefinitely, but not to the question whether the person is present here. Evidence that the person intended to reside there indefinitely despite the illegality would need to be carefully scrutinised. But the question whether a person is physically present in the country is not affected one way or the other by the question whether he has entered the country legally or illegally. If the court finds that the requisite intention has been established by credible and reliable evidence, it would seem to be contrary to principle to decline to give effect to it by recognising that a domicile of choice has been acquired, as Lord Westbury put in *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 320, immediately upon the person's arrival in that country.

LORD PHILLIPS OF WORTH MATRAVERS.

[14] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond. I agree with their reasoning in relation both to ordinary residence

and to domicile and, for the reasons which they give, I would also dismiss this appeal.

BARONESS HALE OF RICHMOND.

[15] The issue before us is whether a person can be either habitually resident or domiciled in England and Wales if her presence in the United Kingdom is a criminal offence under the Immigration Act 1971. The immediate context is whether our courts have jurisdiction, under s 5(2) of the Domicile and Matrimonial Proceedings Act 1973, to entertain her divorce petition. But the domicile issue could arise in many other contexts, as a person can only have one domicile, whereas habitual residence may have a different meaning in different statutes according to their context and purpose.

IMMIGRATION CONTROL

[16] It is worth remembering that the question could not arise until comparatively recently. As Ann Dummett and Andrew Nicol explain in *Subjects, Citizens, Aliens and Others* (1990), pp 39–40:

> 'It is taken for granted today that any state's system of immigration control is permanent and universal. That is, a permanent legal framework exists for scrutinising all entrants and for determining which of them may stay, for how long, and under what conditions ... Such permanent, universal control over immigration is of recent origin only. It would have been unthinkable in early twentieth-century Britain; for one thing, it would have been regarded as a gross invasion of personal freedom; for another, it would have been physically impossible to enforce. Passports were not yet a general requirement. Modern controls depend upon universal documentation, telecommunications, a large bureaucracy, and greater powers to invade people's privacy within the country than then existed.'

[17] Monarchs did from time to time seek to expel or exclude aliens, although whether this was an aspect of the royal prerogative is disputed. Blackstone put it this way (*Commentaries on the Laws of England* (Archbold New edn, 1811), vol 1, p 259):

> 'For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to be sent home whenever the king sees occasion.'

From time to time, temporary legislation was passed to meet a temporary crisis. Lord Grenville's Aliens Act of 1793 was passed in response to the excesses of the French Revolution. This sought to identify aliens on arrival, prohibit some from landing, and provided the machinery for removing those who were ordered to leave. It was renewed until replaced by further legislation in 1802 and again in 1803 which concentrated on identifying and removing aliens rather than prohibiting landing. This was to last until there was a peace treaty. In 1814 and again in 1815 Parliament reverted to legislation which had to be renewed from time to time. By 1826, the country must have felt sufficiently secure to replace the machinery for removal with a permanent system of registration. But after the French Revolution of 1848, it was once again thought expedient 'for the due Security of the Peace and Tranquillity of this Realm' to resort, for a limited period, to the earlier machinery for ordering aliens to depart: see Aliens Act 1848.

But the Crown also reserved the right to refuse to return aliens to their own countries if they would face persecution there. The calls for permanent controls on entry began towards the end of the 19th century in response to the arrival of large numbers of Jewish people escaping the pogroms in Eastern Europe. These culminated in the recommendations of the *Royal Commission on Alien Immigration* (Cmd 1741) (1903). These were highly controversial and emerged, much watered down, in the Aliens Act 1905. This contained powers to refuse entry to, and to deport, defined types of 'undesirable' aliens. Immigration inspectors, the forerunners of the modern immigration service, were appointed to do this. But the Act was comparatively easily evaded. The Aliens Restriction Act 1914 was rushed through the day after war was declared, allowing Orders in Council to be made imposing much more severe controls over all aliens in times of war, imminent national danger or great emergency. After the war, however, it was continued and extended by the Aliens Restriction (Amendment) Act 1919, which also repealed the 1905 Act. It was renewed annually until superseded by the Immigration Act 1971.

[18] The Aliens Acts did not apply to the inhabitants of the British Empire. They were not aliens. Mostly they were British subjects owing allegiance to the Crown, although the British Nationality Act 1948 drew a distinction between citizens of the United Kingdom and Colonies and citizens of the independent members of the Commonwealth. All were entitled to come here freely until the first Commonwealth Immigrants Act of 1962. This regulated the entry of Commonwealth citizens coming here for a variety of purposes. The main effect was to restrict the numbers coming here to work; family reunion was still allowed. During the 1960s, entry clearance officers were established in Commonwealth countries to process dependants' applications for entry and under the Immigration Appeals Act 1969, prior entry clearance became a legal requirement. The Commonwealth Immigrants Act 1968 extended controls to United Kingdom citizens unless they, a parent or grandparent had been born here. The 1962 Act made it an offence for a Commonwealth citizen subject to immigration control to enter or remain within the United Kingdom without the leave of an immigration officer.

[19] The Immigration Act 1971 brought everyone under the same system of control. It abolished the distinction between aliens and British subjects and introduced the distinction between patrials with the right of abode, who were not subject to immigration control, and non-patrials who were subject to immigration control. Under s 24(1)(b) of the 1971 Act a person commits a criminal offence, among other things—

> 'if, having only a limited leave to enter or remain in the United Kingdom, he knowingly either—(i) remains beyond the time limited by the leave; or (ii) fails to observe a condition of the leave'.

THIS CASE

[20] The parties are both Nigerian nationals, born in Nigeria in 1948 and 1950 respectively, and thus having a domicile of origin in Nigeria. They were married according to the local customary law in the River State of Nigeria in 1979. This was a valid polygamous marriage, the husband having married two or possibly three wives before this one, and possibly two afterwards. This couple have four children, David, born in 1980, Katie, born in 1982, Monica, born in 1984, and

Christopher, born in 1985. All four children were born here. The two eldest, being born before the British Nationality Act 1981 came into force, are United Kingdom citizens with British passports. The two youngest were originally Nigerian citizens, but were granted British citizenship in 2000. All four children began their education in Switzerland, but were mainly educated at boarding schools and universities or colleges here. They spent their holidays either in London or Nigeria or in other places abroad.

[21] The husband had a distinguished career in the Nigerian army, rising to the rank of general, and occupying a variety of government posts after the military coup in 1983. He amassed a very considerable fortune during this period. In 1990 he was posted to Washington. The wife had qualified as a lawyer and practised in Nigeria. When the husband was posted to Washington she enrolled for an LLM at Queen Mary College in London, thereafter dividing her time between this country, visits to her husband in the United States, and to Nigeria. She was granted multiple entry visas which allowed her to enter this country for periods of up to six months at a time until March 1997.

[22] In November 1993, there was a further military coup in Nigeria, and the husband was opposed to the new ruler, General Abacha. He was compulsorily retired from the army and went into exile in this country. The parties established a matrimonial home here. In April 1994, the husband was granted a four-year work permit expiring on 30 April 1998 and given leave to remain here until that date. The wife at first relied upon her multiple entry visa to come and go, but was eventually given limited leave to remain until 30 April 1998 as the dependent spouse of a work permit holder. Shortly before that date, the husband applied for and was granted indefinite leave to remain for himself and the two youngest children. At the time, the wife was in Florida attending a bible study course and she was not included in the application. She returned on 29 April and was given leave to enter for one day, until her limited leave expired on 30 April. After that she became an over-stayer and her continued presence here was an offence under ss 24(1)(b) and 24A of the Immigration Act 1971. She has since been granted indefinite leave to remain but only after these proceedings were begun.

[23] General Abacha died in June 1998 and the husband decided to return to Nigeria to take up a political career. He did so in September 1998 and soon became a Senator in the Upper House of the Nigerian Parliament. He continues to visit this country and to stay in the former matrimonial home where the wife still lives. At some time over the following year, the wife abandoned any hope of returning to Nigeria as the husband's principal wife and formed the intention of remaining indefinitely in this country.

[24] On 17 July 2000, at the invitation of the husband's solicitor, the wife issued a divorce petition and application for ancillary relief in the Principal Registry of the Family Division. At that date she relied only upon her habitual residence here over the previous 12 months to found the jurisdiction of the court, but her petition was later amended to include a claim that she had acquired a domicile of choice here. The husband initially admitted that the English court had jurisdiction, but in February 2001 he applied for a stay of the English proceedings on the basis that he had initiated proceedings in Nigeria. This application eventually came before Hughes J in March 2002. He dismissed it in a reserved judgment dated 14 March 2002. Thus, provided that the English court has jurisdiction, it is appropriate for that court to exercise it.

[25] By that time, however, the husband had taken the point that the court did not have jurisdiction because the wife's presence here during the 12 months up to and including the issue of her petition had been unlawful. The issue was tried by Hughes J in June 2002. In a reserved judgment dated 14 August 2002 ([2002] EWHC 1715 (Fam)), he held that the wife could not rely upon her unlawful presence as a basis for establishing habitual residence here but that she could rely upon it as a basis for the acquisition of a domicile of choice. Accordingly the court had jurisdiction. On 19 February 2004, the Court of Appeal (see [2004] EWCA Civ 168, [2004] 1 FCR 385, [2005] Fam 267) dismissed the husband's appeal on the ground that the wife had not only acquired a domicile of choice here before July 2000 but also had been habitually resident here throughout the previous 12 months.

[26] It is not now disputed that the wife would be habitually resident and domiciled here were it not that her presence in this country was, at the material time, unlawful. The issue, therefore, is the impact of that illegality on the jurisdictional requirements set out in s 5(2) of the Domicile and Matrimonial Proceedings Act 1973. This has since been amended to give effect to the Council Regulations (EC) 1347/2000 (OJ 2000 L160 p 19) and (EC) No 2201/2003 (OJ 2003 L338 p 1), but at the material time, it read as follows:

> 'The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) either of the parties to the marriage—(a) is domiciled in England and Wales on the date when the proceedings are begun; or (b) was habitually resident in England and Wales throughout the period of one year ending with that date.'

HABITUAL RESIDENCE

[27] The principal authority on this issue is the decision of this House in *Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309. At issue was the interpretation of the requirement in reg 13 of the Local Education Authority Awards Regulations 1979, SI 1979/889, that, in order to qualify for a mandatory student grant, an applicant had to have been 'ordinarily resident' in the United Kingdom for the previous three years. The five applicants had lived here for at least three years while attending school or college. All five were subject to immigration control, four had entered as students with limited leave to remain for the duration of their studies, and the fifth had entered with his parents for settlement and had indefinite leave to remain. This House held that the natural and ordinary meaning of ordinary residence had been settled by two tax cases, *Levene v IRC* [1928] AC 217, [1928] All ER Rep 746 and *IRC v Lysaght* [1928] AC 234, [1928] All ER Rep 575. Lord Scarman, with whose opinion all the other members of the committee agreed, said ([1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 343):

> 'Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.'

[28] This was 'ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state

of mind' ([1983] 1 All ER 226 at 235–236, [1983] 2 AC 309 at 344). Parliament must have deliberately chosen this simpler test rather than the 'difficult' concept of domicile, 'dependent upon a refined, subtle and frequently very expensive judicial investigation of the devious twists and turns of the mind of man' ([1983] 1 All ER 226 at 236, [1983] 2 AC 309 at 345). The lower courts had erred in attaching decisive significance to the immigration status of the five students. It might throw light on the question, but would be 'of little weight when put into the balance against the fact of continued residence over the prescribed period' ([1983] 1 All ER 226 at 239, [1983] 2 AC 309 at 349).

[29] Lord Scarman did, however, acknowledge one exception to this straightforward factual question:

> 'If a man's presence in a particular place or country is unlawful, eg in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence (even though in a tax case the Crown may be able to do so): *Re Abdul Manan* [1971] 2 All ER 1016, [1971] 1 WLR 859 and *R v Secretary of State for the Home Dept, ex p Margueritte* [1982] 3 All ER 909, [1982] 3 WLR 754. There is, indeed, express provision to this effect in the Immigration Act 1971, s 33(2). But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully.' (See [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 343–344.)

As none of these applicants was unlawfully present, these words were strictly obiter dicta. Furthermore, as Hughes J pointed out, the point was conceded on behalf of the students in the course of argument. But he regarded it as an integral part of the reasoning, particularly as to the limited relevance of immigration control where presence was lawful. Understandably, therefore, he considered that he should follow the principle stated in *Shah*'s case.

[30] In the Court of Appeal, there was much debate about whether the principle was one of statutory construction—implying the word 'lawfully' before 'ordinarily resident'—or whether it was one of public policy—under which a person is unable to benefit from his own illegal act. But the policy reasons for denying the benefit might be the same as those leading to the conclusion that Parliament did or did not intend that the residence be lawful in the particular statute under consideration. Thus, for example, in a statute which confers jurisdiction where *either* party is habitually resident in this country, there seems no good reason to deny the petitioner the benefit (if such it be) of bringing proceedings here on the basis of the *respondent's* habitual residence even if that residence is unlawful. The petitioner is not to be blamed for that. Ultimately, however, the Court of Appeal concluded that the principle stated in *Shah*'s case could not be an absolute rule in the light of the Human Rights Act 1998, and the right of access to a court guaranteed by art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[31] My Lords, I do not consider that there is any need to found our decision upon the Human Rights Act. It is quite clear that Lord Scarman regarded the question he was answering as one of statutory construction. On the meaning of 'ordinary residence' he relied upon the earlier tax cases. Yet it is also quite clear that the legality of a person's residence is completely irrelevant for tax purposes. A person who has taxable income or assets here is liable to United Kingdom tax

irrespective of his immigration status. The two cases cited by Lord Scarman in support of the proposition that residence must be lawful were both immigration cases. In *Re Abdul Manan* [1971] 2 All ER 1016, [1971] 1 WLR 859 the applicant was a Pakistani seaman who had deserted from his ship and so his presence here was unlawful under the Commonwealth Immigrants Act 1962. He nevertheless claimed to be entitled to enter and remain as a person who had been ordinarily resident here for two years. In rejecting that claim, Lord Denning MR said ([1971] 2 All ER 1016 at 1017, [1971] 1 WLR 859 at 861):

> 'The point turns on the meaning of "ordinarily resident" in these Acts. If this were an income tax case he would, I expect, be held to be ordinarily resident here. But it is not an income tax case. It is an immigration case. In these statutes "ordinarily resident" means *lawfully* ordinarily resident here. The word "lawfully" is often read into an Act. See, for instance, *Adlam v Law Society* [1968] 1 All ER 17, [1968] 1 WLR 6. It should be read into these Acts.'

[**32**] Indeed, it is scarcely surprising that, in giving immigration rights to people ordinarily resident here, Parliament should exclude those who were here in breach of immigration control. The same applies to the other case relied upon by Lord Scarman, *R v Secretary of State for the Home Dept, ex p Margueritte* [1982] 3 All ER 909, [1983] QB 180. The applicant first came here from Mauritius in 1972, and was given limited leave to enter for a few months. He overstayed until June 1974 when he paid a short visit to France. On return he was given one month's leave to enter, but again overstayed. In 1978 he married a woman who was settled here and as a result was granted indefinite leave to remain. In 1979 he applied to register as a United Kingdom citizen, on the basis of five years' ordinary residence here, in accordance with a provision inserted into the British Nationality Act 1948 by the 1971 Act. As Lord Scarman mentioned, the 1971 Act contains an express provision, in s 33(2), that a person is not to be treated for the purposes of any provision in that Act as ordinarily resident in the United Kingdom at a time when he is there in breach of the immigration laws. It is scarcely surprising, therefore, that the Court of Appeal construed the new provision in the 1948 Act in the same way.

[**33**] It is common ground that habitual residence and ordinary residence are interchangeable concepts: see *Ikimi v Ikimi* [2001] EWCA Civ 873, [2001] 2 FCR 385, [2002] Fam 72. The question is whether the word 'lawfully' should be implied into s 5(2) of the 1973 Act. I see no reason to do so. The purpose of the 1973 Act was to provide an answer to the question:

> 'when is the connection with this country of the parties and their marriage sufficiently close to make it desirable that our courts should have jurisdiction to dissolve the marriage?' (See the Law Commission's *Family Law: Report on Jurisdiction in Matrimonial Causes* (1972) (Law Com no 48) p 2 (para 5).)

The Commission went on to point out (pp 2–3):

> '6 ... If the members of a broken or separated family are so closely associated with our country that it is concerned with the welfare and financial needs of the spouses and their children and the regularisation of any subsequent unions, it may be desirable that our courts should be able to exercise jurisdiction ...
>
> 7 ... The job of law reform is therefore to formulate bases of jurisdiction which meet the interests of the state and of those who genuinely "belong

> here", without allowing access to our courts to transients, "forum-shoppers", and others with no real connection with the country. A subsidiary but important task is to ensure that the bases of jurisdiction are such that our decrees will be recognised abroad.'

[34] With the possible exception of the last, none of these considerations points to a requirement that habitual residence here for this purpose should be lawful. Quite the reverse. As Waller LJ pointed out in the Court of Appeal ([2004] 1 FCR 385 at [57])—

> 'there must be a very large number of extremely longstanding but unlawful residents in this and other countries whose only real links are with their adopted country and whose personal affairs should properly be governed by the laws of that country, whether to their advantage or their disadvantage.'

Furthermore (at [57]):

> 'Third parties, such as children, may be affected if the court declines jurisdiction on the ground that one party is relying on his own illegal residence.'

[35] If there are also proceedings in another jurisdiction which is in the circumstances more appropriate than this, then the proceedings here can be stayed, on the usual forum non conveniens grounds. Alternatively, as happened in this case, if this is the appropriate jurisdiction, the respondent may be enjoined from continuing the proceedings elsewhere.

[36] I conclude, therefore, that residence for the purpose of s 5(2) of the 1973 Act need not be lawful residence. The question of whether the residence is habitual is a factual one which should be answered by applying the test, derived from the 1928 tax cases, laid down by Lord Scarman in *Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309. It is possible that the legality of a person's residence here might be relevant to the factual question of whether that residence is 'habitual'. A person who was on the run after a deportation order or removal directions might find it hard to establish a habitual residence here. But such cases will be rare, compared with the large numbers of people who have remained here leading perfectly ordinary lives here for long periods, despite having no permission to do so. The husband's first reaction, to admit that the wife was habitually resident here for the purpose of these proceedings, was obviously correct on the facts of this case. There will, however, be other statutory provisions, in particular those conferring entitlement to some benefit from the state, where it would be proper to imply a requirement that the residence be lawful.

DOMICILE

[37] Habitual residence is simply an expression used in a variety of statutes for a variety of purposes and may thus have a different meaning according to the statutory context. Furthermore, a person may be habitually resident in more than one place at a time, or may have no habitual residence at all. Domicile, on the other hand, is a concept of the common law (although the same word is sometimes used in civilian systems to denote something more like habitual residence). A person must always have a domicile but can only have one

domicile at a time. Hence it must be given the same meaning in whatever context it arises.

[38] As the Hong Kong Law Reform Commission explain, in their recent Consultation Paper on *Rules for Determining Domicile* [2004] HKLRCCP 1, p 4 (para 1.2) 'a person's domicile connects him with a system of law for the purposes of determining a range of matters principally related to status or property'. Thus, for example, it governs capacity to marry or to make a will relating to moveable property; it is one of the factors governing the formal validity of a will; the domicile of the deceased also governs succession to moveable property and is the sole basis for jurisdiction under the Inheritance (Provision for Family and Dependants) Act 1975; legitimacy, to the extent that it is still a relevant concept, is governed by the law of the father's domicile; domicile is one of the bases of jurisdiction, not only in matrimonial causes but also in declarations of status or parentage under the Family Law Act 1976; it is the sole basis of jurisdiction to make an ordinary adoption order under s 14 of the Adoption Act 1976, or a parental order under s 30 of the Human Fertilisation and Embryology Act 1990. This is not an exhaustive list but it shows the particular importance of domicile as a connecting factor in family law.

[39] An adult can acquire a domicile of choice by the combination and coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely: see the joint report of the Law Commission and the Scottish Law Commission *Private International Law: The Law of Domicile* (1987) (Law Com No 168, Scot Law Com No 107), p 5 (para 2.6). There is a long line of cases showing that an alien may acquire a domicile of choice in this country even though he might be required to leave at any time by executive action with no right of appeal: see *Boldrini v Boldrini and Martini* [1932] P 9, [1931] All ER Rep 708; *May v May and Lehman* [1943] 2 All ER 146; *Cruh v Cruh* [1945] 2 All ER 545; *Zanelli v Zanelli* (1948) 64 TLR 556; *Szechter (orse Karsov) v Szechter* [1970] 3 All ER 905, [1971] P 286. Indeed, as already seen, aliens were always in that precarious position, and could otherwise never have established a domicile of choice here. In *May v May* the principle was applied to a German Jew who had been given only limited leave to land here in 1939. In *Cruh v Cruh*, Denning J applied the principle to a man of Austrian or German origin who had been recommended for deportation following a conviction for conspiracy and whom the Home Secretary intended to deport as soon as it became practicable to do so. Until the recommendation was actually effected, the domicile of choice remained. Once that happens, however, the domicile is lost.

[40] But what if the residence here is not only precarious but actually unlawful? As already seen, this is a relatively recent phenomenon. There was no authority in England and Wales on the point until *Puttick v Attorney General and Puttick* [1979] 3 All ER 463, [1980] Fam 1. However, there was Commonwealth authority, on the basis of which *Dicey and Morris on the Conflict of Laws* (9th edn, 1973), pp 96–97, 'submitted that an English court would hold that a person who was illegally resident in this country could not thereby acquire an English domicile of choice'. This was adopted by Baker P in *Puttick*'s case, albeit obiter, as he had already held that the *proposita*, the notorious German terrorist Astrid Proll, did not have the requisite animus manendi, being on the run and ready to leave the moment the police caught up with her. Nor were the Commonwealth authorities upon which the text was based produced to him.

[41] The first of these is the New South Wales case of *Solomon v Solomon* (1912) 29 WN (NSW) 68, in which Gordon J observed (at 70), that:

> 'It is a curious proposition that a Court of Justice in New South Wales should hold that a man has acquired a domicile in New South Wales when the laws of the land forbid that man to be here.'

The result was that his Australian wife was unable to obtain a divorce from her husband, who was currently serving a prison sentence for rape, because he was a South Sea Islander who had come to and remained in Australia in defiance of laws which prohibited South Sea Islanders from doing so, and indeed had been on his way to be deported when he committed the offence for which he was then in prison.

[42] A similar injustice was done in the only other case cited by *Dicey and Morris* which is directly in point, *Smith v Smith* 1962(3) SA 930, a decision of the Supreme Court of the Federation of Rhodesia and Nyasaland. The husband, a fugitive from justice in England, had entered Southern Rhodesia on a false passport and his entry and residence had at all times been unlawful under the Immigration Act. The wife obtained a declaration of nullity, but on the husband's appeal, the court itself raised the issue of jurisdiction. Briggs ACJ conducted a full review of the authorities. He distinguished the cases of precarious residence and condoned residence, and found more helpful some South African cases on the statutory concept of domicile in their Immigration Act (which was deliberately distinguished from the common law concept in another case cited by *Dicey and Morris*, *Parker v Principal Immigration Officer* [1926] CPD 255) and the cases holding that a domicile of choice acquired during precarious residence was destroyed by actual deportation, at least where there was also a prohibition on return (including *Ex p Macleod* [1946] CPD 312, the last of the cases cited by *Dicey and Morris*; see also *Ex p Donelly* 1915, WLD 29; *Ex p Gordon* 1937, WLD 35). He concluded as follows (1962(3) SA 930 at 936):

> 'I should formulate the proposition in this way. Acquisition of a domicile of choice requires both residence and *animus manendi*. Not every kind of *de facto* residence will suffice. It must usually be residence of one's free will, or at least, if it is not, the residence can be of no value as evidence of an *animus manendi*. The *animus manendi* must be both genuine and honest. An intention to persist indefinitely in a course of unlawful conduct may be genuine: but it cannot be honest. Fears that the worst may happen do not necessarily preclude a sufficient *animus*. But knowledge that one is residing only in defiance of the law, and will so continue indefinitely, makes it impossible to have an *animus manendi* of the requisite quality. I think also that the matter may properly be put in another way. The *animus manendi*, though it does not require an absolute intention to reside permanently, must at least be an unconditional intention to reside for an indefinite period ... In this case, the intention of the appellant, putting it at the highest, can only have been, "I will stay in Rhodesia if I can escape the attention of the authorities whose statutory duty is to deport me, and who will at once do so if they learn the true facts about me". I think a conditional or provisional intention of this kind cannot in law amount to the *animus manendi* necessary to establish a domicile of choice.'

Thus it will be seen that, although Briggs ACJ had earlier (at 934) referred to the general principle that one 'cannot acquire a domicile of choice "in the teeth of the law"' the principle which he formulated was concerned with the conditions for forming the necessary *animus*.

[43] On the other hand, in *Jablonowski v Jablonowski* (1972) 28 DLR (3d) 440, Lerner J in the Ontario High Court did not find either *Solomon's* case or *Smith's* case persuasive. He found that the petitioner had met both the residence and animus requirements despite having entered Canada illegally. *Jablonowski's* case was followed by McQuaid J in the Prince Edward Island Supreme Court in *Wood v Wood* (1977) 4 RFL (2d) 182.

[44] My Lords, these authorities do not disclose a long-standing and consistent approach to the issue such that we might be reluctant to depart from it. It is necessary, therefore, to consider the matter as one of principle. The object of the rules determining domicile is to discover the system of law with which the *propositus* is most closely connected for the range of purposes mentioned earlier. Sometimes that connection will be an advantage to him. Sometimes it will not. As Hughes J put it ([2002] EWHC 1715 (Fam) at [73])—

> 'the concept of domicile is not that of a benefit to the *propositus*. Rather, it is a neutral rule of law for determining that system of personal law with which the individual has the appropriate connection, so that it shall govern his personal status and questions relating to him and his affairs.'

Recognising that connection despite the illegality of his presence here does not therefore offend against any general principle that a person cannot be permitted to acquire a benefit from his own criminal conduct.

[45] Unlike some of the purposes for which habitual residence may be important, the state has no particular interest one way or another. Indeed, insofar as it does have an interest, this will probably lie in accepting that those who intend to remain here permanently have acquired a domicile here, whatever their immigration status. The actual results in *Solomon's* case and *Smith's* case, in denying relief to the innocent party to a matrimonial dispute, did no one any good. While it might be said that the injustice stemmed, not from the principle under discussion, but from the common law's insistence that a wife was domiciled where her husband was domiciled, it would still have been in everyone's interests that the affairs of such long-term residents were governed by the laws of the country with which they were so closely connected. The supposed principle served only to separate them from the most appropriate legal system to govern their affairs.

[46] As a matter of principle, that connection is established by the coincidence of residence and the animus manendi. If a person has chosen to make his home in a new country for an indefinite period of time, it is appropriate that he should be connected to that country's system of law for the kind of purposes for which domicile is relevant. It would be absurd if this wife's capacity to make a will, succession to her moveable property, and her children's right to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 against her estate were not to be governed by the law of this country.

[47] If there is no reason of public policy to deny the acquisition of a domicile of choice in such cases, can it nevertheless be said that legality is an essential element in residence (as it appears that *Dicey and Morris* regarded it) or in the formation of the animus manendi (as Briggs ACJ in *Smith's* case regarded it)?

Both, however, are issues of fact. As we have already seen, one can be resident in a place where one has no right to be. One can also form an intention to remain in a place despite considerable uncertainty as to whether this will be possible. English law requires only that the intention be bona fide, in the sense of being genuine and not pretended for some other purpose, such as getting a divorce to which one would not be entitled by the law of the true domicile.

[48] A further problem in regarding legality as an essential element, touched on by Hughes J, is the shifting nature of immigration status. An asylum seeker, for example, may commit a criminal offence by entering this country illegally. But on making his claim to the authorities, he may be granted temporary admission. His presence is no longer illegal, but under s 11(1) of the Immigration Act 1971 he is deemed not to be here at all. Is he then to be prevented from acquiring a domicile of choice here, although he undoubtedly has no intention of returning to his country of origin? Furthermore, a person's presence here may at times be lawful and at times unlawful. She may not even know what it is or think that it matters very much. She may enter for a limited purpose and be given limited leave to remain which then expires but is routinely renewed a short time later or the status changed. This is what happened in the Australian case of *Lim v Lim and Titcumb* [1973] VR 370, where there were gaps between the series of temporary permits, although at the material time the *propositus* was lawfully present in Australia (see also *In the marriage of Salacup* (1993) 17 Fam LR 141). In the present case, it so happens that the wife formed her intention of remaining here permanently after her limited leave had expired and presented her petition before her position had been regularised. But the reality of her presence and intention, the merits of her case, and the quality of her connection with the laws of this country are no different from what they would have been had she formed her intention to remain just before her limited leave ran out in April 1998.

[49] Hence, My Lords, it seems to me that there is no reason in principle why a person whose presence here is unlawful cannot acquire a domicile of choice in this country. Although her presence here is a criminal offence, it is by no means clear that she will be required to leave if the position is discovered. Her position is in reality precarious in the same way that the aliens' presence was precarious in the *Boldrini* line of authority. In fact, it was always much less likely that this wife would ever be removed from this country than it was that the *propositus* in *Cruh v Cruh* [1945] 2 All ER 545 would be removed.

[50] This is not to say that the legality of a person's presence here is completely irrelevant. As in the precarious residence cases, it may well be relevant to whether or not she had formed the required animus manendi. But this is a question of fact and not, as it was held to be in *Smith v Smith*, a question of law. Nor is it, as at times the Court of Appeal appeared to be saying, a matter of discretion or, as it is put in *Rayden and Jackson on Divorce and Family Matters* (17th ed, 1997), p 57 (para 2.16), of the court being 'hostile' to the assertion of a domicile of choice by an illegal entrant or resident. Either a person has acquired a domicile of choice in this country or she has not. If she has done so, she is not to be denied it because the court considers her case unmeritorious or tainted with moral or legal turpitude. If she has not done so, she is not to be granted it because the court considers her virtuous. It is a matter of fact whether she had the required intention at the relevant time.

[51] For those reasons, I would, with great respect, differ from the proposition of law stated by *Dicey and Morris* and decline to follow the authorities cited in its support.

The judge was, in my view, correct in holding that the wife had acquired a domicile of choice here by the time that she presented her petition for divorce.

CONCLUSION

[52] It follows that I would hold that the courts of this country had jurisdiction to entertain the wife's divorce petition, both on the basis of her habitual residence for the previous 12 months and on the basis of her domicile here. Accordingly, for these and the further reasons given in the opinion of my noble and learned friend, Lord Hope of Craighead, with which I agree, I would dismiss this appeal. I would also express the fervent hope that the parties can now arrange their affairs with the minimum of resort to further arguments in court. This is benefiting no one but the lawyers, and certainly not the parties, or their children, or even their wider families, who all have an interest in preserving as much as possible of the family's assets for their own benefit rather than that of others.

Appeal dismissed.

Kate O'Hanlon Barrister.

Henry Boot Construction Ltd v Alstom Combined Cycles Ltd

[2005] EWCA Civ 814

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, DYSON AND THOMAS LJJ

12, 13 APRIL, 16 JUNE, 4 JULY 2005

Building contract – Certificate – Cause of action – Whether claim to have sum included in final certificate in respect of work or events for which sum should have been included in interim certificate fresh cause of action.

The claimant was employed by the defendant as contractor for the main civil works for the construction of a power station. The contract was made in 1994. It incorporated a standard form of construction contract including provisions for payment on certificates issued by an engineer. Under the contract the claimant was to submit to the engineer, at monthly intervals, a statement, inter alia, of the estimated contract value of the permanent works executed up to the end of that month, and a list of goods and materials delivered to the site but not incorporated into the permanent works, together with their value. Within 28 days the engineer was to certify and pay to the claimant, after deducting any previous payments on account, the amount which in the engineer's opinion, on the basis of the monthly statement, was due to the claimant. The contract further provided for the claimant to submit a statement of final account together with detailed supporting documentation and within three months the engineer was to issue a certificate stating the amount which in his opinion was finally due under the contract from the defendant to the claimant or vice versa. The claimant started work in April 1994 and achieved substantial completion of the works in May 1996. The defects correction certificate was issued in August 2000. The claimant submitted its final account in stages, the final part being submitted in June 2001. The engineer issued the final certificate in October 2002. In March 2003 the defendant issued a notice of dispute under the contract challenging the valuation in the final certificate. It also raised an issue as to whether the claimant's claims were barred by the Limitation Act 1980. The claimant served notices of dispute which, inter alia, related to the defendant's refusal to pay the sum certified as due under the final certificate. The decision of the engineer was that the value of the final account was £44·38m (thereby reducing the amount certified by £43,000) and that a sum of at least £2·9m became overdue for payment to the claimant on 8 December 2002. Arbitration began in May 2003. The defendant contended that the claimant's claims were statute-barred at the date of the final certificate, so that, contrary to the decision of the engineer, no sum was due to the claimant. The judge arbitrator, trying the limitation defence as a preliminary issue, decided that all or almost all the claims were statute-barred, because the relevant causes of action had arisen when the work was done or when the events on which the claims were based had taken place, ie more than six years before the date when the arbitration proceedings were started. The claimant appealed. The following issues arose: (i) whether the claimant's right to receive payments for the value of work done and materials supplied arose upon the work being done and materials being supplied, or only

upon the issue of a certificate; (ii) if it only arose upon the issue of a certificate, whether it arose once and for all as soon as the claimant was entitled to have the sum certified in an interim certificate, or whether the claimant had a continuing right to have the sum certified in subsequent certificates, and in particular in the final certificate, so that (where the sum was not certified) each failure to certify in accordance with the contract gave rise to a new cause of action; and (iii) the extent to which the claimant's claims for interest on overdue payments were statute-barred.

Held – (1) The right to payment arose when a certificate was issued or ought to have been issued, and not when the work was done, although the doing of the work was a condition precedent to the right to a certificate. The machinery for interim payment was inconsistent with the proposition that the claimant's cause of action in respect of interim payments arose any earlier than the date on which an interim certificate was issued, or (where a certificate was not issued) the date on which a certificate ought to have been issued (see [23], [24], [50], [91], [92], below).

(2) The cause of action in respect of an engineer's failure to include a sum in an interim certificate was not the same as the cause of action in respect of the failure to include a sum in the final certificate, even if the two sums happened to be the same, because interim certificates were no more than provisional estimates of the sum to which the claimant was entitled by way of instalment payments. The contractual scheme was that, as the work proceeded, a provisional running account was prepared by the engineer on the basis of the statement submitted by the claimant. At the final account stage the claimant and the engineer had to perform a very different exercise and it would be an integral part of the final certificate that it would contain the engineer's statement of the contract price ascertained by him after considering the final account, its detailed supporting documentation and all information reasonably required by him for its verification. The nature of the exercise required to be performed by the claimant and the engineer at the interim stage was so different from that required at the final account stage that it could not be said that a failure by the engineer to perform his obligations in relation to an interim certificate could start time running in relation to a cause of action based on the failure by the engineer to perform his obligations in relation to the final account (see [56], [59], [60], [91], [92], below).

(3) The right to claim interest on a sum which should have been certified became statute-barred six years after that right accrued. Once £*x* was overdue for payment in month 1, the cause of action was complete in respect of that overdue payment, whether it resulted from a failure to pay £*x* when it had been certified, or from the engineer's failure to certify £*x*. If the arbitrator did not identify a date when £*x* should have been certified, then £*x* was regarded as overdue for payment from the date of the certificate of substantial completion of the works. Accordingly, the appeal would be allowed in part (see [76]–[78], [91], [92], below).

Notes

For certification in construction contracts, see 4(3) *Halsbury's Laws* (4th edn reissue) paras 125–134.

Cases referred to in judgments

Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1998] 2 All ER 778, [1999] 1 AC 266, [1998] 2 WLR 860, HL.

Brodie v Cardiff Corp [1919] AC 337, HL.

Coburn v Colledge [1897] 1 QB 702, [1895–9] All ER Rep 539, CA.

Costain Building & Civil Engineering Ltd v Scottish Rugby Union plc (1993) 43 Con LR 16, Ct of Sess.

Dunlop & Ranken Ltd v Hendall Steel Structures Ltd, [1957] 3 All ER 344, [1957] 1 WLR 1102, DC.

Elder v Northcott [1930] 2 Ch 422, [1930] All ER Rep 398.

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1973] 3 All ER 195, [1974] AC 689, [1973] 3 WLR 421, HL.

Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [2001] 1 All ER 257, [2001] QB 388, [2000] 3 WLR 1824, CA.

Lubenham Fidelities and Investment Co Ltd v South Pembrokeshire DC (1986) 6 Con LR 85, CA.

Neale v Richardson [1938] 1 All ER 753, CA.

Prestige & Co Ltd v Brettell [1938] 4 All ER 346, CA.

Reeves v Butcher [1891] 2 QB 509, [1891–4] All ER Rep 943, CA.

Scottish Equitable plc v Miller Construction Ltd [2001] ScotCS 214, (2001) 83 Con LR 183, Ct of Sess.

Secretary of State for Transport v Birse-Farr Joint Venture (1993) 35 Con LR 8.

Wilkinson v Verity (1871), LR 6 CP 206, [1861-73] All ER Rep Ext 1283, sub nom, *Williamson v Verity*, 24 LT 32.

Cases referred to in skeleton arguments

Amec Building Ltd v Cadmus Investments Ltd (1996) 51 Con LR 105.

Amec Civil Engineering Ltd v Secretary of State fir Transport [2005] 1 WLR 2339.

Bell v Peter Browne & Co [1990] 3 All ER 124, [1990] 2 QB 495, [1990] 3 WLR 510, CA.

Benstrete Construction Ltd v Hill (1987) 38 BLR 115, CA.

Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd, [1998] All ER (D) 249.

Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd (No 2) (1997) 82 Build LR 39.

Birse Construction Ltd v McCormick (UK) Ltd [2005] EWCA Civ 940, [2005] All ER (D) 366 (Jul).

Blaenau Gwent BC v Lock (Contractors' Equipment) Ltd (1994) 37 Con LR 121.

Board of Trade v Cayzer, Irvine and Co Ltd [1927] AC 610, HL.

BP Chemicals Ltd v Kingdom Engineering (Fife) Ltd (1994) 38 Con LR 14.

Brockman, Re [1909] 2 Ch 170, [1908–10] All ER Rep 364, CA.

Callaghan v Dominion Insurance Co Ltd [1997] 2 Lloyds Rep 541.

Carter, Re, Carter v Carter (1885) 55 LJ Ch 230.

Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd [1983] 3 All ER 706, [1984] AC 226, [1983] 3 WLR 524, PC.

Central Electricity Generating Board v Halifax Corp [1962] 3 All ER 915, [1963] AC 785, [1962] 3 WLR 1313, HL.

Chohan v Times Newspapers Ltd [2001] EWCA Civ 964, [2001] 1 WLR 1859.

Connex South Eastern Ltd v MJ Building Services Group plc [2004] EWHC 1518 (TCC), [2004] All ER (D) 318 (Jun).

Curwen v Milburn (1889) 42 Ch D 424, CA.

Director of Public Works v Ho Po Sang [1961] 2 All ER 721, [1961] AC 901, [1961] 3 WLR 39, PC.

Egmatra AG v Marco Trading Corp [1999] 1 Lloyd's Rep 862.

Errico v Lotter [1956] (4) SA 139, SA SC.

Free Lanka Insurance Co Ltd v Ranasinghe [1964] 1 All ER 457, [1964] AC 541, [1964] 2 WLR 66, PC.

Hillingdon London BC v ARC Ltd [1999] Ch 139, [1998] 3 WLR 754, CA.

Howden (James) & Co v Powell Duffryn Steam Coal Co [1912] SC 920.

Karl Construction Ltd v Palisade Properties plc [2002] SC 270, OH.

Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd [2004] EWHC 996 (Ch), [2004] All ER (D) 243 (Apr).

Kingston upon Thames Royal London BC v AMEC Civil Engineering Ltd (1994) 37 Con LR 39.

Midland Bank Trust Co Ltd v Hett Stubbs & Kemp [1978] 3 All ER 571, [1979] Ch 384, [1978] 3 WLR 167.

Monckton v Payne [1899] 2 QB 603.

Moss, Re, ex p Hallet [1905] 2 KB 307, [1904–7] All ER Rep 713, DC.

Northern Regional Health Authority v Derek Crouch Construction Co Ltd [1984] 2 All ER 175, [1984] QB 644, [1984] 2 WLR 676, CA.

NV Handels-en-Transport Maatschappij 'Vulcaan' v A/S J Ludwig Mowinckels Rederi [1938] 2 All ER 152, HL.

Reliance Industries Ltd v Enron Oil and Gas India Ltd [2002] 1 All ER (Comm) 59.

Robins v Goddard [1905] 1 KB 294, CA.

Royal Norwegian Government v Constant & Constant and Calcutta Marine Engineering Co Ltd [1960] 2 Lloyd's Rep 431.

Scott v Avery [1855–56] 5 HL Cas 811, 10 ER 1121, [1843–60] All ER Rep 1, HL.

Scottish Mutual Assurance plc v Jardine Public Relations Ltd [1999] All ER (D) 305.

Sevcon Ltd v Lucas CAV Ltd [1986] 2 All ER 104, [1986] 1 WLR 462, HL.

Swansea City Council v Glass [1992] 2 All ER 680, [1992] QB 844, [1992] 3 WLR 123, CA.

Virk v Gan Life Holdings (1999) 52 BMLR 207, CA.

West Riding of Yorkshire CC v Huddersfield Corp [1957] 1 All ER 669, [1957] 1 QB 540, [1957] 2 WLR 428.

William Verry Ltd v North West London Communal Mikvah [2004] EWHC 1300 (TCC), (2004) 96 Con LR 96.

Appeal

The claimant Henry Boot Construction Ltd (Boot) appealed with permission of Clarke LJ from part of the award dated 21 April 2004 of Judge Humphrey Lloyd QC sitting as judge arbitrator under s 93 of the Arbitration Act 1996 in arbitration proceedings between Boot and the defendant Alstom Combined Cycles Ltd (Alstom) relating to a contract between Boot and Alstom incorporating the ICE Standard Form (6th edn). The facts are set out in the judgment of Dyson LJ.

Stephen Furst QC and *Tim Lord* (instructed by *Davies Arnold Cooper*) for Boot.

Roger ter Haar QC and *Alastair Walton* (instructed by *Lovells*) for Alstom.

Cur adv vult

4 July 2005. The following judgments were delivered.

DYSON LJ (delivering the first judgment at the invitation of Sir Andrew Morrit V-C).

INTRODUCTION

[1] This is an appeal from part of the award dated 21 April 2004 of Judge Humphrey Lloyd QC sitting as judge arbitrator in accordance with s 93 of the Arbitration Act 1996. Leave to appeal was given by Clarke LJ on the grounds that the issues raised were of general public importance. They concern the question of when a cause of action arises in respect of claims for interim and, more importantly in this case, final payment under construction contracts. This must always be a question of construction. But the essential payment terms of the standard forms of contract have many features in common, including provisions for payment on certificates, usually issued by an engineer or architect. The contract in the present case incorporated the ICE Standard Form (6th edn), with amendments which are immaterial to the issues that arise on this appeal. These issues are of considerable significance to those who are engaged in the construction industry.

[2] Henry Boot Construction Ltd (Boot) was employed by Alstom Combined Cycles Ltd (Alstom) as contractor for the main civil works for the construction of a power station at Connah's Quay, North Wales (the Works). The contract, which was under hand, was made in 1994.

[3] Boot started work on 11 April 1994 and achieved substantial completion of the Works on 28 May 1996. The defects correction certificate was issued on 15 August 2000. Boot submitted its final account in stages, the final part being submitted on 29 June 2001. The total sum claimed in the final account was £102·08m. The engineer issued the final certificate on 9 October 2002 in the sum of £44·43m.

[4] On 1 March 2003, Alstom served a notice of dispute pursuant to cl 66(2) of the conditions of contract, challenging the valuation in the final certificate and raising the issue that the claim was barred by the Limitation Act 1980. On 3 March 2003, Boot served two notices of dispute, the first of which related to Alstom's refusal to pay the sum certified as due under the final certificate.

[5] On 23 May 2003, the engineer gave his decision in relation to all three notices. In response to Alstom's notice, he decided that the value of the final account was £44·38m (thereby reducing the amount certified by £43,000). He made no decision on the limitation issue raised by Alstom. In relation to Boot's first notice, he decided that a sum of at least £2·9m became overdue for payment to Boot on 8 December 2002.

[6] This arbitration was commenced on 27 May 2003. Alstom sought a review of the engineer's decision not to decide whether Boot's claims were statute-barred. Alstom also contended that Boot's claims were statute-barred at the date of the final certificate, so that, contrary to the decision of the engineer, no sum was due to Boot. The limitation defence was tried as a preliminary issue. The judge arbitrator decided that all or almost all the claims were statute-barred, because the relevant causes of action had arisen when the work was done or when the events on which the claims were based had occurred, ie more than six years before the date when the arbitration proceedings were started.

SUMMARY OF ISSUES

[7] (i) Did Boot's contractual right to receive payments for the value of work done and materials supplied arise upon the work being done and materials being supplied, or only upon the issue of a certificate? (ii) If it only arose upon the issue of a certificate, did it arise once and for all as soon as Boot was entitled to have the sum certified in an interim certificate, or did Boot have a continuing right to have the sum certified in subsequent certificates, and in particular in the final certificate, so that (where the sum was not certified) each failure to certify in accordance with the contract gave rise to a new cause of action? (iii) To what extent are Boot's claims for interest pursuant to cl 60(7) of the conditions of contract statute-barred? (iv) Was the engineer obliged only to certify sums in respect of claims which he considered not to be statute-barred?

SUMMARY OF BOOT'S CLAIMS

[8] Boot's claims pursuant to the contract (as distinct from its claims for damages for breach of the contract) were for: admeasure valuation pursuant to cl 56(1) and (2); valuation of Provisional Sums pursuant to cll 58(1)(a) and 52; valuation of Dayworks pursuant to cll 56(4) and 52; valuation of variations pursuant to cll 51 and 52(1) and (2); corrections of errors or omissions in the Bills of Quantities under cl 55(2); extra cost incurred as a result of the late information pursuant to cl 7(4); extra cost incurred as a result of unforeseen conditions under cl 12; extra cost incurred as a result of engineer's instructions under cll 5 and 13(3); interest pursuant to cl 60(7) on payments which it is claimed should have certified by the engineer; extra cost incurred in the circumstances referred to in cl 14(8); extra cost as a result of providing facilities to other contractors (cl 31(2)); extra cost as a result of suspension of work (cl 40(1)); extra cost as a result of failure to give possession (cl 42(3)); and cost of acceleration measures (cl 46(3)).

THE CONCLUSIONS OF THE JUDGE ARBITRATOR

[9] In paras 83–91, the judge arbitrator explained why in his opinion the cause of action in relation to interim payments accrued when the work was done, and was not dependent on the issue of certificates. This he described as his 'preliminary ground' for holding that 'subject to one or two possible exceptions' and subject to the estoppel issue, Boot's claims were all statute-barred. At para 85, he drew attention to the language of the clauses. Thus, cl 60(2) required the Engineer to form an opinion as to what 'is due to the Contractor', and saw significance in the fact that reference was to what 'is due' rather than what 'will be due' (after the certificate had been issued and the time for payment had arrived). He made other linguistic points on the wording of cl 52(4)(c)–(f) which he said was consistent only with the certificate 'substantiating the existing right or obligation'. He placed particular emphasis on cl 52(4)(f) which referred to the contractor being—

> 'entitled to have included in any interim payment certified by the Engineer pursuant to clause 60 such amount in respect of any claim as the Engineer may consider due to the Contractor provided that the Contractor shall have supplied sufficient particulars to enable the Engineer to determine the amount due'

but—

'if such particulars are insufficient to substantiate the whole of the claim the Contractor shall be entitled to payment in respect of such part of the claim as the particulars may substantiate to the satisfaction of the Engineer.'

The judge arbitrator said that this 'is language which presupposes the existence of a right, as it is directed to its quantification after appropriate proof of *amount*'.

[10] He then reviewed a number of authorities which he said support this interpretation. To the extent that I think it necessary to do so, I shall refer to these later in this judgment. The judge arbitrator considered that the House of Lords decision in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1998] 2 All ER 778, [1999] 1 AC 266 was of particular importance as showing that a certificate 'is a convenient way of establishing the rights and duties at that stage'. It followed that 'a certificate does not of itself necessarily create any right or obligation; it is merely a recognition of them, as perceived by the architect'.

[11] He concluded at para 91 that the certification provisions of the contract were written on the basis that 'the contractor is already entitled to the amounts. The only question is whether the entitlement will be recognised by the Engineer'.

[12] Having reached this conclusion, the judge arbitrator addressed the point that, taken to its logical conclusion, it would mean that 'every cubic metre excavated, carted, tipped, spread, poured, lifted, applied etc would make the Employer liable for the applicable rate or price, at least as soon as it was measured for payment under cll 55–57'. That would be absurd. Accordingly, he went on to say:

'It is probably safer to base the decision on the alternative ground that the contractor's right to payment in respect of work, materials etc properly done or supplied arises when a certificate is issued or due to be issued. That result is conveniently encapsulated in the proposition that a certificate is a condition precedent to payment, but that is inaccurate or perhaps an overstatement. However it is a proposition that is endorsed by many cases, even if in a number of them, the point was not analysed as it has been by the submissions in this arbitration.'

[13] He then rejected the submission that, since certificates are cumulative, contractors gain a new right every time a certificate is issued which undervalues the work or does not include a sum to which the contractor is entitled. At para 93, he continued:

'Once all the ingredients which would justify an application or a statement from the contractor are present, the cause of action accrues, perfected, if need be, at the time when the certificate is due. Once the Engineer has failed to issue a certificate for what is due, then time runs against the contractor in respect of the undervaluation or omission—why otherwise is interest payable under cl 60(7)? This is in my judgment fully borne out by the provisions of cll 52(4) and 60 and the authorities to which I have referred.'

[14] He then turned to the individual claims made by Boot and decided that they were all or almost all statute-barred because the causes of action had arisen earlier than 27 May 1997. Thus, for example, the claim under cl 12 was in respect of a cause of action which arose on the happening of events on which the claim was based, and was therefore statute-barred. The same applied in relation to claims made pursuant to cll 7(4)(a), 13, 14, 31 and 40. As regards the claims for measured work, errors and omissions from the Bills of Quantities, Dayworks and

Provisional Sums, Boot's cause of action arose as and when the work was carried out ie before 28 May 1996.

[15] Finally, the judge arbitrator decided (para 101) that the engineer was in error in failing to decide that Boot's claims were statute-barred, and that he had no power to make any decision in favour of Boot (with the exception of the second half of the retention money).

DISCUSSION

The first issue

[16] I do not understand it to be disputed that the question that arises under this issue is one of construction.

[17] By cl 4 of the Form of Agreement which was incorporated into the contract, Alstom agreed to pay 'to the Contractor in consideration of the performance and completion of the Works the Contract Price at the times and in the manner prescribed by the Contract'. The contract price was defined by cl 1 of the conditions of contract as 'the sum to be ascertained and paid in accordance with the provisions hereinafter contained for the construction and completion of the Works in accordance with the Contract'. The contract price was not fixed at the outset, but was to be ascertained by the engineer by the application of the contractual provisions in the light of the work that was actually done and the events that occurred during the carrying out of the Works. The times and manner prescribed by the contract for payment were in cl 60 and nowhere else. As Mr Stephen Furst QC pointed out, but for the provisions for payment of interim certificates, Boot would have had no entitlement to be paid as the work progressed at all. Mr Roger ter Haar QC suggested in argument that, in a substantial contract such as this (indeed he suggested in all construction contracts), there would be an implied term that the contractor was entitled to instalment payments. He cited no authority in support of this sweeping submission. It is true that in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, [1974] AC 689, there are dicta to the effect that 'a building contract is an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done': per Lord Diplock [1973] 3 All ER 195 at 215, [1974] AC 689 at 717 and see also the dicta of Lord Salmon [1973] 3 All ER 195 at 220, [1974] AC 689 at 722. But since cl 60(2) makes detailed provision for interim payments, these dicta are not relevant to the first issue. Still less are they relevant to the question whether the right to an interim payment in respect of part of the contract work is the same cause of action as the right to final payment in respect of the same part of the contract work. That question (which lies at the heart of this appeal and is the subject of the second issue) must, in my judgment, always be a matter of construction.

[18] It is, therefore, to cl 60 that one must look to see what provisions the parties agreed as to the 'times and manner' of payment. So far as material, cl 60 provides:

> '(1) The Contractor shall submit to the Engineer at monthly intervals a statement (in such form if any as may be prescribed in the Specification) showing
>
> (a) the estimated contract value of the Permanent Works executed up to the end of that month

(b) a list of any goods or materials delivered to the Site for but not yet incorporated in the Permanent Works and their value

(c) a list of any of those goods or materials identified in the Appendix to the Form of Tender which have not yet been delivered to the Site but of which the property has vested in the Employer pursuant to Clause 54 and their value and

(d) the estimated amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract including any Temporary Works or Contractor's Equipment for which separate amounts are included in the Bill of Quantities

unless in the opinion of the Contractor such values and amounts together will not justify the issue of an interim certificate.

Amounts payable in respect of Nominated Sub-contracts are to be listed separately.

Monthly payments

(2) Within 28 days of the date of delivery to the Engineer or Engineer's Representative in accordance with sub-clause (1) of this Clause of the Contractor's monthly statement the Engineer shall certify and the Employer shall pay to the Contractor (after deducting any previous payments on account)

(a) the amount which in the opinion of the Engineer on the basis of the monthly statement is due to the Contractor on account of sub-clauses (1) (a) and (1) (d) of this Clause less a retention as provided in sub-clause (5) of this Clause and

(b) such amounts (if any) as the Engineer may consider proper (but in no case exceeding the percentage of the value stated in the Appendix to the Form of Tender) in respect of sub-clauses (1) (b) and (1) (c) of this Clause.

The amounts certified in respect of Nominated Sub-contracts shall be shown separately in the certificate.

Minimum amount of certificate

(3) Until the whole of the Works has been certified as substantially complete in accordance with Clause 48 the Engineer shall not be bound to issue an interim certificate for a sum less than that stated in the Appendix to the Form of Tender but thereafter he shall be bound to do so and the certification and payment of amounts due to the Contractor shall be in accordance with the time limits contained in this Clause [the sum stated in the Appendix was £100,000].

Final account

(4) Not later than 3 months after the date of the Defects Correction Certificate the Contractor shall submit to the Engineer a statement of final account and supporting documentation showing in detail the value in accordance with the Contract of the Works executed together with all further sums which the Contractor considers to be due to him under the Contract up to the date of the Defects Correction Certificate.

Within 3 months after receipt of this final account and of all information reasonably required for its verification the Engineer shall issue a certificate stating the amount which in his opinion is finally due under the Contract from the Employer to the Contractor or from the Contractor to the

Employer as the case may be up to the date of the Defects Correction Certificate and after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled under the Contract.

Such amount shall subject to Clause 47 be paid to or by the Contractor as the case may require within 60 days of the date of the certificate.

Interest on overdue payments

(7) In the event of

(a) failure by the Engineer to certify or the Employer to make payment in accordance with sub-clauses (2) (4) or (6) of this Clause or

(b) any finding of an arbitrator to such effect

the Employer shall pay to the Contractor interest compounded monthly for each day on which any payment is overdue or which should have been certified and paid at a rate equivalent to 2% per annum above the base lending rate of the bank specified in the Appendix to the Form of Tender. If in an arbitration pursuant to Clause 66 the arbitrator holds that any sum or additional sum should have been certified by a particular date in accordance with the aforementioned sub-clauses but was not so certified this shall be regarded for the purposes of this sub-clause as a failure to certify such sum or additional sum. Such sum or additional sum shall be regarded as overdue for payment 60 days after the date by which the arbitrator holds that the Engineer should have certified the sum or if no such date is identified by the arbitrator shall be regarded as overdue for payment from the date of the Certificate of Substantial Completion for the whole of the Works.

Correction and withholding of certificates

(8) The Engineer shall have power to omit from any certificate the value of any work done goods or materials supplied or services rendered with which he may for the time being be dissatisfied and for that purpose or for any other reason which to him may seem proper may by any certificate delete correct or modify any sum previously certified by him. Provided that

(a) the Engineer shall not in any interim certificate delete or reduce any sum previously certified in respect of work done goods or materials supplied or services rendered by a Nominated Sub-contractor if the Contractor shall have already paid or be bound to pay that sum to the Nominated Sub-contractor and

(b) if the Engineer in the final certificate shall delete or reduce any sum previously certified in respect of work done goods or materials supplied or services rendered by a Nominated Sub-contractor which sum shall have been already paid by the Contractor to the Nominated Sub-contractor the Employer shall reimburse to the Contractor the amount of any sum overpaid by the Contractor to the Sub-contractor in accordance with the certificates issued under sub-clause (2) of this Clause which the Contractor shall be unable to recover from the Nominated Sub-contractor together with interest thereon at the rate stated in sub-clause (7) of this Clause from 60 days after the date of the final certificate issued under sub-clause (4) of this Clause until the date of such reimbursement.

Payment advice

(10) Where a payment made in accordance with sub-clause (2) of this Clause differs in any respect from the amount certified by the Engineer the Employer shall notify the Contractor forthwith with full details showing how the amount being paid has been calculated.'

[19] Mr ter Haar submits that Boot's cause of action accrues on the doing of the work, not necessarily brick by brick, but periodically, which, for purposes of the Limitation Act 1980, he says means day-by-day and in any event at the end of each period for which Boot is first entitled to submit a statement of the value claimed. The engineer's valuations and certificates under cl 60(2) and (4) are irrelevant to the accrual of the cause of action. They are no more than evidence of the engineer's opinion of what is due to Boot. The entitlement to payment exists independently of the exercise of that machinery by the engineer, because in this contract the engineer does not create rights for the contractor; rather he recognises and assesses or determines what Boot's rights are at any given time.

[20] An early authority on which Mr ter Haar relies is *Coburn v Colledge* [1897] 1 QB 702, [1895–9] All ER Rep 539. This establishes the proposition that, where A does work for B at B's request on terms that A is entitled to be paid for it, his right to be paid for it (ie his cause of action) arises as soon as the work is done 'unless there is some special term of the agreement to the contrary' (see [1897] 1 QB 702 at 705, per Lord Esher MR). In my view, this decision is not sufficient to vindicate Mr ter Haar's argument for two reasons. First, it begs the question of what is 'the work' for this purpose: is it the whole of the work which is the subject of the contract, or certain separately identified parts of the work? Secondly, the question arises whether, as Mr Furst submits to be the case, cl 60 is a 'special term of the agreement to the contrary'.

[21] Mr ter Haar submits that the judge arbitrator was right to find support in the language of the contract for Alstom's case that interim certificates are not conditions precedent to Boot's right to payment. The reference in cl 60(2)(a) to the amount which in the opinion of the engineer 'is due' indicates that the engineer is required to certify the amount which he considers already to be due to Boot independently of the certification process. He makes similar points in relation to cl 52(4) which provides for claims for additional payments pursuant to any clause of the conditions other than cll 52(1) and (2) and 56(2). Mr ter Haar places particular reliance on cl 52(4)(f) which provides that:

'The Contractor shall be entitled to have included in any interim payment certified by the Engineer pursuant to Clause 60 such amount in respect of any claim as the Engineer may consider due to the Contractor provided that the Contractor shall have supplied sufficient particulars to enable the Engineer to determine the amount due. If such particulars are insufficient to substantiate the whole of the claim the Contractor shall be entitled to payment in respect of such part of the claim as the particulars may substantiate to the satisfaction of the Engineer.'

[22] He submits that cl 52(4) presupposes that Boot is already entitled to additional sums under the relevant clauses of the contract, and it is not consistent with the entitlement to payment only arising upon the issue of a certificate.

Conclusion on the question of construction without reference to previous authority

[23] In my judgment, on the true construction of this contract, certificates are a condition precedent to Boot's entitlement to payment under cl 60(2) and (4), and they are not merely evidence of the engineer's opinion. By 'condition precedent' I mean that the right to payment arises when a certificate is issued or ought to be issued, and not earlier. It does not, however, follow from the fact that a certificate is a condition precedent that the absence of a certificate is a bar to the right to payment. This is because the decision of the engineer in relation to certification is not conclusive of the rights of the parties, unless they have clearly so provided. If the engineer's decision is not binding, it can be reviewed by an arbitrator (if there is an arbitration clause which permits such a review) or by the court. If the arbitrator or the court decides that the engineer ought to have issued a certificate which he refused to issue, or to have included a larger sum in a certificate which he did issue, they can, and ordinarily will, hold that the contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum (see further, [40]–[45] below). It is convenient to make such an award or to enter such a monetary judgment in order to avoid the risk of further proceedings in the event that the employer does not pay. For the reasons that follow, I consider that the right to payment arises when a certificate is issued or ought to be issued, and not when the work is done (although the doing of the work is itself a condition precedent to the right to a certificate).

[24] For the purposes of the first issue, I shall concentrate on interim payments. Clause 60(1) requires Boot to submit at monthly intervals a statement showing the estimated value of the permanent works executed up to the end of that month as well as the other matters referred to in cl 60(1)(b) to (d). I shall examine cl 60(1) in more detail when I deal with the second issue. Clause 60(2) requires the engineer within 28 days of the delivery of the monthly statement to certify and Alstom to pay the amount which in the opinion of the engineer 'on the basis of the monthly statement' is due on account of sub-cll (1)(a) to (d). Thus what the engineer has to certify and Alstom to pay is not the true final value of the work in fact done and materials in fact supplied etc, but what in the opinion of the engineer is due on the basis of the monthly statement. If Boot omits an item of work from the statement, even if the work has been done, the engineer is not obliged to include its value in the certificate. Moreover, the engineer is required to certify and Alstom to pay within 28 days of the delivery of the statement. It follows that the certificate may be issued at least 28 days after the end of the month to which the statement relates, and, if Boot takes some time to deliver the statement, possibly even later than that. In my view, it is clear that Boot's entitlement to interim payment does not arise until the engineer issues his certificate. The machinery for interim payment is provided exclusively by cl 60(1) and (2), and it is inconsistent with the proposition that Boot's cause of action in respect of interim payments arises any earlier than the date on which an interim certificate is issued, or (where a certificate is not issued) the date on which a certificate ought to be issued. I do not see how it is possible to construe this contract as meaning that the right to interim payments arises brick by brick, or day-by-day or is in any other way unrelated to certificates.

[25] There are other provisions in the contract which support this conclusion. First, cl 60(3). This provides that, until the Works have been certified as substantially compete, the engineer is not bound to issue a payment certificate for

a sum less than £100,000. It follows that, if Boot's monthly statement were to claim a net amount of, say, £50,000, the engineer would be entitled to refuse to issue a certificate, and Alstom would not be obliged to make any payment for that month. And yet, on Mr ter Haar's argument, Boot's cause of action in respect of the £50,000 would have accrued. But it is quite clear that it is intended that there should be no right to payment of the £50,000 at that stage. If the position were otherwise, it is difficult to see what purpose is served by cl 60(3) at all. I reiterate that the fundamental payment obligation on Alstom is to pay the contract price at the times and in the manner prescribed by the contract.

[26] Secondly, I refer to cl 60(7). This provides that, in the event of 'failure by the Engineer to certify' or the employer to make payment in accordance with cl 60(2), (4) or (6), Alstom shall pay interest compounded monthly for each day on which any payment is overdue or which should have been certified. It is immaterial for present purposes that it has been decided that the phrase 'failure to certify' has a restricted meaning: see *Secretary of State for Transport v Birse-Farr Joint Venture*(1993) 35 Con LR 8. Hobhouse J held that a failure to certify must demonstrate some misapplication or misunderstanding of the contract by the engineer. The important point is that the contract provides for the payment of interest, not from the date when the work was done, but from when payment was 'overdue' or should have been certified and paid. A payment is 'overdue' inter alia if it is not made in accordance with sub-cll (2), (4) or (6). If the cause of action accrued at the date when the work was done, one would have expected interest to run from that date. Instead, it runs from the later date when payment is overdue because it has not been made in accordance with cl 60.

[27] Thirdly, if certificates do no more than recognise Boot's existing rights and are no more than evidence of Boot's contractual entitlement to payment, then why is it necessary (by cl 66(8)) to give arbitrators the 'full power to open up review and revise any ... certificate or valuation of the Engineer'? If a certificate is no more than (non-conclusive) evidence as to Boot's entitlement, it would not be necessary to give the arbitrator this power.

[28] As regards the points made on the wording of cll 52(4) and 60(2) to which I have referred at [21] above, I do not consider that the words will bear the weight the judge arbitrator sought to put upon them. In my judgment, the tense used in these clauses does not indicate that the certificate is merely the quantification of a cause of action that has already accrued. The amount certified *is* due because that is the amount assessed as due for payment by the Engineer as a consequence of the issue of his certificate. It is not due for payment at any earlier time. The fact that the certificate relates to work that was done before the issue of the certificate does not mean that the sum certified as due for payment was due before the certificate was issued. This interpretation of the meaning of 'due' in cl 60(2) is also consistent with cl 60(7) (see [26] above). The same arguments arise under cl 52(4)(f). Boot is entitled to have included in any interim payment certified under cl 60 'such amount in respect of any claim as the Engineer may consider due to the Contractor'.

Previous authority

[29] The conclusion that I have reached thus far is based on my interpretation of the contract untrammelled by previous authority. But this is an area that is not free of authority. As Lord Hoffmann said in the *Beaufort Developments* case at [1998] 2 All ER 778 at 784, [1999] 1 AC 266 at 274:

'It is also important to have regard to the course of earlier judicial authority and practice on the construction of similar contracts. The evolution of standard forms is often the result of interaction between the draftsmen and the courts and the efforts of the draftsman cannot be properly understood without reference to the meaning which the judges have given to the language used by his predecessors.'

[30] A number of cases were cited to us on standard forms of construction contracts which deal with the question whether a certificate is a condition precedent to the contractor's right to payment. In *Dunlop and Ranken Ltd v Hendall Steel Structures Ltd* [1957] 3 All ER 344, [1957] 1 WLR 1102, the issue was whether a debt was owed by main contractors to sub-contractors which could be the subject of a garnishee order. Lord Goddard CJ said ([1957] 3 All ER 344 at 347, [1957] 1 WLR 1102 at 1105):

'... until the architect has given a certificate, the contractor has no right to receive any sum of money from his employer by what I may call a drawing on account. Until the contractor can produce to the building owner a certificate from the architect, the contractor cannot get anything.'

[31] In *Lubenham Fidelities and Investment Co Ltd v South Pembrokeshire DC* (1986) 6 Con LR 85, an issue arose as to whether the contractor under a JCT form of building contract was entitled to determine its employment on the grounds that deductions made by the architect in his interim certificates were improper. It was held by the Court of Appeal that the employer was not obliged to pay more than the amount stated on the face of the certificate and that it had properly determined the contractor's employment under the contracts. In giving the judgment of the court, May LJ said (at 96):

'Whatever be the cause of the under-valuation, the proper remedy available to the contractor is, in our opinion, to request the architect to make the appropriate adjustment in another certificate, or if he declines to do so, to take the dispute to arbitration under condition 35. In default of arbitration or a new certificate the conditions themselves give the contractor no right to sue for a higher sum. In other words, we think that under this form of contract the issue of a certificate is always a condition precedent to the right of the contractor to be paid.'

[32] In *Costain Building & Civil Engineering Ltd v Scottish Rugby Union plc* (1993) 43 Con LR 16, the Court of Session, Inner House had to decide whether a contractor employed under the ICE conditions of contract was entitled to arrestment of a sum which it claimed had been undercertified. It was held that, since the sum claimed was not a debt due, it could not be the subject of arrestment. For the purposes of founding an arrestment, a debt was due only if it was 'due for payment immediately *ex hypothesi* of the pursuer's case' (see (1993) 43 Con LR 16 at 22). The Lord President (Lord Hope) considered the conditions of the contract in some detail. The contractor's argument was that what was due to it was 'something that can be established independently of the engineer's opinion' (see (1993) 43 Con LR 16 at 26). Lord Hope rejected this argument as being impossible to reconcile with the conditions of the contract. It ignored the detailed provisions by which the contract price was to be ascertained, and proceeded instead upon the view that the contractor was entitled to be paid for

the work at rates which could be adjudicated upon by the court, in effect a claim for payment on a quantum meruit.

[33] In *Scottish Equitable plc v Miller Construction Ltd* [2001] ScotCS 214, (2001) 83 Con LR 183, another decision of the Court of Session, Inner House, differences arose under a JCT form of building contract. Practical completion took place on 6 August 1990 and all the factual events on which the contractor's claim for loss and expense was based had occurred before that date. The latest interim certificate was issued on 18 June 1992, and the arbitration started less than five years after that date (five years is the relevant limitation period under the law of Scotland). The question was whether the claim for loss and expense had been enforceable for a continuous period of five years before the arbitration proceedings were started. It was held that the claim for loss and expense was not statute-barred. It seems to have been common ground that there would be no right to payment without a certificate, and the *Lubenham Fidelities* case and the *Costain Building* case were cited (at [24]). The *Scottish Equitable* case is of more direct relevance to the second issue.

[34] Mr ter Haar submits that these authorities can no longer be regarded as good law in the light of the *Beaufort Developments* case. He relies strongly on this decision in support of the proposition that a certificate is not a condition precedent to Boot's right to payment, a right which rises independently of certificates. In that case, the contractor started proceedings in the High Court claiming sums due under interim certificates. The employer denied liability and alleged that it was entitled to set off an amount in excess of the claim. The contractor gave notice of arbitration, and the employer started further proceedings against the contractor and architect claiming damages for negligence and breach of contract. The contractor applied for a stay of proceedings in the employer's action on the grounds that an arbitrator would, but the court would not, have the power to open up, review and revise certificates issued by the architect.

[35] The House of Lords refused the stay on the grounds that it was unnecessary: the court's jurisdiction was unlimited. The fact that the power to open up, review and revise certificates was expressly conferred on the arbitrator, but not upon the court, could not be construed as removing the court's unlimited power to determine the rights and obligations of the parties. The issue, therefore, was the extent of the jurisdiction of the court. As Lord Hoffmann put it ([1998] 2 All ER 778 at 782, [1999] 1 AC 266 at 272), the question was whether 'an arbitrator appointed to decide a dispute arising under a building contract in the JCT standard form has a power to review decisions and certificates of the architect which is not available to a court'. As Lord Hoffmann said ([1998] 2 All ER 778 at 783, [1999] 1 AC 266 at 273), 'the critical question is whether, upon the true construction of the contract, such certificates are binding'. The issue was not whether the certificate was a condition precedent to the right to payment in the first place.

[36] Lord Hoffman said ([1998] 2 All ER 778 at 785–786, [1999] 1 AC 266 at 275–276):

> 'If one considers the practicalities of the construction of a building or other works, it seems to me that parties could reasonably have intended that they should have what might be called a provisional validity. Construction contracts may involve substantial work and expenditure over a lengthy period. It is important to have machinery by which the rights and duties of

a the parties at any given moment can be at least provisionally determined with some precision. This machinery is provided by architect's certificates. If they are not challenged as inconsistent with the contractual terms which the parties have agreed, they will determine such matters as when interim payments are due or completion must take place. This is something which the parties need to know. No doubt in most cases there will be no challenge.'

b [37] As Mr Furst points out, it was not suggested in the *Beaufort Developments* case (still less did the House hold) that the certification process was irrelevant to the contractor's rights and merely evidence of the true content of those rights. On the contrary, this passage in the speech of Lord Hoffmann suggests that certification was an essential element in determining the parties' rights and c obligations even if, due to its provisional status, a certificate could subsequently be challenged. It is a non sequitur to reason that, because interim certificates are not conclusive and may subsequently be reviewed, therefore they are not an essential part of the contractual machinery for payment. To assert that a certificate (a) is a condition precedent to a right of action, and (b) is not conclusive, since it can be reviewed by an arbitrator or court, is not to advance d two inconsistent propositions. It is, therefore, not surprising that their lordships did not say anything about the question of what constitutes the cause of action or when it arises. Nor is it surprising that decisions such as *Dunlop & Ranken v Hendall Steel Structures Ltd, Lubenham Fidelities and Investment Co Ltd v South Pembrokeshire DC* and *Costain Building & Civil Engineering Ltd v Scottish Rugby* e *Union plc* were not mentioned. They were not relevant to the issue that the House of Lords had to decide.

[38] Mr ter Haar places particular reliance on the speech of Lord Hope. Lord Hope said ([1998] 2 All ER 778 at 795, [1999] 1 AC 266 at 286), that the court does not need the power conferred on the arbitrator to open up, review and revise f certificates: the ordinary powers of the court in regard to the examination of the facts and awarding sums found due are all that is required. He drew a distinction (1998] 2 All ER 778 at 797, [1999] 1 AC 266 at 288) between an agreement that machinery be used to implement or give effect to the contract, and an agreement that the parties' rights are to be determined solely by means of that machinery. Machinery for the certification and making of interim payments falls into the first g of these categories. An agreement to provide machinery of that kind does not imply any limitation on the ordinary powers of the court. Its purpose is 'simply to enable the contract to be worked out upon the agreed terms to achieve the result to which it was directed'. Thus, when an architect makes decisions as to the amounts to be paid to the contractor by way of instalment payments towards h a final settlement of the sums to which he is entitled under the contract, it is the duty of the architect (or in the event of an arbitration, the arbitrator) to 'give effect to the contract, not to alter or modify it' (see [1998] 2 All ER 778 at 799, [1999] 1 AC 266 at 290). If the issue comes before the court, the court is—

j 'entitled to examine the facts and to form its own opinion upon them in the light of the evidence. The fact that the architect has formed an opinion on the matter will be part of the evidence. But, as it will not be conclusive evidence, the court can disregard his opinion if it does not agree with it (see [1998] 2 All ER 778 at 800, [1999] 1 AC 266 at 292)'.

[39] I do not see any difference of principle between the approach of Lord Hoffmann and that of Lord Hope. For the reasons already given, I do not

consider that the decision in the *Beaufort Developments* case compels the conclusion that certificates are not a condition precedent to the right to payment.

[40] Finally, Mr ter Haar submits that the *Lubenham Fidelities* case was decided per incuriam, because it is inconsistent with three important decisions which were not cited to the court. These are *Brodie v Cardiff Corp* [1919] AC 337, *Neale v Richardson* [1938] 1 All ER 753 and *Prestige v Brettell* [1938] 4 All ER 346.

[41] In *Brodie*'s case, the contract provided that the employer was not to become liable for the payment of any charge for additions, alterations or deviations unless instructions for them were given in writing by the engineer. There was a widely drafted arbitration clause. The arbitrator held that the engineer had improperly refused to give orders in writing for the extras. The employer argued that the absence of such orders was a defence to the contractor's claim to be paid for them. The House of Lords held that the arbitrator had power to award that the items in question should be paid for as extras, despite the absence of any orders in writing by the engineer. Lord Finlay LC said (at 351) that the finding of the arbitrator 'is to take the place of the order in writing which ought to have been given'. It seems to me that this is entirely consistent with what May LJ said in the *Lubenham Fidelities* case. It was a condition precedent to the right to payment that an order was given, or ought to have been given. *Brodie*'s case certainly does not support the proposition that the cause of action in respect of the extra work arose when the work was done.

[42] In *Neale*'s case, payments were to be by instalments when the architect gave a certificate. In the case of disputes, the architect was to act as arbitrator. A dispute arose and the architect refused to act as arbitrator or to issue a certificate in relation to the final instalment. It was held by the Court of Appeal that the absence of a certificate was no bar to the contractor's right to recover. Slesser LJ said ([1938] 1 All ER 753 at 756) that he could not see why in principle the employer should not be entitled to stand upon her contract and say that she had undertaken to pay when, and only when, the architect gave his final certificate. But the arbitration clause compelled a different conclusion. Following *Brodie*'s case, he held that an arbitration resulting in an award in favour of the contractor would have enabled him to sue for his payment 'as if a final certificate for that amount had been granted and not wrongfully refused' (see [1938] 1 All ER at 758). The employer was not permitted to take advantage of the architect's refusal to operate the contract machinery for the resolution of disputes. But it is noteworthy that Slesser LJ did not say that the absence of a final certificate was irrelevant. Rather, in the events that occurred, the contractor was entitled to bring proceedings *as if* a final certificate had been issued and not been honoured.

[43] In *Prestige*'s case, the architect refused to issue a certificate. The contractor referred the dispute to arbitration. The Court of Appeal applied *Brodie*'s case and *Neale*'s case and held that the arbitrator had power not only to decide as to the issue of a certificate, but also to make an award of the sum due. Slesser LJ said ([1938] 4 All ER at 350):

> 'Where an arbitrator having jurisdiction has to decide that something ought to have been done by the architect or engineer which was not done, if the terms of reference are wide enough to enable him to deal with the matter, he may by that decision himself supply the deficiency, and do that which ought to have been done, and produce the result which ought to have been produced ...'

[44] He said (at 350) that if the arbitrator came to the conclusion that the certificate ought to have been issued, 'he could act as if it had been granted'. MacKinnon and Greer LJJ agreed. Mr ter Haar places particular reliance on the judgment of Greer LJ, who said (at 354):

> 'I cannot read either *Brodie v Cardiff Corpn* or *Neale v Richardson* except as expressing the view that, in the opinion of the House of Lords in *Brodie's* case, and in the opinion of this court in *Neale v Richardson,* an arbitrator to whom a matter is remitted in the form in which it was in this case has the power to dispense with the conditions precedent, and to order that, notwithstanding the non-performance of those conditions precedent, a liability may be established on which money may be ordered to be paid.'

[45] It is clear that in *Prestige's* case the Court of Appeal was purporting to apply *Brodie's* case, which for the reasons I have given does not support Mr ter Haar's argument. Moreover, Greer LJ explicitly acknowledged that certificates *were* a condition precedent to payment, but said that the arbitrator and the court had power to dispense with the condition where a certificate ought to have been issued. In my judgment, this approach is inconsistent with the proposition that a certificate is no more than evidence of the contractor's right to payment accruing when the work is done, rather than when the certificate is, or ought to be, issued.

The claim under clause 46

[46] Clause 46(3) of the contract provides:

> 'If the Contractor is requested by the Employer or the Engineer to complete the Works or any Section within a revised time being less than the time or extended time for completion prescribed by Clauses 43 and 44 as appropriate then the Contractor shall submit written proposals to the Engineer stating:
>
> (a) The lump sum based on an estimate of the reasonable extra costs which the Contractor would require to be added to the Contract Price in order substantially to complete and test the Works or any Section by such earlier date as the Employer or the Engineer may have specified, together with details showing the manner of calculation of the lump sum and proposals for the terms of payment thereof.
>
> (b) Where applicable, the extent to which any extension of time to which the Contractor has become entitled at the date of the request may be cancelled or reduced such that the date for substantial completion then resulting would become the substantial completion date for the Works or any Section.
>
> Notwithstanding that the Employer and the Contractor may not have agreed the amount by which the Contract Price is increased, the Contractor shall nevertheless be obliged to proceed with the Works or Section thereof in order to achieve the earlier date aforesaid, and the Employer shall make a reasonable payment on account to the Contractor pending agreement on the lump sum increase to the Contract Price. The cost of preparing the proposals referred to in this sub-clause shall be borne by the Contractor.'

[47] An issue arose in the arbitration as to whether payment of the extra cost of accelerating the completion of the Works is subject to the certification provisions of cl 60. The judge arbitrator said:

> 'Clause 60(1)(d) requires the contractor to include in its monthly applications "the estimated amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract." Clause 46 makes such provision.'

[48] Mr ter Haar makes the following points. Clause 46 contemplates an agreement between the parties that acceleration measures are to be put into effect. The 'request' by the engineer or Alstom is not an 'instruction' under cl 51, so that the valuation provisions of cl 52 do not apply. The clause envisages an agreement between the parties as to the price to be paid for the acceleration measures: this is to be a lump sum increase, and there is no provision that, once agreed, payment of the sum is dependent on a certificate by the engineer. Prior to, or in the absence of agreement of the amount of the increase, Alstom is obliged to make a reasonable payment on account, and this obligation is not dependent on the issue of a certificate by the engineer.

[49] In my judgment, the judge arbitrator was right. The language of cl 60(1)(d) is very wide: 'estimated amounts ... in connection with *all other matters for which provision is made under the Contract* ...' (my emphasis). Sums claimed in respect of acceleration measures pursuant to cl 46 are amounts to which Boot considers itself entitled in connection with a matter (acceleration measures) for which provision is made under the Contract (by cl 46). It seems to me that none of Mr ter Haar's points compels a different conclusion.

Conclusion on the first issue

[50] In my judgment, there is nothing in the authorities which requires me to modify the conclusion that I expressed earlier that, upon the true construction of the contract, the right to payment arises when a certificate is not paid in accordance with cl 60(2) or (4) as the case may be, or when a certificate to which Boot is entitled under cl 60(2) or (4) is not issued in accordance with the contract.

The second issue

[51] Mr ter Haar submits that (whatever the outcome of the first issue), once Boot had a right to an interim payment in respect of an item of work or a claim, the cause of action in respect of that right to payment accrued, and it became statute-barred six years thereafter. He says that it is a very strange proposition that the repeated omission of an item or claim gives rise to a fresh cause of action. He makes the point that, if A claims a debt from B and B refuses to pay, and one month later A again claims the same sum and B again refuses to pay, B's refusal on the second occasion does not give rise to a fresh cause of action.

[52] Mr ter Haar submits that the proposition that the same cause of action can be renewed or 'refreshed' is contrary to principle and authority. He cites *Wilkinson v Verity* (1871) LR 6 CP 206, [1861–73] All ER Rep Ext 1283. That concerned a claim in detinue against a bailee of goods. Willes J said:

> 'It is a general rule that where there has once been a complete cause of action arising out of contract or tort, the statute [of Limitations] begins to run, and that subsequent circumstances which would but for the prior

wrongful act or default have constituted a cause of action are disregarded.' (See (1871) LR 6 CP 206 at 209, [1861–73] All ER Rep Ext 1283 at 1285.)

[53] Another authority relied on by Mr ter Haar is *Reeves v Butcher* [1891] 2 QB 509, [1891–4] All ER Rep 943. In that case, the plaintiff claimed principal and interest under a five-year loan agreement. The plaintiff started proceedings to recover the principal and interest within six years from the end of the term of five years. A limitation defence succeeded. It was held that time began to run from the earliest time at which the plaintiff could have brought her action ie 21 days after the first instalment of interest became due. Lindley LJ said:

> '... the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.' (See [1891] 2 QB 509 at 511, [1891–4] All ER Rep 943 at 944.)

[54] But it is important to distinguish between (a) successive claims in respect of the same cause of action and (b) successive claims in respect of different causes of action. In the example of the debt owed by B to A, there is only one cause of action, namely the right to repayment of the debt. That cause of action arises no later than when B first refuses to pay. It is obvious that the mere refusal of payment on the second occasion does not give rise to a fresh cause of action. Willes J referred to '*a* complete cause of action', and Lindley LJ to '*the* cause of action' (my emphases). It is clear that they were not contemplating successive and distinct causes of action.

[55] The question that arises in relation to the second issue is whether a claim to have a sum included in a final certificate in respect of work or events for which a sum should have been included in an interim certificate is a fresh cause of action, or merely a repeat of the earlier cause of action. If the causes of action are the same, and the claim for inclusion of the sum in the final certificate is made more than six years after the cause of action first arose, then it is statute-barred. In that event a separate question that arises is whether the engineer is obliged to include in the final certificate a sum in respect of that cause of action even though it is statute-barred. That question is the subject of the third issue.

[56] In my view, the cause of action in respect of an engineer's failure to include a sum in an interim certificate is not the same as the cause of action in respect of the failure to include a sum in the final certificate, even if the two sums happen to be the same. This is because interim certificates are no more than provisional estimates of the sum to which Boot is entitled by way of instalment payments. The engineer is required to certify the amount which on the basis of Boot's monthly statement in his opinion is due 'on account of clause 60(1)(a) and (d)'. Clause 60(1)(a) requires the monthly statement to show the 'estimated contract value of the Permanent Works'. Clause 60(1)(d) requires the statement to show the 'estimated amounts to which the Contractor considers himself entitled in connection with all other matters ...' (ie other claims). The engineer is, therefore, required to decide, on the basis of estimates, what in his opinion is due as a payment 'on account'. The contract does not state what supporting documentation *if any* Boot must put forward in support of its estimates. Boot is not even obliged to claim the full estimated values or amounts, because the whole of cl 60(1) is subject to the qualification: 'unless in the opinion of the Contractor such values and amounts together will not justify the issue of an interim certificate.' These words may do no

more than reflect the language of cl 60(3). More importantly, the engineer is not required to carry out a detailed and accurate valuation each month. His obligation is no more than to certify the amount which in his opinion is due *on account of* cl 60(1)(a) and (d). This is of particular relevance in relation to claims for extra expense pursuant to various clauses of the contract, where the calculation of Boot's true entitlement can be very complicated and time-consuming, and where it is often impossible to form an accurate view at the interim stage of the extra expense that will finally be payable.

[57] Boot is required to include in its statement a list of any goods or materials delivered to the site but not yet incorporated in the Permanent Works (cl 60(1)(b)); and a list of any of those goods or materials identified in the appendix to the form of tender not yet delivered to the site but of which the property has vested in Alstom (cl 60(1)(c)). In relation to these amounts, the engineer is required to certify such amounts as he may consider 'proper'. This gives the engineer a measure of discretion which, of course, he does not have at the final certificate stage, when all the goods and materials will have been incorporated in the Works.

[58] The provisional nature of the exercise performed by the engineer at the interim stage is reinforced by cl 60(8) which provides that he may 'by any certificate delete correct or modify any sum previously certified by him'.

[59] Accordingly, the contractual scheme in relation to interim certificates and payments is that, as the work proceeds, a provisional running account is prepared by the engineer on the basis of the statement submitted in accordance with cl 60(1). At the final account stage, however, Boot and the engineer have to perform a very different exercise. Clause 60(4) requires Boot to submit—

> 'a statement of final account and supporting documentation showing *in detail* the value in accordance with the Contract of the Works executed together with all further sums which the Contractor considers to be due to him up to the date of the Defects Correction Certificate' (my emphasis).

It is then provided that within three months after receipt of the final account 'and of *all information reasonably required for its verification*' (my emphasis), the engineer shall issue his final certificate stating the amount which in his opinion is finally due under the contract from Alstom to Boot or from Boot to Alstom, as the case may be. It will be an integral part of the final certificate that it will contain the engineer's statement of the contract price ascertained by him after considering the final account, its detailed supporting documentation and all information reasonably required by him for its verification.

[60] In my view, the nature of the exercise required by the contract to be performed by Boot and the engineer at the interim stage is so different from that required at the final account stage that it cannot be said that a failure by the engineer to perform his obligations in accordance with cl 60(2) can start time running in relation to a cause of action based on the failure by the engineer to perform his obligations in accordance with cl 60(4). It seems to me that the submissions of Mr ter Haar fail to take account of the fundamental differences between what the engineer is required to do at the interim stage and what he is required to do at the final stage. The position would be otherwise if this were, say, a contract for a fixed sum of £1m whose only payment provision was that the price was to be paid by 10 equal monthly instalments of £100,000. In such a case, the right to claim the first instalment would accrue at the end of the first month, and the right to sue for that instalment would become statute-barred six years

after the end of the first month. This is because the right to payment of £100,000 at the end of the first month would be the cause of action in respect of the work done in that month. The right to payment of £100,000 for that work would be unaffected by any other provisions of the contract. It would not be reviewed or recalculated at the end of the contract. But this kind of contractual arrangement is quite different from that provided by the contract in this case, where there is a single contract price and one set of elaborate provisions for dealing with instalment payments on account and a very different set of elaborate provisions for ascertaining the contract price finally payable in the light of the work actually done and the events that occur during the carrying of the Works.

[61] This analysis is consistent with what has been said on a number of occasions about the difference between interim and final certificates. In *Secretary of State for Transport v Birse-Farr Joint Venture* (1993) 35 Con LR 8 at 21, Hobhouse J said:

> 'Certification may be a complex exercise involving an exercise of judgment and an investigation and assessment of potentially complex and voluminous material. An assessment by an engineer of the appropriate interim payment may have a margin of error either way. It may be subsequently established that it was too generous to the contractor just as it may subsequently be established that the contractor was entitled to more. Further the sum certified may be made up from a large number of constituent figures, some of which may likewise be assessed favourably to one party or the other. It may be that a contractor can say under a certain heading he did not have certified as high a figure as can later be seen to be appropriate but that under another heading he has to accept that the figure certified can be shown to have been an over-certification. At the interim stage it cannot always be a wholly exact exercise. It must include an element of assessment or judgment. Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a fair system of monthly progress payments to be made to the contractor. The strict 28-day period in sub-cl (2) can be contrasted with the three months allowed in sub-cl (3) "after receipt of this final account and of all further information reasonably required for its verification".'

[62] I have already referred (at [36] above) to the passage in the speech of Lord Hoffmann in the *Beaufort Developments* case where he spoke of the 'provisional validity' of interim certificates, and the fact that they are machinery by which the rights and duties of the parties can be 'at least provisionally determined with some precision'.

[63] Finally, I refer to what Lord Prosser said in the *Scottish Equitable* case (2001) 83 Con LR 183:

> '[29] The question which underlies the submissions advanced on behalf of the appellants is nevertheless perhaps this: if the claimants could have challenged earlier certificates, more than five years before they eventually initiated the arbitration, and moreover could have done so on the same basis as formed the basis of that eventual challenge, may it not be said that they really should have made that challenge at those earlier dates, and that having failed to do so their rights have prescribed? There is a certain attraction in that broad approach (although it is not perhaps quite the same as the argument presented by the appellants). But it is important to appreciate that the prescription of one right cannot prevent a claimant from continuing to

assert another right. Since each interim certificate supersedes its predecessor, and effectively constitutes a revaluation of the whole work carried out, any failure in relation to one interim certificate (in terms of prescription or otherwise) will apparently leave unaffected the right of a claimant (and indeed a building owner) to challenge the valuation of the whole works executed, in the next or any subsequent certificate. Moreover, cl 41 provides not only a right, in arbitration proceedings, to challenge previous certificates in ways which were not available when those certificates were issued. A previous certificate can apparently be challenged in the arbitration, notwithstanding that the challenge might have been, and was not, advanced when that earlier certificate was issued. In our opinion, a challenge at the earlier stage, and a challenge at the stage of arbitration, can be distinguished. Even if the challenge is upon the same basis, a challenge when a certificate is issued would relate to the amount which ought to be paid at that stage and could properly be seen as part of the enforcement of a different contractual right. A subsequent challenge in arbitration, even upon the same factual basis, may be very different, relating either to the content of a much later interim certificate, or to a final certificate. The whole structure of the contract appears to us to allow such subsequent challenges, notwithstanding that a challenge on the same basis could have been made much earlier, for more limited or different purposes. The availability of arbitration or even litigation for those earlier purposes, even if regarded as the assertion of an enforceable right, does not result, by the elapse of a prescriptive period, in the loss of a separate right to challenge any subsequent certificate.'

[64] It is true that, as Mr ter Haar submits, *Scottish Equitable plc v Miller Construction Ltd* was a case where the question was when an obligation became 'enforceable' for the purposes of s 6 of the Prescription and Limitation (Scotland) Act 1973. But in my view, this does not affect the analysis in para [29] of Lord Prosser's judgment. It is not necessary on this appeal to decide whether the failure to include a sum in successive interim certificates gives rise to successive causes of action, but if it were necessary to do so, I would adopt the analysis of Lord Prosser on this point. But for the reasons that I have given I consider that there is no doubt that the failure to include a sum in an interim certificate gives rise to a different cause of action from the failure to include a sum in a final certificate (even if it happens to be the same sum).

[65] Mr ter Haar submits on policy grounds that such a resolution of the second issue will have serious implications for the construction industry and is incompatible with the need for finality, a need which is recognised by the Limitation Acts. He points to the facts of this case. Work started on 11 April 1994. The defects correction certificate was issued on 15 August 2000. Boot's final account was submitted on 29 June 2001 and the final certificate was issued on 9 October 2002. A final certificate dispute could involve a claim in respect of work carried out or events which occurred in April 1994. If this appeal is allowed, such a dispute would not be statute-barred until six years after the date when the final certificate was issued, or ought to have been issued. By that time, relevant documents may well have been destroyed, witnesses may have died or disappeared and so on.

[66] But these potential consequences do not cause me to doubt the correctness of the conclusion that I have reached. Large construction contracts

of this kind are often executed as deeds, thereby attracting a 12-year limitation period. Practical problems of the type described by Mr ter Haar are not unusual in such contracts. Their significance should not, however, be overstated. Issues of pure measurement should not usually cause difficulty. One would expect contemporaneous measurement records to be kept. The more troublesome area is likely to be claims made under the clauses of the contract which permit such claims to be made: cl 12 is but one example. The draftsman of the contract recognised the problem of claims and made special provision to reduce, if not avoid, the difficulty. Thus, the contractor is required to give notices, and may be instructed by the engineer to keep contemporary records and permit the engineer inspect such records. The contractor is required to give full and detailed particulars of the amount claimed. Clause 52(4)(e) provides:

> 'If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he shall seek to make then the Contractor shall be entitled to payment in respect thereof only to the extent that the Engineer has not been prevented from or substantially prejudiced by such failure in investigating the said claim or the Employer has not been prevented from or prejudiced in pursuing his own claim as a result of such failure.'

The third issue

The submissions

[67] Boot claims in excess of £13m compound interest pursuant to cl 60(7). The claim is made on the basis that there was a failure on the part of the engineer to certify sums in interim certificates pursuant to cl 60(2), and that Boot is therefore entitled to interest on the sums which should have been certified from the dates on which such sums were 'overdue' ie 60 days after they should have been certified.

[68] The judge arbitrator held (para 98) that the cause of action for interest accrued when the certificate that is successfully impeached was issued, or, if no certificate was issued, when it should have been issued. Accordingly, any claim for interest is statute-barred in so far as it is based on amounts that should have been, but were not, certified before 27 May 1997.

[69] Mr ter Haar seeks to uphold this conclusion. First, he submits that the right to interest pursuant to cl 60(7) does not depend on certification. Interest is payable whether or not it is certified. Clause 60(7) simply provides for payment of interest in the event of failure to issue interim certificates in accordance with cl 60(2).

[70] Secondly, Mr ter Haar submits that, if the failure to certify which triggers a claim for interest is a failure to certify £*x* in month 1, then for limitation purposes, there is only one cause of action for interest from month 1, and that is based on the failure to certify £*x* in month 1 and it arises in month 1. What happens subsequently if Boot includes its claim for interest on £*x* in succeeding applications and each month the engineer fails to include £*x* (and interest thereon) in the later certificate is that there is simply a succession of applications for the payment of interest, all based on the failure to certify £*x* in month 1. Once more than six years elapses from the date when interest should have been paid in respect of the failure to certify £*x* in month 1 (ie 60 days after the date when £*x*

should have been certified), the claim for interest in respect of the failure to certify £*x* in month 1 becomes statute-barred.

[71] Mr Furst submits that the right to interest is dependent on the issue of a certificate in the same way as the right to payment of the principal sums due under the contract. In this respect, the treatment of claims under cl 60(7) is no different from the treatment of claims made under cl 46(3) as to which I refer to [46]–[49] above. The cause of action for interest based on the failure to certify £*x* in month 1 accrues at the time when £*x* is overdue for payment. A claim can be made in month 2 for interest which includes interest on £*x* from the date when £*x* was overdue for payment, and that is a fresh cause of action for interest from month 1. And the same applies in relation to succeeding claims until the date of the defects correction certificate (15 August 2000).

[72] Moreover, Mr Furst submits that, if and to the extent that the engineer did not include in his final certificate dated 9 October 2002 all the interest properly claimable pursuant to cl 60(7) (including interest based on the failure to certify £*x* in month 1), a fresh cause of action accrued on that date. A claim under cl 60(7) is not in principle different from any other claim to payment under a certificate. For the reasons which I have accepted at [55]–[58] above, a cause of action in respect of an engineer's failure to include a sum in an interim certificate is not the same as the cause of action in respect of the failure to include a sum in the final certificate. By parity of reasoning, Mr Furst submits that a cause of action in respect of the engineer's failure to include interest in an interim certificate is not the same as a cause of action in respect of the failure to include interest in a final certificate. It follows, therefore, that the claims for interest under cl 60(7), even if statute-barred in so far as they are made in respect of a failure to include interest in interim certificates, is not statute-barred in so far as they are made in respect of a failure to include interest in the final certificate.

My conclusion

[73] It seems to me to be inescapable that certificates are the contractual mechanism for certification and payment of interest. That follows from the language of cl 60(1)(d) to which I have already referred. But I do not consider that this disposes of the third issue.

[74] It is, I think, helpful to start by considering what the position would be if the claim for interest under cl 60(7) were advanced on the basis of a failure to pay the sum of £*x* certified as due for payment in month 1. In my view, it is clear that the claim for payment of £*x* pursuant to cl 60(2) would become statute-barred six years after the cause of action arose, ie six years from the date when £*x* was due for payment under the certificate: it would appear from cl 60(2) that a sum certified is payable forthwith upon the issue of an interim certificate. Similarly, a claim for interest for that non-payment of £*x* would also be statute-barred six years from the date when £*x* was due for payment. The general principle that, once an action for the principal sum is barred, an action for arrears of interest will also be barred would apply: see *Elder v Northcott* [1930] 2 Ch 422, [1930] All ER Rep 398. The fact that the claim for interest is brought in arbitration proceedings would make no difference. Section 13(1) of the Arbitration Act 1996 provides: 'The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings'.

[75] Is the limitation position different in a case where the claim under cl 60(7) is for interest on £*x* which is overdue for payment because it was not certified in month 1 (rather than because it was certified but not paid in that month)? It

would be surprising if the position were different, and no reason has been suggested as to why it should have been intended by the draftsman of these conditions of contract that there should be such a difference. In each case, Boot's complaint is that £*x* should have been paid in month 1 and its claim is for interest on £*x* for that non-payment at that time.

[76] In my judgment, once £*x* is overdue for payment in month 1, the cause of action is complete in respect of that overdue payment, whether the overdue payment results from a failure to pay £*x* when it has been certified, or from the engineer's failure to certify £*x*. The fact that, where it has not been certified, £x can be certified in later certificates does not affect the position. The right to payment of £*x* and interest when £*x* is overdue for payment accrues when Boot is first entitled to those payments. The right to have £*x* included in successive certificates probably gives rise to successive causes of action (see [64] above). This is because each successive interim certificate revalues the whole of the work carried out, and any failure in relation to one interim certificate will leave unaffected Boot's right to challenge the valuation of the whole of the work executed in later certificates. Likewise, the right to have included in a final certificate a sum which happens to be £*x* for work for which £*x* was claimed at the interim certificate stage gives rise to a distinct cause of action (see [55]–[66] above). But the claim to interest on £*x* from the date when the arbitrator holds that £*x* should first have been included in an interim certificate, even if repeated in later applications for interest when it is capitalised and recalculated, does not become a different cause of action when it is so repeated. On the other hand, a claim to interest on £*x* from a later date, on the footing that £*x* should have been included in a later certificate as part of the monthly revaluation of the work, would, if upheld by the arbitrator, give rise to a different cause of action accruing at that later date.

[77] I would, therefore, hold that the right to claim interest on a sum which should have been certified becomes statute-barred six years after that right accrued. If the arbitrator does not identify a date when £*x* should have certified, then £*x* is regarded as overdue for payment from the date of the certificate of substantial completion of the Works: see cl 60(7).

[78] I should add for completeness that we heard argument as to whether the engineer is obliged to certify sums in respect of claims even if he considers them to be statute-barred: this is the subject of the fourth issue. But in my judgment, this issue does not arise here. For the reasons that I have already given, the cause of action in respect of interest based on the failure to certify £*x* in month 1 arises in month 1. The arbitrator cannot grant relief in respect of that failure if the cause of action arose outside the limitation period.

[79] We have not been provided with sufficient material to enable us to work out how much of the claim under cl 60(7) is statute-barred. But I have endeavoured to explain how the limitation issue in relation to the claim under this sub-clause should be applied.

The fourth issue

[80] In view of the conclusion that I reached on the second issue, the fourth issue does not arise

OVERALL CONCLUSION

[81] For the reasons that I have given, I would allow the appeal, save to the extent that Alstom has been successful on the third issue. Counsel should agree a form of order to give effect to this judgment.

LEAVE TO APPEAL TO THE HOUSE OF LORDS

[82] Under s 69(8) of the 1996 Act as modified by para 2 of Sch 2 to the Act in relation to judge arbitrators, no leave may be given to appeal to the House of Lords unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the House of Lords. Leave to appeal can only be given by the court which heard the first appeal from the judge arbitrator: see *Henry Boot Construction Ltd v Malmaison Hotel Ltd* [2001] 1 All ER 257, [2001] QB 388.

[83] It is clear, therefore, that this court cannot give leave to appeal unless the appeal would raise a question of general importance. I am in no doubt that this necessary condition is satisfied: see para [1] above. Mr ter Haar concedes, rightly in my view, that this is not a sufficient condition for leave to appeal to be given. But he submits that the only other condition that needs to be satisfied is that the proposed appeal is arguable. He contends that this condition is amply met in the present case.

[84] In my judgment, in deciding whether to give leave to appeal, the correct approach is to apply para 4.7 of the *House of Lords Practice Directions applicable to Civil Appeals* (the Blue Book) (April 2005), which includes:

> 'Leave to appeal is granted to petitions that raise an arguable point of law of general public importance which ought to be considered by the House at this time, bearing in mind that the matter will already have been the subject of judicial decision and reviewed on appeal.'

The words 'which ought to be considered by the House' are important. They give the House a broad discretion. I would refuse leave to appeal in this case. The principal question that arises on this appeal is whether the cause of action in respect of the engineer's failure to include a sum in an interim certificate is the same as the cause of action in respect of the failure to include a sum in the final certificate (the second issue). In my judgment, the answer to this question is plain, although I would not go so far as to characterise Mr ter Haar's submissions on this issue as unarguable. It is sufficiently plain that I would hold on that account alone that the point is not one which ought to be considered by the House of Lords. In my view, the cl 60(7) issue (on which Alstom has achieved a large measure of success) does not raise an issue of general importance sufficient to justify giving leave to appeal. In reaching my conclusion, I also bear in mind that this is an appeal from an arbitrator's award. In *Henry Boot Construction Ltd v Malmaison Hotel Ltd* Waller LJ said ([2001] 1 All ER 257 at 264–265, [2001] QB 388 at 396):

> 'I also reject Mr Black's submissions that once matters are in court the philosophy applicable to arbitrations somehow has no further application. Parties who have agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible: see generally s 1(a) of the [Arbitration Act 1996]. Limitation on the rights of appeal is consistent with that philosophy and one tribunal dealing with the question is also consistent with that philosophy.'

[85] It seems to me that, in deciding whether the questions *ought* to be considered by the House of Lords, this is a relevant factor.

[86] In the event that we refused leave to appeal to the House of Lords on the substantive issues that arise, we were asked by Mr ter Haar to grant leave to appeal against that refusal of leave. Section 69(6) of the 1996 Act, as modified by para 2 of Sch 2 provides that 'the leave of the [Court of Appeal] is required for any appeal from a decision of the [Court of Appeal] under this section to grant or refuse leave to appeal'. In my judgment, this power should be exercised very sparingly, particularly in relation to the grant of leave to appeal to the House of Lords, and only where there is real doubt as to the criteria to be applied for the grant of leave to appeal. As I understood it, it was common ground that the relevant criteria are contained in para 4.7 of the House of Lords Practice Direction. It is true that there was an issue as to whether the statement of Waller LJ cited at [84] above is correct. But I do not consider that this is a sufficient reason for giving leave to appeal against the refusal of leave to appeal. The fact that this is an appeal against an award of an arbitrator is no more than a relevant factor. I would, therefore, refuse leave to appeal against the refusal to grant leave to appeal.

COSTS

[87] Mr ter Haar accepts that Boot is entitled to the costs of the appeal up to the close of the hearing on 13 April 2005. But further costs were incurred in relation to the cl 60(7) issue. I did not deal with this issue in the first draft of my judgment. This was because the cl 60(7) claim was not included by Mr Furst in his skeleton argument of the list of relevant claims; and, although the issues were discussed by both sides to some extent in their lengthy skeleton arguments, no oral argument was directed to the issue at all: it was simply not mentioned. In the result, the parties were requested to submit further skeleton arguments dealing with the point, and an oral hearing took place on 16 June to deal with it (as well as the question of leave to appeal). Since Alstom has only been partially successful on the cl 60(7) issue, and bearing in mind that both parties were responsible for failing to draw the attention of the court to the issue, I think that there should be no order in relation to the costs attributable to the cl 60(7) issue incurred since 13 April 2005.

[88] Boot has submitted a bill of costs in the breathtaking sum of almost £350,000. They ask for a payment on account of costs of two-thirds of this sum. This was a two-day appeal on issues of pure law which had been canvassed in considerable detail before the arbitrator. I take full account of the fact that the case raises important issues and that the claim is very large: Boot's claim is quantified at approximately £60m. But it is a matter of grave concern that costs of this magnitude have been incurred by Boot on this appeal. The incurring of costs on this scale does not appear to be consistent with the proportionate resolution of disputes. We were not told what costs have been incurred by Alstom, but it is reasonable to infer from the silence on the part of Alstom's legal representatives that its costs are also likely to be very substantial. We were told that they did not have time to prepare a bill. I find this somewhat surprising in these days of computerised billing: Alstom's solicitors must have some idea of their costs for the appeal.

[89] Of course, Boot is free to agree to pay its legal representatives what it wishes. It may well be that Boot insisted that they left no stone unturned in their preparation for the appeal. But Boot is only entitled to a payment on account of

costs which were reasonably and proportionately incurred and which were proportionate and reasonable in amount: CPR 44.5(1). I accept that it is not for this court to conduct a detailed assessment of costs. But bearing in mind that the appeal raised pure questions of law which had been considered in great detail before the judge arbitrator, I think that it is unlikely that the costs judge will assess Boot's costs at anything like the level claimed. The solicitors claim total profit costs of £177,631 excluding value added tax (VAT). This is a massive sum for an appeal such as this. Counsel's fees are claimed at almost £150,000 excluding VAT: this too is a huge sum.

[90] Mr ter Haar submits that £150,000 would be a reasonable payment on account. In my view, this is, if anything, generous. But in view of the position taken by Alstom, I would order that sum to be paid on account of Boot's costs.

THOMAS LJ.

[91] I agree.

SIR ANDREW MORRITT V-C.

[92] I also agree.

Appeal allowed in part. Leave to appeal refused. Leave to appeal against the refusal to grant leave to appeal refused.

Celia Fox Barrister.

Oxfordshire County Council v Oxford City Council and another

[2005] EWCA Civ 175

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, CARNWATH LJJ AND BLACKBURNE J

17-20 JANUARY, 24 FEBRUARY 2005

Commons – Registration – Town or village green – Land on which significant number of inhabitants of locality had indulged in lawful sports or pastimes as of right for not less than 20 years and 'continue to do so' – Whether registration of such land as town or village green in itself conferring rights on inhabitants to indulge in lawful sports and pastimes – Whether such a green falling within scope of nineteenth-century legislation rendering it an offence to interfere with enjoyment of town or village greens – Whether lawful sports and pastimes having to continue to date of registration – Whether registration authority having power to amend application for registration to exclude part of land included in application or to register as a green part only of land included in application – Inclosure Act 1857, s 12 – Commons Act 1876, s 29 – Commons Registration Act 1965, ss 10, 22(1A).

The first defendant city council owned an area of undeveloped land which it wished to use for housing development. Most of the land was inaccessible for ordinary recreation, but some of it was used by local people for dog-walking, children's play and general informal recreation. In 2002 the second defendant, a local resident, applied to the claimant registration authority for the land to be registered as a 'town or village green' under the Commons Registration Act 1965, claiming that it had become such a green by 1 August 1990 because it had been used by local residents for lawful pastimes as of right for an unbroken period of 20 years. By virtue of s 10[1] of the 1965 Act, such registration was conclusive evidence of the matters registered as at the date of registration. The definition of 'town or village green' was contained in s 22[2] of the Act. As originally enacted, the definition included land on which the inhabitants of any locality had indulged in lawful sports and pastimes as of right for not less than 20 years. That type of town or village green was commonly known as a class c green. As from 30 January 2001 (ie before the local resident had made her application for registration), the original definition of a class c green in s 22 was substituted by a reference to land falling within a new sub-s (1A), namely land on which for not less than 20 years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, had indulged in lawful sports or pastimes as of right, and either 'continue to do so' (para (a)) or had ceased to do so for not more than such period as might be prescribed, or determined in accordance with prescribed provisions (para (b)). No such provisions had been made. The city council objected to the application for registration, and erected notices prohibiting access to the land without its express consent. The local resident attempted to amend the application by excluding certain areas. Subsequently,

1 Section 10 is set out at [11], below

2 Section 22, so far as material, is set out at [9], below (as originally enacted) and at [16], below (as amended)

the registration authority initiated proceedings with a view to obtaining rulings on a number of issues arising on the application, including (i) whether the relevant inhabitants had rights to indulge in lawful sports and pastimes on land which had become a class c green; (ii) whether land which had become a class c green fell within the scope of s 12[3] of the Inclosure Act 1857 (which created various summary offences prohibiting any act interrupting the use or enjoyment of a town or village green as a place for exercise or recreation) and s 29[4] of the Commons Act 1876 (which provided that any encroachment, erection or interference made on a town or village green was to be deemed a public nuisance so as to give rise to summary offences under the 1857 Act); (iii) whether the words 'continue to do so' in s 22(1A)(a) of the 1965 Act meant, in the absence of regulations made under para (b) of that subsection, that the lawful sports and pastimes had to continue up to the date of the application to register or the date of registration or some other date; (iv) whether all applications for registration of land as a class c green made on or after 30 January 2001 automatically engaged (and engaged only) the amended definition of such a green in s 22(1A); (v) whether the application could as a matter of law (if supported by appropriate facts) succeed on the basis that the land had become a green on 1 August 1990 or whether an application was bound to fail if it specified a date earlier than that immediately preceding the date of the application; (vi) whether the registration authority had power to treat the application as if a different date (namely that immediately preceding the date of the application) had been specified, and to determine the application on that basis; and (vii) whether as a matter of law it was open to the registration authority to permit the application to be amended so as to refer to some lesser area or, without such an amendment, to register as a green only part of the land included in the application. Those issues eventually came for determination before the Court of Appeal.

Held – (1) Registration of land as a class c green did not of itself confer or imply any rights on the part of local inhabitants (however defined) to indulge in sports and pastimes on that land (see [81], [117], [121], [122], below).

(2) Such registration was, however, conclusive that the land was a town or village green within the scope of, inter alia, s 12 of the 1857 Act and s 29 of the 1876 Act. 'Town and village greens' were referred to in the nineteenth-century statutes without definition, and there had been no settled interpretation of that term. It would certainly have been consistent with the purposes of the 1965 Act to clarify the application of those references by providing a conclusive means of identifying the land to which they applied. Such a conclusion gave a practical effect to s 10 of the 1965 Act as applied to town and village greens (see [84], [89], [90], [117], [121], [122], below).

(3) The words 'continue to do so' in s 22(1A)(a) of the 1965 Act meant that the lawful sports and pastimes had to continue to the date of registration. In the absence of any other indication, those words could only be taken as referring to the time when the statute required the definition to be applied, namely the date when the register was amended (see [92], [98], [117], [121], [122], below).

3 Section 12, so far as material, is set out at [40], below
4 Section 29, so far as material, is set out at [40], below

(4) Any applications for registration of land as a class c green made on or after 30 January 2001 automatically engaged (and engaged only) the amended definition in s 22(1A) of the 1965 Act (see [92], [98], [117], [121], [122], below).

(5) The application in the instant case could not as a matter of law succeed on the basis that the land had become a green on 1 August 1990. Since s 10 of the 1965 Act only took effect in relation to any particular land on registration, there was no legal basis for treating that land as having acquired village green status by virtue of an earlier period of qualifying use (see [100], [117], [121], [122], below).

(6) The registration authority had power to treat the application as if a different date had been specified therein, and to determine the application on that basis (see [112], [117], [121], [122], below).

(7) As a matter of law, it was open to the registration authority on proper consideration to permit the application to be amended to refer to a lesser area or to register as a green part only of the land included in the application (see [112], [117], [121], [122], below).

Notes

For town and village greens, see 6 *Halsbury's Laws* (4th edn) (2003 reissue) paras 426, 427, 430.

For the Inclosure Act 1857, s 12, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 1028.

For the Commons Act 1876, s 29, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 1065.

For the Commons Registration Act 1965, ss 10, 22, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 1105, 1115.

Cases referred to in judgments

Abbot v Weekly (1665) 1 Lev 176, 83 ER 357.

Beckett (Alfred F) Ltd v Lyons [1967] 1 All ER 833, [1967] Ch 449, [1967] 2 WLR 421, CA.

Bright v Walker (1834) 1 Cr M & R 211, 149 ER 1057, [1824–34] All ER Rep 762.

Brocklebank v Thompson [1903] 2 Ch 344.

Bryant v Foot (1867) LR 3 QB 161; *affd* (1868) LR 3 QB 497.

Caerphilly County BC v Gwinnutt (16 January 2002, unreported).

Central Electricity Generating Board v Clwyd CC [1976] 1 All ER 251, [1976] 1 WLR 151.

Chandler (Victor) International Ltd v Customs and Excise Comrs [2000] 2 All ER 315, [2000] 1 WLR 1296, CA.

Chapman v Cripps (1862) 2 F & F 864.

Chief Adjudication Officer v Maguire [1999] 2 All ER 859, [1999] 1 WLR 1778, CA.

Corpus Christi College, Oxford v Gloucestershire CC [1982] 3 All ER 995, [1983] QB 360, [1982] 3 WLR 849, CA.

Dyfed CC v Secretary of State for Wales (1989) 59 P & CR 275, CA.

Edwards v Jenkins [1896] 1 Ch 308.

Fitch v Fitch (1797) 2 Esp 543, 170 ER 449.

Fitch v Rawling (1795) 2 Hy Bl 393, 126 ER 614, [1775–1802] All ER Rep 571.

Hall v Nottingham (1875) 1 Ex D 1.

Hammerton v Honey (1876) 24 WR 603.

Hampshire CC v Milburn [1990] 2 All ER 257, [1991] 1 AC 325, [1990] 2 WLR 1240, HL.

Inverclyde DC v Lord Advocate (1981) 43 P & CR 375.

Mounsey v Ismay (1863) 1 H & C 729.
New Windsor Corp v Mellor [1975] 3 All ER 44, [1975] Ch 380, [1975] 3 WLR 25, CA.
Pole-Carew v Craddock (Surveyor of Taxes) [1920] 3 KB 109, CA.
R (on the application of Alfred McAlpine Homes Ltd) v Staffordshire CC [2002] EWHC 76 (Admin), [2002] 2 PLR 1.
R (on the application of Beresford) v Sunderland City Council [2003] UKHL 60, [2004] 1 All ER 160, [2004] 1 AC 889, [2003] 3 WLR 1306.
R (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC [2003] EWHC 2803 (Admin), [2004] JPL 975.
R (Whitmey) v Commons Comrs [2004] EWCA Civ 951, [2005] QB 282, [2004] 3 WLR 1342.
R v Oxfordshire CC, ex p Sunningwell Parish Council [1999] 3 All ER 385, [2000] 1 AC 335, [1999] 3 WLR 160, HL.
R v Suffolk CC, ex p Steed [1997] 1 EGLR 131, CA; *affg* [1995] 2 EGLR 233.
Schwinge v Dowell (1862) 2 F & F 845.
Tehidy Minerals Ltd v Norman [1971] 2 All ER 475, [1971] 2 QB 528, [1971] 2 WLR 711, CA.
Village Green, Waddingham, Lincs, Re (1972) unreported.
Virgo v Harford (1893) Times, 30 March.
West Anstey Common, Re [1985] 1 All ER 618, [1985] Ch 329, [1985] 2 WLR 677, CA.
Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833, [1983] 1 AC 553, [1982] 3 WLR 1026, PC.

Appeal

On an appeal from the decision of Lightman J on 22 January 2004 ([2004] EWHC 12 (Ch), [2004] All ER (D) 181 (Jan)), the claimant, Oxfordshire County Council, sought rulings on issues arising in an application to it by the second defendant, Catherine Mary Robinson, for the registration as a town or village green under s 13 of the Commons Registration Act 1965 of the Trap Grounds, an area of undeveloped land in Oxford owned by the first defendant, Oxford City Council. The facts are set out in the judgment of Carnwath LJ.

George Laurence QC and *Ross Crail* (instructed by *Peter Clark*, Oxford) for the county council.
Charles George QC and *Philip Petchey* (instructed by *Brian Johnson*, Oxford) for the city council.
Douglas Edwards and *Jeremy Pike* (instructed by *Public Law Solicitors*, Moseley) for Miss Robinson.

CARNWATH LJ (giving the first judgment at the invitation of Peter Gibson LJ).

BACKGROUND

[1] The traditional village green needs no introduction:

> '"Village green"—the very words are evocative of great age and tranquillity, of turf as rich in hue as it is trim in a setting untouched by time.'[1]

1 See the Report of the Royal Commission on Common Land 1955–1958 (1958) (Cmnd 462) (para 18).

> '... the traditional village green with its memories of maypole dancing, cricket and warm beer.'[2]

More prosaically, Gadsden describes the popular perception:

> 'In popular language, the village green ... is a small area of open land in the middle of a village where the inhabitants can rest or play, the children run round and, archetypally, the village cricket team holds its matches.'[3]

[2] The story of the 'Trap Grounds' is rather different. According to the inspector's[4] report, the name has been traced back to 1790, but its origin is unknown:

> 'It may derive from the use of the land for trapping birds or eels, for parking horse drawn traps attending the annual horse races in Port Meadow which took place until 1880, or for dumping night soil from college privies or "traps".'

The land consists of nine acres of undeveloped land in North Oxford, between the railway to the west and the towpath of the Oxford Canal to the east. Beyond the canal to the east lies the residential area forming the parish of St Margaret's. For a long time the land was owned by St John's College who used part as a refuse tip. In 1975 it was sold to the Oxford City Council, who wish to use it for housing development.

[3] As for its physical features, about one-third on the eastern side (referred to as 'the reed beds') is permanently under water, and inaccessible to ordinary walkers. The remainder consists of trees and a scrubby undergrowth (the scrubland). The land is approached by a bridge over the canal along a track known as Frog Lane, which leads along the northern edge of the reed beds and gives access to a circular path around the scrubland, off which there are numerous small paths through the undergrowth. The inspector observed that the scrubland 'bore the marks of its former use as a dump for builders' rubble', but that since the 1970s 'the land was left neglected to grow vegetation on and around the rubble'.

[4] He found evidence of use by local people for 'dog-walking, children's play and general informal recreation'. He estimated that a total of about 25% of the scrubland is 'reasonably accessible to the hardy walker'. Understandably most of the activity seems to have been on or around the circular path. Mr Statham's evidence is an example:

> 'Between 1989 and 2001, he had dogs and walked them on the Trap Grounds several times a week. He usually did a circular walk around the scrubland, going off the path to retrieve his dogs, to pick blackberries in season and to admire some striking giant hogweed in the south western sector of the scrubland in the spring and summer ...'

The inspector described the land as—

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2 See *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 388, [2000] 1 AC 335 at 347, per Lord Hoffmann.

3 See GD Gadsden *The Law of Commons* (1988) p 377 (para 13.01).

4 Mr Vivian Chapman, the barrister appointed by the county council to hold an inquiry into Miss Robinson's application (see below).

'a typical case of institutionally owned land on the urban fringe which is neglected by the landowner because it has long term development plans and which attracts use by local people for informal recreation.'

THE APPLICATION

[5] Miss Robinson is a local resident. In June 2002 she submitted an application to register the Trap Grounds as a 'town or village green' under s 13 of the Commons Registration Act 1965. She claimed that it had become a town or village green by 1 August 1990, by virtue of the fact that—

'local residents had used it for lawful pastimes as of right (without obstruction, permission, stealth or force) for an unbroken period of 20 years. They continue to do so until the present day.'

The application form required her to state the 'locality', which she gave as 'the Parish of St Margaret, Central North Oxford'. She attached a plan showing the Trap Grounds edged in green and the parish in red. Although she filled in the form herself she was helped by a publication of the Open Spaces Society, 'Getting Greens Registered' (1995). She later attempted to amend the application by excluding certain areas.

[6] The city council as landowners objected to the application. The county council, as registration authority, had the task of deciding whether to amend the register. They appointed Mr Vivian Chapman, a specialist barrister, to hold a non-statutory inquiry. He advised that the register should be amended to include the Trap Grounds as a town or village green, but excluding the reed beds (because they were inaccessible for ordinary recreation) and the track known as Frog Lane (because it had been used for access rather than recreation). The county council received conflicting advice on certain points from Mr Laurence QC, another specialist in this field. It became apparent that the resolution of this dispute raised some fundamental questions about the interpretation and practical application of the 1965 Act on which a determinative ruling from the courts would be required. Accordingly the county council itself initiated the present proceedings with a view to obtaining rulings on the questions which it considered material. The proceedings were commenced by the county council by claim form dated 11 June 2003, naming the city council and Miss Robinson as defendants.

[7] Meanwhile, in the early part of 2003, the city council had put up on the Trap Grounds notices in the following terms:

'Oxford City Council
Trap grounds and reed beds
Private property
Access prohibited
Except with the express consent
Of Oxford City Council'

The purpose of this was to put an end to the period of qualifying use, by ensuring that it could no longer be 'as of right'.

THE COMMONS REGISTRATION ACT 1965

[8] The principal purpose of the 1965 Act, as appears from the long title, was—'to provide for the registration of common land and of town or village greens ...'

[9] Section 1(1) required the registration of (a) land in England and Wales which was 'common land or a town or village green'; (b) rights of common over such land; and (c) those claiming rights of ownership over such land, or becoming owners by virtue of the 1965 Act. Certain terms were defined by s 22, which applied '[i]n this Act, [except where] the context otherwise requires'. '[C]ommon land' was defined as land subject to common rights, or 'waste land of a manor' not subject to such rights, but excluding any 'town or village green'. The definition of 'town or village green' (adopting the accepted, but non-statutory, division into three classes) was:

> '... land [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.'

[10] Registration authorities were established with the duty to 'maintain' the registers, and to make them open to inspection by the public at all reasonable times (see s 3). The 1965 Act provided machinery for 'provisional registration[s]' (s 4), for objections (s 5), and for reference of disputed claims to the Commons Commissioner (an office specially established by the 1965 Act for this purpose) (s 6). In the case of town or village greens, if no other ownership claim was established, the land was to be registered in the name of the relevant district council (s 8(3)). Registrations had to be made in accordance with 'Model Entries' provided by the Commons Registration (General) Regulations 1966, SI 1966/1471. It is to be noted that the register had to record simply the status of the 'land' as a town or village green, not the particular class of the definition under which it had acquired registrable status.[5]

[11] By s 1(2), after the end of a period prescribed by the minister (in the event, 31 July 1970), no land capable of being registered under the 1965 Act 'shall be deemed to be common land or a town or village green unless it is so registered'; and no rights of common 'shall be exercisable' unless registered 'under this Act or the Land Registration Acts'. Conversely, s 10 provided:

> 'The registration ... as common land or as a town or village green, or of any rights of common over such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only.'

[12] It should be noted at this point that, in spite of previous judicial disagreements, the effect of s 1(2) is no longer in issue. The question was whether or not it had the effect that any rights of local inhabitants which were registrable but unregistered by 31 July 1970 were extinguished. Lightman J ([2004] EWHC 12 (Ch), [2004] Ch 253, [2004] 2 WLR 1291) decided that they were extinguished. He noted also that this view was consistent with the ministerial statements at the time.[6] I expressed the same view of the section at first instance in *R v Suffolk CC, ex p Steed*:

> '... whatever rights may have been thought to exist by virtue of actions or events before 1970, they ceased to have effect. Thereafter the land was

5 See Sch 2, Pt 1, No 5 of the 1966 regulations (model entry for 'Goose Green').

6 See para [45].

deemed not to be a "town or village green", within any of the three parts of the definition.'[7] a

In the Court of Appeal in *Ex p Steed* [1997] 1 EGLR 131, Pill LJ (obiter) disagreed. He took the view that existing customary rights could survive non-registration. He quoted with approval the reasoning in an opinion of Mr Laurence for the Countryside Commission.[8] However, Mr Laurence himself frankly told us that he no longer felt able to support his previous opinion (for reasons he explained to us). In any event, the correctness of Lightman J's conclusion on this point is not in issue before us. Accordingly, without disrespect to Pill LJ, I will proceed on the basis that it is correct. b

[13] Returning to the statute, separate provision was made for amendment of the register to take account of future changes. Section 13 of the 1965 Act stated that regulations should provide for amendment of the register: (a) where any land registered under the 1965 Act 'ceases to be common land or a town or village green'; or (b) where any land 'becomes common land or a town or village green'; or (c) any registered rights are varied or extinguished. c

[14] Provision for amendment was accordingly made by the Commons Registration (New Land) Regulations 1969, SI 1969/1843. The main points are: (i) Where 'after 2nd January 1970, any land becomes common land or a town or village green', an application may be made for inclusion of the land in the appropriate register (reg 3(1)). The application may be made by any person (reg 3(4)). (ii) The application must be made to the registration authority for the area in the prescribed form (Form 30), accompanied by a statutory declaration and all relevant documents in the applicant's possession, under the applicant's control or of which the applicant has the right to production (regs 3(7), 4(1)). (iii) The authority may reject the application after preliminary consideration if it appears 'not to be duly made', but where it appears to the authority 'that any action by the applicant might put the application in order' they must first give the applicant a reasonable opportunity to take that action (reg 5(7)). (iv) Otherwise the authority must notify likely objectors (including owners, tenants and occupiers of the land in question) and publish and display notices of the application in the area, inviting objections by a specified date (reg 5(4)). It must then consider the application and any objections, and give the applicant an opportunity to respond (reg 6). (v) The regulations contain no provision for formal hearings. However, it is accepted that, as part of its implied duty to act fairly in deciding the application, the authority may find it necessary to arrange an informal oral hearing. For this purpose, a practice has developed of arranging a non-statutory public inquiry before a specialist lawyer (as in this case). (vi) Whether or not such an inquiry is held, it is for the authority to decide on the available material whether to accept the application and make the registration, or reject it (regs 7, 8). Unlike s 6 of the 1965 Act (which provided specifically for confirmation of a provisional registration by the Commons Commissioners 'with or without modifications'), the 1969 regulations make no express provision for amendment or modification of the application before registration. (vii) Where the application is accepted, the registration authority must make the necessary registration following as closely as possible the appropriate model entry in the d e f g h j

7 [1995] 2 EGLR 233 at 238.

8 See [1997] 1 EGLR 131 at 135. The substance of the opinion had been published by the Open Spaces Society in 1995 in 'Getting Greens Registered'.

1966 regulations. The relevant model entry includes a reference to the fact that the entry is made pursuant to an application under s 13 of the 1965 Act (rather than a provisional registration under s 4).

[15] The Commons Commissioners have no function in respect of amendments, and there is no other statutory adjudication machinery. However, supervision by the High Court is provided by s 14 of the 1965 Act. This gives the court power to order the register to be amended, if, following an amendment under s 13, it appears to the court that no amendment or a different amendment ought to have been made and that rectification would be just. As the judge observed (and has since been confirmed by this court in *R (Whitmey) v Commons Comrs*,[9] the availability of this remedy (as well as, where appropriate, judicial review) renders the procedure compliant with art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[16] Finally, it is necessary to refer to the amendment to the definition of class c greens made by s 98 of the Countryside and Rights of Way Act 2000, which had come into force by the time of Miss Robinson's application. As from 30 January 2001, the original definition of a class c green is substituted by a reference to land falling within a new sub-s (1A):

> '(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either—
>
> (a) continue to do so, or
>
> (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.'

[17] Three points should be made at this stage about this amendment. First, the 2000 Act contains no transitional provisions dealing with the position of applications made before 30 January 2001, or of later applications based on use partly before and partly after that date. Secondly, there are as yet no 'prescribed provisions' under para (b), which therefore has no practical effect.[10] Thirdly, the 2000 Act made no corresponding provision for the inhabitants of the neighbourhood or locality to enjoy any *rights* over class c greens. (By contrast, s 2 of the 2000 Act for the first time gave the public a right of access 'for the purposes of open-air recreation' to various categories of land. The categories included registered common land, but not village greens.)

[18] In the remainder of this judgment I shall distinguish between 'historic' and 'modern' class c greens. The former term I shall use for class c greens which qualified for registration by virtue of a period of 20 years use as of right (which I shall call a period of 'qualifying use') prior to the relevant date for the initial registrations. The latter are those for which the period of qualifying use ended after that date, and which therefore are only registrable (if at all) by amendment of the register under s 13.

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9 [2004] EWCA Civ 951, [2005] QB 282, [2004] 3 WLR 1342.

10 The Common Land Policy Statement 2002 (CLPS) proposed a provision enabling application for registration to be made up to two years after the user ceased and stated there would be consultation on the draft regulations (see para 48). No such draft regulations have yet made their appearance.

THE ISSUES

[19] In these proceedings the county council, as registration authority, seek 'rulings' or 'guidance' from the court on a list of ten issues (which I take from Mr Laurence's summary). It is convenient to divide them into five groups.

(a) Substantive effect of class c registration:

(i) whether the relevant inhabitants have rights to indulge in lawful sports and pastimes on land which has become (within the meaning of s 13 of the 1965 Act) a class c green;

(ii) whether land which has become (within the meaning of s 13 of the 1965 Act) a class c green falls within the scope of s 12 of the Inclosure Act 1857 and s 29 of the Commons Act 1876.

(b) The effect of the 2000 amendment:

(iii) the meaning of the words 'continue to do so' in the amended definition, for which purpose the court was asked to rule whether (in the absence of regulations made under s 22(1A)(b) of the 1965 Act) the lawful sports and pastimes must continue up to (a) the date of the application to register or (b) the date of registration or (c) some other (and if so what) date;

(iv) whether all applications for registration of land as a class c green made on or after 30 January 2001 automatically engage (and engage only) the amended definition.

(c) 'Free-standing' periods of use:

(v) whether the application could as a matter of law (if supported by appropriate facts) succeed on the basis stated by Miss Robinson in Pt 4 of her application, namely that the land became a green on 1 August 1990, or whether (subject to (vi) below) an application which specifies in Pt 4 a date earlier than the date immediately preceding the date of the application must fail.

(d) Amendments to the application:

(vi) whether the county council has power (the city council not objecting) to treat the application as if a different date (namely a date immediately preceding the date of the application) had been specified in Pt 4, and to determine the application on that basis;

(vii) whether as a matter of law it is open to the county council to permit the application to be amended so as to refer to some lesser area (such as by excluding the part known as 'the reed beds' and/or a ten-metre strip along the western boundary of the part known as 'the scrubland'), and if so, according to what criteria;

(viii) whether as a matter of law it is open to the county council (without any such amendment being made) to accept the application in respect of, and to register as a green, part only of the land included in the application, such as the part known as 'the scrubland', and if so, according to what criteria.

(e) Evaluation of evidence:

(ix) how the county council should approach the application in the light of the evidence reported by the inspector in relation to user of the main track and subsidiary tracks and his estimate that only about 25% (or less) of 'the scrubland' is reasonably accessible; and

(x) the relevance of the existence or potential for the existence of public rights of way.

THE ROLE OF THE COURT

[20] President Barak, President of the Supreme Court of Israel, recently described the respective roles of a supreme court and a court of appeal:

> 'The primary concern of the supreme court in a democracy is not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's concern is broader, system-wide corrective action ...'

He saw one of the main issues for such corrective action as 'bridging the gap between law and society'.[11]

[21] It is a depressing fact that, 40 years after the enactment of the 1965 Act, fundamental issues as to its practical implications and substantive effect, at least in relation to village greens, remain unresolved. This is in spite of numerous judicial decisions at all levels, including two recent House of Lords' cases, and in spite of amending legislation in 2000. It is not surprising if, in consequence, there is a gulf between the law and society's perception. 'System-wide corrective action' is urgently required.

[22] The main problem, as was pointed out in this court as long ago as 1975,[12] is that, while class a and class b greens were well-established legal concepts, class c greens were a new creation of the 1965 Act, for which no legal incidents were prescribed. At that time it was suggested by Lord Denning that, if amending legislation were too long delayed, judicial interpretation might have to fill the gap. Over the years since then, the difficulties have frequently been acknowledged in judgments, government reports, and other authoritative studies. Legislative action has been promised.[13] In 1995 I referred to some of these sources.[14] A decade later the problem remains. Most recently, in *R (on the application of Beresford) v Sunderland City Council*, Lord Walker of Gestingthorpe, while agreeing with the registration of the open space in that case as a 'town or village green', added:

> '... the campaigners have achieved that end by a route which has by-passed normal development controls, and in a way which may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended.'[15]

[23] To bring matters up-to-date, we have been shown a note prepared for the present hearing, following a conversation with the senior policy officer for commons legislation at the Department for Environment, Food and Rural Affairs (DEFRA).[16] This indicates that a commons Bill is currently under preparation,

11 (2002) 116 Harvard LR 19 at 28–29, quoted by Baroness Hale in 'A Supreme Court for the United Kingdom?' Legal Studies Vol 24 (March 2004) p 42.

12 See *New Windsor Corp v Mellor* [1975] 3 All ER 44 at 51–52, 54, [1975] Ch 380 at 391–393, 395 per Lord Denning MR and Browne LJ respectively.

13 Most recently in the 2002 CLPS (paras 51, 60)).

14 See *Ex p Steed* [1995] 2 EGLR 233 at 235.

15 See [2003] UKHL 60 at [92], [2004] 1 All ER 160 at [92], [2004] 1 AC 889.

relating mainly to improvements to the management of common land. A decision had been taken not to include any significant provisions in relation to town and village greens 'because it was felt that the subject was too complex to be included in the Bill'. It is, however, intended that there should be research with regard to the continuing registration of greens, with a view to updating existing data, investigating conflicts and problems, and also exploring 'whether village registrations are being used to frustrate development'. There is no timetable either for completion of this work, or for further legislation. For the foreseeable future, therefore, we must take the statute as it is.

[24] Against this background, I am reluctant to accept that there is nothing the courts can do. We can and should look again at the 1965 Act in its historical context. We should be guided by the assumption, so far as possible within ordinary judicial constraints, that the 1965 Act was intended to achieve its stated purpose of providing a definitive register of common land and town and village greens, and to have practical effects, within a scheme which was coherent, workable and fair. We are entitled also to have regard to the Royal Commission report, whose recommendations provided the basis for the legislative scheme.[17] At the same time, in accordance with established principles, we must adopt a restrictive approach to the interpretation of legislation which imposes or extends penal obligations or detrimentally affects property rights.[18] Finally, s 3 of the 1998 Act requires us, so far as possible, to interpret all legislation (old and new) in a manner compatible with the rights guaranteed by the human rights convention, including the protection of property rights.[19]

[25] Counsel appearing before us, all of whom are experienced in this field, joined in urging us to be as bold as we feel able, in providing practical help for those interested as landowners or claimants, and for the authorities who have to administer the system on a day-to-day basis. In doing so, right or wrong, we may at least help to clear the way for further corrective action by the House of Lords in its judicial capacity, or by Parliament.

GREENS—ANCIENT AND MODERN

[26] It is impossible to reach a principled conclusion on the fundamental questions raised by the first two issues, without revisiting the development of the law in this area from its beginnings in the seventeenth century to the Royal Commission report and the 1965 reforms.

[27] Aspects of the relevant history were reviewed in the 'magisterial'[20] speech of Lord Hoffmann in *Ex p Sunningwell Parish Council*, and in *Beresford*'s case itself. However, in neither case did the House find it necessary to resolve the uncertainty as to the substantive effect of registration under class c. In *Ex p Sunningwell Parish Council* Lord Hoffmann referred to this uncertainty when commenting on the background to the case. He said:

16 Since the hearing, a press notice on the government's proposals for common land, following consultation, was issued on 17 February 2005.

17 See 44(1) *Halsbury's Laws* (4th edn reissue) para 1423.

18 See footnote above (paras 1456, 1464).

19 See art 1 of the First Protocol (protection of property)).

20 See *Beresford*'s case [2004] 1 All ER 160 at [71], [2004] 1 AC 889, per Lord Walker.

'It is unclear what rights, if any, registration would confer upon the villagers. The Act is silent on the point. But registration would prevent the proposed development because by s 29 of the Commons Act 1876 encroachment on or inclosure of a town or village green is deemed to be a public nuisance.'[21]

The extent of the villagers' rights was not in issue in that case. Nor (notwithstanding Lord Hoffmann's reference to it) was the application of s 29 of the 1876 Act. We understand (from Mr Laurence, who also appeared in that case) that there was no argument on the point, and it remains properly as an issue before us (issue (ii)).

[28] In *New Windsor Corp v Mellor*, Lord Denning MR in a characteristically vivid passage encapsulated the essentials of the law of customary rights over village greens.[22] However, to answer the issues left open in that case, and in *Ex p Sunningwell Parish Council*, it is necessary to fill in some more of the detail. In this review, I will seek to emphasise four main points: (i) Understanding of the law at the time of the Royal Commission's report depended principally on its development and clarification in cases and writings in the second part of the nineteenth century, in spite of which many points remained unresolved. (ii) There was no standard package of rights applicable to all town or village greens. Rights depended on customary law. The extent of the local rights in any case, and the identity of those entitled to enjoy them, depended on the local evidence. (iii) Although some nineteenth-century statutes contained references to 'town or village greens', the statutory term was not defined. There was nothing in the statutes or in any reported cases which necessarily limited that term to land subject to customary rights. (iv) Historic class c greens, as a concept, were a natural extension of the common law, and consistent with the objectives of the 1965 Act. Modern class c greens are neither; and it seems likely that they were an unintended consequence of the statutory definition. Although they are now firmly embedded in the law, there is no policy reason to give them a substantive significance beyond that expressly or impliedly required by the statutory wording.

[29] In this part of the judgment, I will review the development of the law in five parts: (i) nineteenth-century cases and studies; (ii) nineteenth-century statutes; (iii) the Royal Commission and the 1965 Act; (iv) modern class c greens; (v) *Ex p Sunningwell Parish Council*.

Nineteenth-century cases and studies

[30] Compared to the venerability of village greens as an institution, the legal sources before the nineteenth century are surprisingly thin. In so far as it is possible to refer to an established body of law before the 1965 Act, it is largely derived from cases and treatises in the second half of the nineteenth century. This period coincided with increasing concerns over the social consequences of the inclosure of commons, and recognition of the needs of the growing urban populations for exercise and recreation. Immediately before this period came the Inclosure Act 1845, which—'carried much farther the concept that inclosure was the concern of all the local inhabitants, and not only of the lord and the

21 See [1999] 3 All ER 385 at 388, [2000] 1 AC 335 at 347.

22 See [1975] 3 All ER 44 at 47, [1975] Ch 380 at 386–387.

commoners' and which first included a general prohibition on the inclosure of town or village greens.[23] Other legislation followed during the nineteenth century, to some of which I shall refer in the next section. However, there was no statutory definition of the expression 'town or village green', and apparently no reported case in which its statutory meaning was discussed.

[31] The nineteenth-century authors sought legal underpinning for the traditional rights over village greens in the law of customary rights. That law is usefully summarised in the current edition of *Megarry & Wade*:

> 'Such rights differ from easements in that they are exercisable by all who are included within the custom, independently of ownership of a dominant tenement and independently of any grant. They differ from public rights in that they are exercisable only by members of some local community, not by members of the public generally. The user must be as of right and, as such, linked to a particular locality. For these purposes, the locality must, it seems, be some unit recognised in law, such as a parish or town.
>
> A custom really amounts to a special local law, a local variation of the common law. The common law recognises such variations only if they are ancient, certain, reasonable and continuous. To be "ancient" a custom must date back to the year 1189, the beginning of legal memory; but ancient origin may be presumed if there has been long enjoyment and there is no proof of a later origin ...'[24]

By the end of the nineteenth century it seems to have become settled law that—

> 'A regular usage of twenty years unexplained and uncontradicted is sufficient to warrant a jury in finding the existence of an immemorial custom ... And from such modern usage, unless the contrary appear, the jury ought to presume the immemorial existence of the right ...'[25]

[32] The nineteenth-century textbooks refer to two old cases as directly relevant to village greens: *Abbot v Weekly*[26] and *Fitch v Rawling*.[27] In neither does the report contain any mention of a 'village green' as such. Both were unsuccessful actions for trespass by the owner of land, where the defence rested on an alleged custom. In *Abbot v Weekly* the court upheld a customary right for the inhabitants of a village to use the land 'to dance there at all times of the year at their free will and for their recreation'. In *Fitch v Rawling* the defendants had played cricket on the plaintiff's land, relying on an alleged custom for the inhabitants of the parish, to use the land for 'all kinds of lawful games, sports and pastimes ... at all seasonable times of the year ...' The reported arguments revolved round a number of technical and pleading points, such as whether cricket was within the custom, and whether it mattered that some of the players (presumably the opposing side) came from a different parish.

23 See Dr WG Hoskins *History of Common Land and Common Rights* (App II to the Royal Commission report) para 54).

24 See Megarry & Wade *The Law of Real Property* (6th edn, 2000) p 1096 (para 18-078).

25 See *Brocklebank v Thompson* [1903] 2 Ch 344 at 350 per Joyce J.

26 (1665) 1 Lev 176, 83 ER 357.

27 (1795) 2 Hy Bl 393, 126 ER 614.

[33] Writing in 1868 Charles Elton[28] said of these cases:

> 'On these cases rest the immemorial privileges enjoyed by inhabitants upon town-greens and village-greens, which may be defined as small portions of wastes dedicated to the inhabitants of a certain place, either by custom or by express grant of an owner in fee-simple.'[29]

He contrasted these local rights with the position of the general public, which 'has no such rights by the common law, and cannot claim them by particular custom'. This was illustrated by reference to two recent cases[30] where a customary claim by village inhabitants to use of land as a village green was rejected because the evidence showed that 'the general public resorted to the place for recreation and roaming about'. A similar objection in 1876 proved fatal to a claim to customary rights on Stockwell Green in Lambeth, in the well-known case of *Hammerton v Honey*.[31] Jessel MR said:

> '... what must be the usage proved? It must be not only consistent with the custom alleged, but ... not too wide. For instance, if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom.'

In *Edwards v Jenkins*[32] it was even held to be fatal that the claimed rights were enjoyed by three parishes, rather than one. Although Lord Denning MR doubted the correctness of this decision,[33] it remains a fundamental feature of a customary right that it is for the benefit of a particular locality, not for the world at large.

[34] In 1896, Sir Robert Hunter devoted a whole chapter of his work on open spaces to the subject of village greens.[34] This is particularly valuable as an authoritative review of the state of the law towards the end of the main period of case law development. Even then, he noted the continuing uncertainty of the law:

> 'So familiar is the expression "village green" that it has found its way into Acts of Parliament, and even into the utterances of the Courts. Yet the term "village green", like the term "common" as applied to a piece of land, has no exact legal definition, unless it be that of green situate in a village. It does not follow, that, because a piece of land is what is usually called a village green,

28 *A Treatise on Commons and Waste Lands* (1868) pp 285–291).

29 See *Elton* (p 288). It appears from a footnote that this proposition was based on a report of the Select Committee on Open Spaces (1865) 1 Rep 26.

30 *Schwinge v Dowell* (1862) 2 F & F 845, *Chapman v Cripps* (1862) 2 F & F 864.

31 (1876) 24 WR 603 at 604.

32 [1896] 1 Ch 308.

33 See the *New Windsor* case [1975] 3 All ER 44 at 47, [1975] Ch 380 at 387.

34 See Sir Robert Hunter *The Preservation of Open Spaces and of Footpaths and other Rights of Way* (1896) p 175. The author is described on the title page as 'Solicitor to the Post Office, Formerly Honorary Solicitor to the Commons Preservation Society'.

> it is therefore subject to peculiar rights. It may be subject to such rights, but in each case the existence of the right, as a fact, has to be proved.'[35]

[35] Hunter referred to the difficulties of proving customary rights under the case law, particularly given the practical impossibility of showing 'systematic exclusion of the general public', and the consequent need to show 'some kind of assertion of right on the part of the inhabitants over and above the mere use in common with others ...'[36]

[36] One topical issue was whether the right of recreation 'may be claimed at all times of the year, or only at seasonable times', the latter words being taken from the description of the custom upheld in *Fitch v Rawling*. Hunter commented (pp 178–179): 'it seems now to be settled that the right may be claimed at all times. Nevertheless, the custom must be used reasonably, and no wanton damage caused.[37] The authorities relied on as resolving this dispute were *Mounsey v Ismay*[38] and *Hall v Nottingham*.[39] The first was not about a village green in the ordinary sense, since it concerned an alleged custom to use the plaintiff's land for horse-racing on only one day each year (Ascension Day). The second concerned land known as the 'Maypole Piece', in a Shropshire village. The alleged custom was for the villagers to erect a maypole and dance around it, and 'otherwise [to] enjoy any lawful and innocent recreation at any times in the year on the land'. This was upheld even though not expressly limited to 'seasonable times'. The court followed *Abbot v Weekly* and *Fitch v Rawling*, which—'[taken] together ... shew that all lawful games and pastimes may be used at all times.'[40] The court rejected an objection that the custom was too uncertain. Cleasby B said:

> 'Looking to the nature and origin of such customs, it would be unreasonable to expect any precise certainty as to what should be enjoyed as a matter of right.'[41]

[37] Two other cases, referred to by Hunter[42] show that by this time claims to customary recreational rights were not confined to small areas within villages or towns. In *Virgo v Harford*[43] the court upheld recreational rights of the villagers over 65 acres of 'fine open land on the top of a hill'. The rights, as so declared, extended to 'the playing of football, rounders, cricket, and all other lawful village sports, games and pastimes'. In *Lancashire v Hunt*[44] the claim related to an area of

35 See footnote above (p 175).

36 See p 181. Suggestions for evidence of 'assertion of right' were the placing of a maypole on the green, the reservation of an area for the village cricket club, or an entry in the vestry-books showing a 'claim of right'.

37 See pp 178–179. He referred to the sequel to *Fitch v Rawling* (*Fitch v Fitch* (1797) 2 Esp 543, 170 ER 449), in which it had been held that it was not a lawful exercise of the custom 'to enter upon the land when the grass had been allowed to grow and had been cut for hay, and to throw the hay about and mix it with gravel and spoil it.'

38 (1863) 1 H & C 729.

39 (1875) 1 Ex D 1.

40 See (1875) 1 Ex D 1 at 3 per Kelly CB. The requirement for enjoyment to be at 'seasonable times' was implied in the more general allegation (at 4) per Cleasby B.

41 See (1875) 1 Ex D 1 at 4.

42 See pp 181–182.

43 Unreported, except inaccurately (according to Hunter) in (1893) Times, 30 March.

some 160 acres, known as Stockbridge Common Down. The main issue was the extent to which commercial training of horses was permitted. It was held that the inhabitants were entitled by custom to use the downs 'for all useful and lawful games and recreation, including riding ... and to erect such tents and other accessories as were necessary ...' but not so as to include the training of horses not belonging to the inhabitants, or the business of training of horses for profit.

Nineteenth-century statutes

[38] I turn to the nineteenth-century statutes, which are relevant both to the background of the 1965 Act, and to one of the main issues in this case (issue (ii)). Town and village greens were referred to in a number of statutes, without definition.

[39] Thus, s 15 of the 1845 Act provided that '[n]o town green or village green shall be subject to be inclosed', and it also provided powers for such greens to be allotted to the 'churchwardens and overseers of the poor' in trust for use for 'exercise and recreation'. Section 147 provided a procedure whereby 'lands not subject to be inclosed' (which under s 15 would have included village greens) could be exchanged for other land, on terms approved by the Inclosure Commissioners. There was separate provision in s 73 of the 1845 Act for the allotment of land 'as a place of exercise and recreation for the inhabitants of the said parish and neighbourhood', but no indication that such land was to be equated with a 'town or village green' in the statutory sense.

[40] Later statutes made further provision for the protection of village greens and allotted recreation land, by deeming certain encroachments or interferences to be 'public nuisances', and so subject to criminal prosecution. They were s 12 of the 1857 Act and s 29 of the 1876 Act. The language is somewhat dense, but the detail is immaterial. In summary, the 1857 Act created various summary offences for the purpose of preventing nuisances 'in town greens and village greens, and on land allotted and awarded upon any inclosure under the [Inclosure] Acts as a place for exercise and recreation ...' The acts so prohibited included 'any ... act whatsoever ... to the interruption of the use or enjoyment thereof as a place for exercise or recreation ...' The 1876 Act provided that any encroachment, erection or interference made on a 'town or village green', otherwise than with a view to its 'better enjoyment', should be 'deemed to be a public nuisance' so as to give rise to a summary offence under the 1857 Act.

[41] In some statutes, town or village greens were included in the definition of 'commons'. An example is the Commons Act 1899, which gave district councils various powers (including management schemes and byelaws) in respect of 'commons'. Commons were defined so as to 'include any land subject to be inclosed under the Inclosure Acts 1845 to 1882, and any town or village green ...' (See s 15.) The same definition was carried into the compulsory purchase legislation, which provided for a 'common' (including a town or village green) to be compulsorily acquired, subject to the provision of other land 'equally advantageous ... to the public', and subject to the '[same] rights, trusts and incidents'.[45]

[42] We have been shown no reported case which considered the expression 'town or village green' in any of these statutes, or, in particular, which directly linked

44 (1894) 10 TLR 448.

45 See s 19(1), (4) of the Acquisition of Land Act 1981.

it to the cases on customary rights. It is noteworthy that in 1896 Sir Robert Hunter made no such link. Thus, of the references to 'town or village greens' in the Inclosure Acts, he said:

> 'For the purpose of these enactments, a village green or town green means, it may be assumed, a green situate in a village or town and habitually used as the green of the place for recreation, air, and exercise; it would not be necessary to prove that a legal right of recreation in the inhabitants of the district ever existed.'[46]

He cited no authority for this proposition, but it may have represented a realistic view of the practicalities of summary proceedings at the time when these statutes were enacted. In any event, in considering the purposes of the 1965 Act, it cannot be taken as settled law that 'town or village greens' in the nineteenth-century statutes were limited to those over which customary rights could be strictly proved.

The Royal Commission and the 1965 reforms

[43] There appear to have been no significant cases (or academic writings) about village greens between the 1914–1918 war and the setting up in 1955 of the *Royal Commission on Common Land*, which led in due course to the 1965 Act. In *Ex p Sunningwell Parish Council*, Lord Hoffmann summarised the background and general effect of the reforms, so far as related to village greens:

> 'The main purpose of the 1965 Act was to preserve and improve common land and town and village greens. It gave effect to the Report of the Royal Commission on Common Land ... which emphasised the public importance of such open spaces. Some commons and greens were in danger of being encroached upon by developers because of legal and factual uncertainties about their status. Others were well established as commons or greens but there was uncertainty about who owned the soil. This made it difficult for the local people to make improvements (for example, by building a cricket pavilion). There was no one from whom they could obtain the necessary consent.
>
> The 1965 Act dealt with these problems by creating local registers of common land and town and village greens which recorded the rights, if any, of the commoners and the names of the owners of the land. If no one claimed ownership of a town or village green, it could be vested in the local authority. Regulations made under the Act prescribed time limits for registrations and objections and the determination of disputes by Commons Commissioners. In principle, the policy of the Act was to have a once-and-for-all nationwide inquiry into commons, common rights and town and village greens. When the process had been completed, the register was conclusive. By s 2(2), no land capable of being registered under the Act was to be deemed to be common land or a town or village green unless so registered.'[47]

46 See pp 184, 186.

47 See [1999] 3 All ER 385 at 388–389, [2000] 1 AC 335 at 347–348.

[44] I would only comment, with respect, that the first paragraph perhaps understates the extraordinary complexity of the task which faced the commissioners, against a background of widely differing geographical settings and local traditions, and very uncertain legal principles.[48] One cannot read the report without huge admiration for their achievement in bringing order to this apparent chaos.

[45] In their vivid general description, the commission contrasted the traditional image of the village green with—

> 'the reality [which] all too frequently falls far short of imagination ... Too often ... village greens are neglected and become rank with unmown grass and weeds, or trodden bare, used as dumps for rubbish and disfigured with litter. So far from being untouched, they may find the hand of the twentieth century lying heavy upon them ...'[49]

Most of the report was concerned with common land as such, for which detailed proposals were made for registration, public access and management.

[46] Town and village greens were dealt with relatively briefly, both in the body of the report and the legal commentary by Sir Ivor Jennings QC himself. The glossary defined such a green as: 'A piece of open land in a village on which the inhabitants of the village (or town) have a customary right of playing lawful games and enjoying it for recreation.'[50] The commission recommended the extension of their proposals for registration (but not apparently those for access and management) to village greens, commenting: 'There are probably very few villagers who will not know what they mean by their "green"; equally their assumption that it is "their" green is seldom likely to be questioned.' However, to guard against the 'difficulty and expense' for inhabitants if put to proof of their green, they recommended that the relevant local authority should be able to claim the land as a town or village green, and that, subject to a successful objection to the Commons Commissioner within a defined time, title would be deemed to be vested in the authority, which should maintain it as open space.[51] Village greens were to be excluded from the definition of common land.

[47] The definition of 'town or village green' proposed for this purpose was wider than that in the glossary, and anticipated the three parts of s 22 of the 1965 Act:

> 'Any place which has been allotted for the exercise or recreation of the inhabitants of a parish or defined locality under the terms of any local Act or inclosure award, any place in which such inhabitants have a customary right to indulge in lawful sports and pastimes, *and in a rural parish any unenclosed open space which is wholly or mainly surrounded by houses or their curtilages and which has been continuously and openly used by the inhabitants for all or any such*

48 See eg the Royal Commission report (para 216), where they describe the task of establishing ownership of common land as 'having to grope around in a mist of doubt and uncertainty—as bewildering as those mists which sometimes descend on the commons of Dartmoor'.

49 See paras 18–19.

50 See p 276.

51 See paras 370–372.

purposes during a period of at least twenty years without protest or permission from the owner of the fee simple or the lord of the manor.'[52] (My emphasis.)

There is a tantalising lack of any discussion of the third category. It may not be coincidental that it reads like an elaboration of the wording suggested by Sir Robert Hunter in connection with the nineteenth-century statutes: 'a green situate in a village or town and habitually used as the green of the place for recreation, air, and exercise ...' The commission may have had in mind that, as already noted, the statutory meaning of a 'town or village green' was not settled law. They may have wished to cast their net wide enough to ensure that no plausible candidate escaped consideration at the initial stage of the registration process.

[48] As has been seen, the 1965 Act definition followed the three-part format, in classes a to c; but the third was significantly widened by removing the limitation to land surrounded by houses. Again one can only speculate as to the reasons for this extension. It is possible that this was the draftsman's response to the analogy of cases such as *Lancashire v Hunt*, to which such a restrictive definition would have been inapplicable.

[49] More generally, the draftsman's objective, in creating the concept of historic class c greens, may have been to cut through some of the technicalities of customary law. He would have had in mind that, where a landowner had a valid defence to such local claims to recreational rights over his land, the time between the passing of the 1965 Act and the final registration of claims would leave him plenty of opportunity to assert it. This might be by express licence or by effective prohibition, either of which would have the effect that it would no longer be 'as of right'.[53] Thus any land in relation to which a claim to village green status survived the registration process, could, without unfairness, be regarded as the practical equivalent of a customary green.[54]

[50] In practice, in their handling of the initial registrations, commissioners understandably seem to have treated classes b and c as overlapping, without always drawing a clear distinction between the two.[55] As already noted, the 1965 Act itself required only that the land should be registered as a town or village green, without specifying the class which brought it within the definition.

Modern class c greens

[51] The concept of a 'modern' class c green, as it has emerged in the cases since 1990, would, I think, have come as a surprise to the Royal Commissioners, and to the draftsman of the 1965 Act. There is no hint of it in the Royal Commission report, or the parliamentary debates on the Bill. The commissioners' terms of reference were directed to sorting out the problems of the past, not to creating new categories of open land, for which there was no

52 See para 403.

53 See *Beresford*'s case [2004] 1 All ER 160 at [72], [2004] 1 AC, per Lord Walker.

54 In relation to historic greens, efforts by the landowner to interrupt a recreational use, in the face of evidence of a long history of such enjoyment, would be likely to be defeated by the presumption that the use was based on customary rights: see eg *Re Village Green, Waddingham, Lincs* (1972) unreported, where the Chief Commons Commissioner upheld customary uses established by evidence 'during the whole period of living memory', even though the objectors had 'discouraged it a few years ago by starting to use the land as a garden'.

55 See *Gadsden* p 383 (para 13.20).

obvious need. By this time, of course, there were numerous statutes conferring on public authorities modern powers for the creation and management of recreational spaces for the public.

[52] It is true that s 13 of the 1965 Act contemplated the possibility of new entries, by including power to amend the register, where land 'becomes ... a town or village green'. However, that provision could be readily explained by the long-established statutory provisions for the substitution of replacement greens under the Inclosure Acts or compulsory purchase law. There was no need to infer an intention to create a new category of modern greens, established merely by use. Furthermore, the fact that the procedure was entrusted to administrative authorities (subject to correction by the court), rather than Commons Commissioners, implies an assumption that the issues would be relatively clear-cut. Had anyone anticipated the kinds of factual and legal disputes exemplified by the present case, one would have expected the specialist role of the Commons Commissioners to be extended to deal with them.[56] It is notable that, as late as 1975, in the *New Windsor* case, all three members of the court thought it natural to read class c as referring to 20 years 'before the passing of the ... Act'[57]—an interpretation which would have excluded the possibility of modern class c greens.

[53] The first suggestion of a wider purpose seems to have come in the notes to the 1969 'new land' regulations, already referred to. They indicated that land could 'become' a town or village green after January 1970 in four ways.[58] Category (iii) was: 'By the actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years.' This suggestion appears to have been derived simply from the statutory definition; no further explanation was given.

[54] Of the other categories, (i) and (iv) were unsurprising: (i) creation by or under an Act of Parliament, and (iv) substitution or exchange for existing greens under statutes so providing.[59] Category (ii) ('[b]y customary right established by judicial decision') can now be seen to have been a mistake. If, as already discussed, any unregistered customary rights were extinguished by s 1(2) of the 1965 Act, a subsequent judicial decision could not revive them.

[55] The questions raised by modern class c greens did not come before the higher courts until 1995.[60] In the two cases considered in that year,[61] no point

56 A suggestion that such a role should be implied (made in an article by the present Chief Commons Commissioner, Edward Cousins) was rejected by this court in *Whitmey's* case [2005] QB 282 at [3], [18]–[19], [2004] 3 WLR 1342.

57 See [1975] 3 All ER 44 at 51, 54, [1975] Ch 380, at 391, 395, 396, per Lord Denning MR, Browne LJ and Brightman J respectively.

58 The same four categories were repeated in a ministerial circular in 1971, although it was said that 'the majority' of new applications were expected to be in respect of substituted land: MHLG Circular 3/70, para 4-5.

59 Although arguably such substituted greens are not strictly within any of the three classes of the statutory definition, there was sensibly no dispute before us that they are properly registrable (if only, because the 'incidents' of the substituted land have to be the same).

60 *Gadsden* mentions a few such applications in the 1980s (p 387 (para 13.30)). However, the advice of the Open Spaces Society (see 'Getting Greens Registered') seems to have favoured waiting a full 20 years from the end of July 1970 (the cut-off date for rights under s 1(2) of the 1965 Act), and that accordingly 1 August 1990 should be given in the application as the date when the land became a green. This advice was followed by Miss Robinson in the present case.

61 *Ex p Steed* [1995] 2 EGLR 233 (Carnwath J) and *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 (Harman J).

was taken as to the principle; but the restrictive interpretation adopted in those cases, if upheld, would have severely limited the potential for successful registrations. That changed with the decision of the House of Lords in *Ex p Sunningwell Parish Council* (1999), since when this has become an area of unusually vigorous legal activity for registration authorities, and for the specialist bar—whether in the conventional role of counsel, or as inspectors in non-statutory inquiries established by registration authorities.

[56] In *Ex p Sunningwell Parish Council*, not only was the principle of the modern class c green accepted by the House of Lords without question, but it was taken as one of the reasons for the statutory provision for amendment.[62] Since then, the amendment made in 2000 to the statutory definition of class c can be seen as implicit indorsement of the principle by Parliament. Accordingly, even if (as I believe) it was not what was intended in 1965, the clock cannot be turned back. However, this history may be relevant when one is trying to make sense of the statutory scheme as we now have it.

Ex p Sunningwell Parish Council

[57] The principal issue in *Ex p Sunningwell council* was whether the words 'as of right' (in class c) required, as the Court of Appeal had held: 'an honest belief in a legal right to use ... as an inhabitant ... and not merely a member of the public.'[63] That view was rejected by the House of Lords, holding that, as in statutory provisions for public rights of way, the words 'as of right' were in effect shorthand for the common law expression 'nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner'.[64] What mattered was the appearance conveyed by the use of the land to its owner, not the subjective beliefs of the users:

> 'The user by the public must have been, as Parke B said in relation to private rights of way in *Bright v Walker* ((1834) 1 Cr M & R 211 at 219), "openly and in the manner that a person rightfully entitled would have used it ..."'[65]

In other words, they must have used the land 'in a way which would suggest to a reasonable landowner that they believed they were exercising a public right.'[66]

[58] Lord Hoffmann had previously commented on the division into three classes. Class c was explained by Lord Hoffmann by reference to a detailed comparison of English and Scottish law relating to the acquisition by prescription of private and public rights of way, including the Prescription Act 1832 and the Rights of Way Act 1932. The latter provided for a presumption of dedication as a highway after 20 years enjoyment 'as of right', which he saw as 'an echo' of the words 'claiming right' under the 1932 Act, and intended to have the same effect. Of the 1965 Act he said:

62 See [1999] 3 All ER 385 at 389, [2000] 1 AC 335 at 348, per Lord Hoffmann.

63 See *R v Suffolk CC, ex p Steed* [1997] 1 EGLR 131 at 134.

64 See [1999] 3 All ER 385 at 391, 395–396, [2000] 1 AC 335 at 350, 355–356.

65 See [1999] 3 All ER 385 at 393, [2000] 1 AC 335 at 353. This followed the discussion of Lord Blackburn's speech in *Mann v Brodie* (1885) 10 App Cas 378 at 386.

66 See [1999] 3 All ER 385 at 394, [2000] 1 AC 335 at 354, summarising the earlier discussion.

'... this was the background to the definition of a "town or village green" in s 22(1) of the 1965 Act. At that time, there had been no legislation for customary rights equivalent to the 1832 Act for easements or the 1932 Act for public rights of way. Proof of a custom to use a green for lawful sports and pastimes still required an inference of fact that such a custom had existed in 1189. Judges and juries were generous in making the required inference on the basis of evidence of long user. If there was upwards of 20 years' user, it would be presumed in the absence of evidence to show that it commenced after 1189. But the claim could still be defeated by showing that the custom could not have existed in 1189 ... It seems to me clear that class "c" in the definition of a village green must have been based upon the earlier Acts and intended to exclude this kind of defence. The only difference was that it allowed for no rebuttal or exceptions. If the inhabitants of the locality had indulged in lawful sports and pastimes as of right for not less than 20 years, the land was a town or village green.'[67]

[59] The particular issue whether a custom could have existed in 1189 does not in fact seem to have figured in any of the reported cases on customary recreational rights.[68] However, this passage is consistent with the view that the general objective of the draftsman of the 1965 Act was to enable the commissioners to cut through such technicalities, recognising the difficulties of proof for local claimants in cases (of which there must have been many) where '[n]one of them knew the origin of the right but that they had it there was no doubt in any of their minds.'[69]

[60] For present purposes, however, the main significance of *Ex p Sunningwell Parish Council*, in my view, is in its implied widening of the division between class c and the traditional customary green, represented by class b, a process which was continued by the 2000 amendment.

[61] In the first place, in relation to modern class c greens, there is no place for any 'claim of right' in the traditional sense,[70] to provide the link between the recreational use and the inhabitants of a particular locality. In *Ex p Steed* in 1995, I had seen such a link as essential in this context in order to define the right, by contrast with the context of rights of way:[71]

'Regular and open use of a particular route by the public, or of a particular access by the occupier of a tenement, can readily be taken as an assertion of right; the right is defined by the use, and in each case it is a right recognised by the law.[72] Recreational use of a particular piece of land by members of the

67 See [1999] 3 All ER 385 at 393–394, [2000] 1 AC 335 at 353–354.

68 Not even, for example, in relation to cricket, which, as Lord Hoffmann observed, was unknown in 1189, and unlawful for some centuries thereafter (see [1999] 3 All ER 385 at 397, [2000] 1 AC 335 at 357). The only example given by Lord Hoffmann (*Bryant v Foot* (1867) LR 3 QB 161) was about customary charges for marriage services.

69 See *Corpus Christi College, Oxford v Gloucestershire CC* [1982] 3 All ER 995 at 997, [1983] QB 360 at 363 per Lord Denning MR (a case relating to common rights).

70 As in the Royal Commission's understanding that the 'villagers ... know what they mean by their "green"' (see [46], above).

71 See [1995] 2 EGLR 233 at 239. In *Ex p Sunningwell Parish Council*, Lord Hoffmann made reference to this passage ([1999] 3 All ER 385 at 397, [2000] 1 AC 335 at 357), but only for my unremarkable observation that in modern life informal recreation such as 'an evening stroll with a dog, or children at play' might be the main function a village green.

public is not so readily interpreted, since a prescriptive right to roam as such is unknown to the law ... Thus, the Act requires something more than mere usage to define the right; the usage must be linked to a right claimed by the inhabitants of a particular locality.'[73]

That approach cannot stand with *Ex p Sunningwell Parish Council*, in which Lord Hoffmann, in rejecting the subjective test, relied almost exclusively on analogies with the law of prescription in the context of rights of way, public and private.[74] Indeed, a credible 'claim of right' is impossible for a modern class c green, since, even on pieces of land where there was once the possibility of such a claim, it was extinguished in 1970 by the effect of s 1(2) of the 1965 Act, if the land was unregistered. A genuine claim of right is no part of the concept of a modern class c green.

[62] Other parts of Lord Hoffmann's speech in *Ex p Sunningwell Parish Council* provide further illustrations of the differences between historic and modern class c greens. Various points had been made on the interpretation of the expression 'lawful sports and pastimes' in class c, including analogies with customary rights. These were rejected. Lord Hoffmann treated the expression as 'a single composite class', so that: 'As long as the activity can properly be called a sport or a pastime, it falls within the composite class.'[75] Furthermore the expression must be interpreted by reference to current practice:

> 'Class "c" is *concerned with the creation of town and village greens after 1965* and in my opinion sports and pastimes includes those activities which would be so regarded in our own day.'[76] (My emphasis.)

Having noted that in modern life 'dog walking and playing with children' might be the main function of a village green, he added: 'It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right.'[77]

[63] Similarly, he rejected an argument, based on the nineteenth-century case law, that the evidence of user was too broad, because it included people who were not inhabitants of the locality. He said:

> 'That was with reference to a claim to a customary right of recreation and amusement, that is to say a class "b" green. Class "c" requires merely proof of user by "the inhabitants of any locality". It does not say user *only* by the

72 The same observation might be made in relation to common rights; for example, the use for 20 years of a defined area of downland for grazing cattle from a particular tenement, as in *Tehidy Minerals Ltd v Norman* [1971] 2 All ER 475 at 485, [1971] 2 QB 528 at 545 (although the court in that case found that the use had been 'in the assertion of a right so to do').

73 I referred to *Beckett (Alfred F) Ltd v Lyons* [1967] 1 All ER 833 at 845, [1967] Ch 449 at 472, where in relation to a claim by inhabitants of the County of Durham to a customary right to collect sea-coal, Harman LJ commented that 'it would at least be necessary to show that the coal-gatherers supposed themselves to be gathering coal in right of their inhabitancy of the county ...' This aspect of the judgments in the *Beckett* case was not referred to in the *Sunningwell* case.

74 Including an article by JG Riddall, 'A False Trail' (1997) 61 Conv 199, in which the author discusses the erroneous course taken by recent cases on that subject, again without reference to customary recreational rights.

75 See [1999] 3 All ER 385 at 396, [2000] 1 AC 335 at 357.

76 See [1999] 3 All ER 385 at 397, [2000] 1 AC 335 at 357.

77 See [1999] 3 All ER 385 at 397, [2000] 1 AC 335 at 357.

a inhabitants of the locality, but I am willing to assume, without deciding, that the user should be similar to that which would have established a custom.'[78]

On the evidence it appeared that informal recreation on the glebe 'was predominantly, although not exclusively, by inhabitants of the village'. Lord Hoffmann commented: 'I think it is sufficient that the land is used predominantly b by inhabitants of the village.'[79]

[64] Taking these passages together, therefore, it appears that Lord Hoffmann was treating class c as a free-standing category, 'concerned with the creation of town and village greens after 1965', and to be interpreted in a modern context, unhampered by technicalities of customary law applicable to class b. The test is objective. Provided that the recreational use is sufficiently substantial 'to carry c the outward appearance of user as of right', and provided that the predominant use is in fact by inhabitants of the locality, that is sufficient, regardless of the impossibility of any credible claim of right.

[65] This general approach can be seen as having received indorsement by Parliament in the 2000 Act, which introduced the new[80] concept of a d '*neighbourhood* within a locality', and required no more than a 'significant' number of local users. Whatever precisely that expression means (which happily is one of the few issues not before us),[81] it can only have the effect of weakening still further the links with the traditional tests of customary law.

e ISSUES IN THE PRESENT CASE

[66] Against that background, I turn to the particular issues in the present case, grouped under the main headings identified above.

(a) Substantive effect of class c registration

f Introduction

[67] Issues (i) and (ii) raise fundamental questions as to the legal effect of registration as a class c green. They treat separately two aspects: (i) what rights (if any) are enjoyed by 'the relevant inhabitants'; and (ii) what criminal sanctions are applicable to such greens under the nineteenth century statutes relating to town g or village greens.

[68] It is important to emphasise at the outset that we are concerned solely with rights or liabilities created by the 1965 Act itself, as opposed to any arising under other legislation or the general law. Rights over greens were not registrable as such. In relation to historic class c greens, registration under the h 1965 Act did not purport to alter the character of any previously existing rights, customary or otherwise, or those entitled to them. The difference, in relation to modern class c greens, is that, even if there were any customary rights, they were destroyed by the 1965 Act. Accordingly, the nature of any rights or liabilities has to be found in some provision of the 1965 Act itself.

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78 See [1999] 3 All ER 385 at 397, [2000] 1 AC 335 at 357.

79 See [1999] 3 All ER 385 at 397, [2000] 1 AC 335 at 358.

80 Cf the 1845 Act, s 73 (land allotted for 'the parish and neighbourhood') where the word 'neighbourhood' seems to have a wider connotation.

81 See the discussion of the issues raised by this aspect of the new definition in *R (on the application of Cheltenham Builders Ltd) v South Gloucestershire DC* [2003] EWHC 2803 (Admin), [2004] JPL 975 (Sullivan J).

[69] The definition section itself has no substantive effect. It merely states the criteria for registration. Accordingly, arguments about the meaning of the words 'becomes ... a ... green' (in s 13) are beside the point. That is simply an indication that the land has acquired the status of a 'village green', as defined by the 1965 Act, so as to become registrable as such.[82] It says nothing about the legal consequences of registration. The answer to that question, as Lightman J said, has to be found in s 10, which states the effect of registration; it is 'conclusive evidence of the matters registered, as at the date of registration ...'

[70] The difficulty comes in the interpretation of the section. It is easy to state the problem: (i) Under ordinary principles the creation of new rights over private land or the imposition of new criminal liabilities requires a clear expression in the statute. The 1965 Act is on its face (with some limited exceptions) concerned with registration, not with the creation of rights or liabilities; there are no clear words, in s 10 or elsewhere, having such effect. (ii) On the other hand, s 10 was presumably intended to achieve something. Since the status of a class c green had no recognised legal consequences outside the 1965 Act, if the fact of class c status is the only 'matter' on which the register is conclusive, then the 1965 Act has achieved nothing in that respect. (iii) The problem goes further. Although the status of a class a or class b green is recognised by the general law, the register does not distinguish between the different classes. Accordingly, whether a particular registered green is within class a or class b on the one hand, or class c on the other, is not a 'matter' which one can deduce from the register. Thus it is not possible to tell from the register whether *any* of the greens included in it are subject to any legally enforceable rights or constraints.

[71] Lightman J took a robust approach to these issues:

> 'The starting point is section 10 of the 1965 Act. Registration is conclusive evidence of the facts registered, and accordingly, in case of a registered class c green, that the land is in law and fact a green. The critical question, as it seems to me, is accordingly what is the effect of the land in question being (as registration conclusively proves it to be) a green. The answer is that, unless the legislation manifests an intention that the existence and character of any incident rights is to await determination by subsequent legislation or that the incident rights of a class c green are to be different from the established incident rights of a class a or b green, *the same rights must attach to class c greens (whether registered or not) as attach to class a and b greens, namely the rights of the local inhabitants to indulge in lawful sports and pastimes on the land.* In my judgment the 1965 Act manifests neither such intention.'[83] (My emphasis.)

[72] His reference to 'determination by subsequent legislation' is to Lord Denning MR's suggestion that the apparent deficiencies in the 1965 Act were explicable by the fact that further legislation was anticipated to deal with issues of use and management.[84] Lightman J had already concluded, from his examination of the 1965 Act and the parliamentary background, that references to such further legislation related to common land, but not village greens.[85] If

82 See [2004] Ch 253 at [14], [2004] 2 WLR 1291, per Lightman J.

83 See [2004] Ch 253 at [36], [2004] 2 WLR 1291.

84 See the *New Windsor* case [1975] 3 All ER 44 at 51–52, [1975] Ch 380 at 392–393.

that is right (and I accept that it is a possible interpretation of the contemporary parliamentary statements), it is less surprising if the only class c greens in anyone's mind at the time were historic greens.

[73] Of the cases referred to by Lightman J, the most explicit support came from the judgments of this court in *Ex p Steed*. Pill LJ said:

> 'While I accept that, by its title, the Act is said to be "an Act to provide for the registration ... of town or village greens" and not an Act to amend the law relating to public rights, section 22 does provide that "in this Act unless the context otherwise requires", class c land is included within the definition "town or village green". There is no express limitation upon the purposes for which the land is included within the definition. There is no doubt that the inhabitants have rights over class a and class b greens and the effect of land being a class c green should be considered in that context. I find it difficult to conclude other than that parliament intended, in section 22, to open the way to the creation of new rights. The right is "to indulge in lawful sports and pastimes" while avoiding the need to prove an immemorial custom or legal origin which would establish a class a or class b green ...
>
> The analogy is not exact but I see class c as a way of establishing rights just as section 1(1) of the Rights of Way Act 1932 (now section 31 of the Highways Act 1980) provided a means of proving the existence of a highway ... An actual dedication need not be proved. I would construe the class c definition as having the same effect in making proof of the appropriate user sufficient to create a right.'[86]

[74] Lightman J concluded on this aspect:

> '... registration merely records and confirms the prior existence of the class c green. Registration is simply of a green. Plainly the incidents of a class a and a class b green include the rights of local inhabitants to use the green: there is no suggestion in the legislation that the same incidents do not attach to a class c green and one would naturally expect that the incidents should reflect the qualifying user. I conclude that the existence of a green of whichever class, whether established with or without the benefit of the presumption arising by reason of registration, gives rise to the rights of the local inhabitants ordinarily incident to the status of such a green.'[87]

Issue (i)—Rights

[75] With respect to both Lightman J and Pill LJ, I find it impossible to accept their approach, at least in relation to the existence of rights. Not only does it ignore the general statutory presumption against interference with property rights without clear words. More importantly, in my view, it misrepresents the nature of customary rights. It assumes the existence of a single package of rights, 'ordinarily incident to the status of a [Village] Green', which attaches to all class a and class b greens, and can therefore be applied by implication to class c.

85 [2004] Ch 253 at [11], [2004] 2 WLR 1291.
86 See [1997] 1 EGLR 131 at 135–136.
87 See [2004] Ch 253 at [43], [2004] 2 WLR 1291.

As the historical review has shown, that is not a correct representation of the customary law of village greens. a

[76] It may be that, in modern conditions and for most practical purposes, the uses of most class a and class b greens are the same. The public uses them for recreation, and no one pays much attention to the historical source of the rights, or even the 'locality' to which they are attached. However, in law class a and class b greens are distinct, and have different legal attributes. More importantly, b within class b itself, the extent and nature of any rights, and those entitled to enjoy them, are defined by the custom under which they arise,[88] even if in the later cases a more flexible approach was sometimes adopted. To take but one example, on a 'green' as extensive as Stockbridge Common a customary right to exercise horses for non-commercial purposes would cause little problem, at least c as long the right is confined to those living in a defined locality; but on the typical small village green a custom to that effect could be highly controversial.

[77] For village greens, as opposed to common land, the 1965 Act did not require the registration of rights. That may well be because, unlike common rights which may have considerable commercial value, the historical differences between greens were thought to be of little practical significance. Where disputes d arose, they were probably best left to be sorted out locally. However, that does not mean that the distinctions had lost their legal significance.

[78] The difficulties of implying such general rights are compounded by widening of the gap between class b and class c, to which I referred when discussing *Ex p Sunningwell Parish Council* and the 2000 Act. It is one thing to say e that informal recreation may represent a 'sport or pastime' sufficient to procure registration. It is quite another to say that it brings with it a general right for the public at large to use the land for *any* sports or pastimes, however intrusive or mutually incompatible they may be. Parliament cannot be taken as intending to create a free-for-all (walkers, riders, cricketers, footballers, golfers, and so on) f without any provision for its regulation.

[79] Similarly, as has been seen, it is an essential feature (at least in legal theory) of class b greens, that any rights arise by virtue of a connection with a particular locality, which has a historic claim to them. For modern class c greens any such historic link has been severed. Under *Ex p Sunningwell Parish Council* and g the 2000 Act, the 'locality' test can now be satisfied simply by pointing to a 'neighbourhood' from which a 'significant' number of users come. That is understandable, if the purpose is simply registration. But if the purpose is to confer rights, one needs to know to whom they are to belong: to the 'significant' number, to the neighbourhood, to the locality, or to the whole world? The h 2000 Act itself provides no answer; and the gulf between class c and class b has now become too wide to enable any answer to be found by analogy with customary law.

[80] In my view, it is impossible, by the application of any accepted judicial technique, to hold that registration of a class c green, in itself, implies any formal legal right to its use, whether by the public in general or by any particular group. j This conclusion should not materially affect the use of historic greens. The fact that they were registered in the initial period will be apparent from the register,

88 For a convenient list of 'customary' activities which have been upheld by the courts, see *Gadsden* p 378 (para 13.03).

and will be one of the 'matters' which s 10 of the 1965 Act makes conclusive. In those cases 20 years unchallenged use for recreation by local inhabitants before 1970 can reasonably be equated with a customary use. There is likely to be no reason why recreation should not have continued after 1970 in the same way as it had in the past. The problem in relation to modern 20-year greens is that, even if they did enjoy customary rights in the past, those rights have been extinguished by s 1(2). By revealing the date of the entry, the register reveals on its face that there *cannot* any longer be any historic rights; and there is nothing in the 1965 Act to create them.

[81] Issue (i) therefore must be answered in the negative.

Issue (ii)—Penal restrictions

[82] If registration says nothing about the existence of any rights over the land, can it none the less operate so as to bring registered land within the scope of the nineteenth-century statutes applicable to town or village greens? My initial reaction was: obviously not. How can a definition enacted in 1965, and expressly stated to be defining terms 'in this Act', be held by implication to operate retrospectively to alter the meaning of a penal statute passed a century before?

[83] That, as we have seen, was not the instinctive reaction of Lord Hoffmann. He acknowledged the uncertainties over rights, but assumed without argument that the nineteenth-century Acts would be engaged. This was the most recent authoritative statement on the issue when Parliament legislated in 2000. The same assumption was made by this court, with the support of counsel for DEFRA, in *R (Whitmey) v Commons Comrs.*[89] I reject Mr Laurence's suggestion that the court made a binding decision on the point. There was, and needed to be, no detailed consideration of the point. Looking at the judgments as a whole, it is clear that the court was content to assume the point in Mr Whitmey's favour, for the purpose of the human rights issue, which was at the heart of the case. Those indications, though not binding on us, call for careful consideration.

[84] On further consideration, I am persuaded that this approach can be defended on accepted principles of construction. The definition in s 22 the 1965 Act applies 'unless the context otherwise requires'. Arguably, the context of s 10 does so require, in order to avoid circularity, and to give it some substantive effect. The 'matter' stated in the register, and which is conclusively established, is that the registered land is a 'town or village green'. If one can look beyond the definition of a town or village green in s 22, then there is nothing to prevent its application to the same expression as used in other statutory contexts. As has been seen, town and village greens were referred to in the nineteenth-century statutes without definition, and there was no settled legal interpretation of that term. It would certainly have been consistent with the purposes of the 1965 Act to clarify the application of those references by providing a conclusive means of identifying the land to which they applied.

[85] In supporting this view, Mr Laurence referred (as he did before Lightman J) to the principle of statutory interpretation, known as 'updating construction'; that is, that the meaning of the statutory words is treated as continuously updated to allow for changes since it was initially framed.[90] I did not find this helpful in the present context, since none of the cases initially cited by him related to changes

89 [2005] QB 282 at [36]–[37], [2004] 3 WLR 1342.

brought about by legislation (as opposed to outside circumstances). In such cases, if Parliament intends an 'updating' effect, one would expect it to be apparent from the legislation.

[86] Further research disclosed a more plausible example, in *Pole-Carew v Craddock (Surveyor of Taxes)*.[91] In that case, the court was concerned with a 1790 statute, under which a ferry was established, and which granted the proprietors exemption from the payment of 'any tax, rate or assessment whatsoever'. It was held that this exemption extended to income tax, even though that tax was first imposed after 1790. The context, and the statutory wording, are of course quite different from the present. However, the case may be taken as illustrating a more general principle, that when one is looking at the combined effect of two statutes, concerned with the same general subject matter, even if separated by a substantial period of time, the intention of Parliament is not necessarily to be derived solely from the most recent. They must be looked at together. Such an approach provides a possible answer to concerns about applying a 1965 definition to a statute passed a century before.

[87] The most obvious objection to this interpretation is that it offends the ordinary presumptions to which I have referred, by extending penal provisions (without clear words to that effect) to land which would not otherwise have been within their scope. There is less objection in relation to historic class c greens. As has been seen, the criteria for them would have given rise to a presumption of customary rights at common law, and the registration process gave plenty of opportunity for owners to resist the process. The risk of interference with established rights was slight, and readily justifiable by the overall policy objectives of the 1965 Act.

[88] The same cannot be said of modern class c greens. However, as I have said, they were given implicit statutory indorsement in the 2000 Act, and no amendment was made to s 10. It must be assumed that Parliament intended them to have the same legal incidents as historic class c greens. The compatibility of that extension with convention rights may be open to question, but that is not an issue before us.

[89] A further possible difficulty with this interpretation is that it may involve a different approach from that applied to 'common land', which is also within the scope of s 10. That part of the definition has given rise to its own difficulties, but there is the important difference that both the components (common land and manorial waste) were recognised legal concepts apart from the 1965 Act.[92] That comparison should not, in my view, prevent the court from giving a practical meaning to s 10 as applied to town and village greens.

[90] Accordingly, I would answer question (i) in the negative and question (ii) in the affirmative.

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90 He referred to *Bennion on Statutory Interpretation* (4th edn, 2002) p 762 (section 288(1)–(3)), a passage indorsed by Scott V-C in *Victor Chandler International Ltd v Customs and Excise Comrs* [2000] 2 All ER 315 at 322, [2000] 1 WLR 1296 at 1303.

91 [1920] 3 KB 109.

92 See the *Corpus Christi College* case [1982] 3 All ER 995, [1983] QB 360 and *Hampshire CC v Milburn* [1990] All ER 257, [1991] 1 AC 325.

(b) The effect of the 2000 amendment

[91] Two issues arise: (i) Should the recreational use 'continue' to the date of the application, the date of registration, or some other date? (ii) Must any application made after the commencement date of the 2000 Act be considered exclusively in accordance with the amended definition?

[92] Although the practical effects of these questions are very important, the answers to both seem to me reasonably clear, on the ordinary reading of the statute. (i) The use must 'continue' to the date of registration. That is because, in the absence of any other indication,[93] the words 'continue to do so' can only be taken as referring to the time when the statute requires the definition to be applied; that is the date when the register is amended under s 13 of the 1965 Act. That is the only formal step referred to in the statute itself. It is also the date at which registration is made conclusive by s 10. In this context, unlike that of the initial registration process, there is no statutory equivalent to the prior step of 'provisional registration'.[94] The earlier procedures, starting with the application, are the creation of the regulations, and cannot in my view be taken to govern the interpretation of the statute. (ii) The application must be considered under the *amended* Act. This is because, as from the commencement of the 2000 Act, an application can only be made under the Act as so amended. Unless preserved by some specific transitional provision (of which there are none in this statute) or some general provision of the Interpretation Act 1978, the unamended definition is dead, and cannot be resurrected.

[93] Lightman J took a different view on both points. He thought that the continuation of the use need only be up to the time of 'the application for registration or of the commencement of proceedings vindicating the existence of the green ...'.[95] He reached this view, as I understand it, not on the wording of the statute, but by reference to its supposed objectives. He said:

> 'It cannot sensibly require ... continuation until the date of determination of the application by the registration authority or judgment by the court, for such a construction would enable the landowner in all cases to defeat a claim to the existence of a green by placing a notice in appropriate terms on the land in question (such as has been placed in this case) after the application has been made or proceedings commenced and before the determination or judgment and accordingly frustrate the purpose of the legislation ... I do not think that the provision made in subsection (1A)(b) for the making of regulations in any way weakens this argument. The legislation must have been intended to operate sensibly and effectively in any interim period,

93 Cf the Highways Act 1980, s 31(2), which specifies a period of 20 years prior to the date when the right of the public is 'brought into question'.

94 Even in that context, it was held that the facts were not to be treated as frozen at the date of provisional registration, but had to be considered in the light of the position at the date of determination: see *Central Electricity Generating Board v Clwyd CC* [1976] 1 All ER 251, [1976] 1 WLR 151 (Goff J). Although questioned in the *Corpus Christi College* case [1982] 3 All ER 995 at 1001, [1983] QB 360 at 368), this case was never overruled.

95 He cited in support an unreported decision, *Caerphilly County BC v Gwinnutt* (16 January 2002) (Judge Hywel Moseley QC).

which might be (as it has been) protracted, until the regulations were made.'[96]

[94] I agree that a consequence of my interpretation is that the owner may be able to take action to bring the qualifying use to an end, and that this is likely to limit substantially the opportunities for registration of new class c greens. However, I do not accept that this reading is so obviously unreasonable, or contrary to the legislative intention, that it must be rejected.[97] It means simply that the landowner, who otherwise will be deprived by operation of law of the effective use of his land, is given a final opportunity to assert his rights.[98] As I have said, the history of the 1965 Act gives no support for a broad interpretation of the provisions for new greens. Indeed, a restrictive view can help to provide an answer to possible human rights objections. If the landowner fails to assert his rights, even at this late stage, then it may be legitimate to infer that the land has been dedicated or abandoned to recreational use,[99] and to record that fact by registration as a class c green. Parliament gave the Secretary of State the power to limit the landowner's options by prescribing a different time limit. That power not having been used, I see no reason for the court to take over that task, and no proper basis on which it could do so.

[95] On the second point, Lightman J's reasons for taking a different view were more fundamental. He thought that that the answer depended on the application of presumption against retrospectivity:[100]

> 'The answer depends on whether in enacting the amended definition Parliament can be taken to have intended to take away the status as a green of land which had previously become a green and registrable as such and with it the protection of the 19th century legislation and the local inhabitants' rights over it which (as I have held) attach to that status. In my view Parliament cannot be presumed to have intended any such thing. If Parliament had any such intention, it would surely have made its intention plain. There is a presumption against retrospectivity of legislation.'[101]

[96] On any view, that approach loses its force if, as I think, class c status carries no implication that the inhabitants have rights over the land. In any event, I would question with respect whether the answer is to be found in the principles to which the Lightman J referred. He was not addressed on the effect of s 16 of

96 See [2004] Ch 253 at [20], [2004] 2 WLR 1291. The same view was taken by Sullivan J in the *Cheltenham Builders* case [2004] JPL 975 at [62].

97 Although we were referred to statements made in Parliament at the time of this amendment, it was not suggested that they provided a clear answer on this issue.

98 There is a parallel in the changes recommended by the Law Commission to the traditional law of adverse possession (now enacted in the Land Registration Act 2002). They include a requirement of notice to the landowner before the squatter's title is finally registered. This is seen as required to 'strike a more appropriate balance between landowner and squatter': see *Land Registration for the Twenty-First Century* (2001) (Law Com no 271) para 14.4.

99 It might, for example, be an unregistered former village green, of which the ownership is unknown and on which the traditional use has continued unchecked.

100 See eg *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 at 836, [1983] 1 AC 553 at 558 per Lord Brightman.

101 See [2004] Ch 253 at [66]–[67], [2004] 2 WLR 1291.

the Interpretation Act 1978, which in my view provides the correct framework for considering such issues.

[97] Section 16 provides '[g]eneral savings' applicable on the repeal or amendment of an Act, applicable in the absence of specific transitional provisions. In particular, it provides that repeal of an enactment does not, unless the contrary intention appears:

> '(1) ... (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;[102]
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment ...'[103]

None of these savings is relevant to Miss Robinson's case. She took no steps under the unamended statute; she acquired no rights; and no penalties were incurred.

[98] Accordingly, in my view: (i) under issue (iii), the use must continue until the date of registration; (ii) under issue (iv), the application must be considered under the 1965 Act as amended.

(c) Free-standing periods of use

[99] Issue (v) raises the question whether the application can succeed on the basis that the land 'became' a village green at the date stated by Miss Robinson in her application (1 August 1990), or some earlier date. This question takes on critical importance if, as I have held, the use must continue down to the date of registration, and if the notices erected by the city council in early 2003 had the effect of ending the qualifying use.

[100] Again I will deal with this issue shortly, because my conclusions as to the substantive effect of registration seem to me to provide the answer also to this question. The 1965 Act created no new legal status, and no new rights or liabilities, other than those resulting from the proper interpretation of s 10. Since that section only takes effect in relation to any particular land on registration, there is no legal basis for treating that land as having acquired village green status by virtue of an earlier period of qualifying use. The mere fact that it would at some earlier time have come within the statutory definition is irrelevant, if it was not registered as such. If this view is correct, then the interesting points raised by Lightman J's discussion of this issue[104] do not arise.

(d) Amendments to the application

[101] Three particular proposed amendments were the subject of issues (vi) to (viii). Issue (vi) was whether the application could be treated as relating to 20 years ending at a different date to that specified in the application. Lightman J held that it could. Issue (vii) concerned an application proposed by Miss Robinson to exclude two areas, one being the area of the reed beds and the other a

102 See *Chief Adjudication Officer v Maguire* [1999] 2 All ER 859, [1999] 1 WLR 1778 for an authoritative discussion of the relevant authorities under para (c).

103 It is also unnecessary in the context of the present case to consider the possible application of s 16(1)(e) (pending investigations or legal proceedings) to a case where the application for registration was made before the commencement of the 2000 Act, but considered afterwards.

104 See [2004] Ch 253 at [50]–[65], [2004] 2 WLR 1291.

ten-metre strip along the western boundary of the scrubland. Her reasons appear from her letter of 21 October 2002:

> 'The reason for (1) is that access to the Reed Bed for recreational purposes is not part of my claim, and none of my witnesses lays claim to it either. It seems simpler, to save the Inspector's time, to exclude this area from the argument.
>
> The reason for (2) is that I have received assurance that the County Council has commissioned a feasibility study in respect of a westerly route for the proposed access road which would serve the new primary school to the south of the Trap Grounds. This alternative route avoids the sensitive wildlife habitats that I seek to protect. I am therefore prepared to renounce my claim on the strip of land in question.'

Issue (viii) was whether, if Miss Robinson was not able to make such an amendment, it was open to the county council to accept the application in respect of part only of the land included in the application.

[102] I have very little sympathy with the arguments presented by the two councils on these issues. They seemed to reintroduce a degree of technicality, reminiscent of the elaborate pleading arguments found in the eighteenth century cases, and long since abandoned in modern court procedure. The beginning and end of the argument appeared to be that the 1969 regulations do not in terms permit an application to be amended, and therefore no such power is to be implied.

[103] It is true that the procedure is initiated by an application, and the applicant therefore bears the primary responsibility for getting the application right and producing the evidence to support it. However, as has been recognised in numerous cases, it also has a public element. In *Whitmey*'s case [2005] QB 282 at [30], [2004] 3 WLR 1342, Arden LJ referred to the advantages of the informality and 'flexible approach' allowed by the non-statutory inquiry procedure.[105] The same approach should in my view be applied to the procedure generally. It is also relevant that the registration authority has a general duty to 'maintain' the register.[106] This carries with it, in my view, a duty to ensure that the procedures are fair and orderly, and that the register itself is accurate and accessible.

[104] Mr Chapman had advised that Miss Robinson had no absolute right to amend the application but that the authority had a discretion to permit it. Furthermore, he advised that the authority could for proper reasons determine the application for a lesser area than that proposed in the application. I agree respectfully with that approach. In relation to the issue of amendment he explained his views as follows:

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105 She cited the *Corpus Christi College* case [1982] 3 All ER 995 at 1000, 1009, [1983] QB 360 at 366–367, 379 per Lord Denning MR and Oliver LJ, respectively. Although there had been a difference in that case on the issue of burden of proof (resolved by Slade LJ in *Re West Anstey Common* [1985] 1 All ER 618 at 625, [1985] Ch 329 at 341–342), there was no difference as to the need for a flexible approach. Lord Denning referred to the process 'as an administrative matter—to get the register right—rather than as a legal contest'; similarly, Oliver LJ accepted the need for 'greater latitude both as regards proof and procedure than the judge deciding a civil dispute inter partes'.

106 See s 3 of the 1965 Act.

'My view is that an applicant under s 13 has no absolute right to amend or withdraw an application. It is not unknown for campaigners to make and then purport to withdraw and resubmit s 13 applications as a tactic to inhibit the development of land. I should make it clear that there is no question of such a tactic in this case but I consider that the registration authority must have a power to insist on determining a duly made application so that the status of the land is clarified in the public interest. However I consider that it is, as a matter of common sense, implicit in the 1969 regulations that a registration authority does not have to proceed with an application that the applicant does not wish to pursue (whether wholly or in part) where it is reasonable that it should not be pursued. It would be a pointless waste of resources for a registration authority fully to process an application that the applicant did not wish to pursue whether wholly or in part unless there were some good reason to do so.

In the present case, the city council as landowner has made it clear, through its counsel, that it does wish to have the status of the Trap Grounds as whole determined. I consider that it is a reasonable wish on the part of the landowner to know whether its land has become a town green or not. I can see no good reason why the status of the reed beds and the ten-metre strip should remain in limbo. The fact that Miss Robinson would not object to use of the ten-metre strip as access road to the new school is entirely irrelevant to the question whether that land has become a prescriptive town green. My advice to the county council as registration authority is (a) that Miss Robinson does not have power to insist on amending her application, (b) that the county council has power to allow an amendment where it is reasonable to do so, (c) that in the present case it would be unreasonable to allow the proposed amendment because the city council as landowner wishes to have the status of its land determined, and (d) that the county council should determine the original application as a whole.'

That approach, with respect, seems to me sensible, and unobjectionable as a matter of law, although the final decision remains a matter for the discretion of the registration authority.

[105] With regard to the council's own powers in considering the application, he advised that they should exclude the reed beds and part of Frog Lane, on the grounds that there was no evidence of material recreational use of those areas, but that the remainder should be included on the register. This included the ten-metre strip alongside the railway, which he considered was indistinguishable from the rest of the scrubland. Again, as a matter of law, I see no error in that approach, although I express no view on the factual conclusion.

[106] As I have said, I am unconcerned that this involves a departure from the strict words of the regulations. If authority is required for that, I am content to rely on Lord Keith's approach in *Inverclyde DC v Lord Advocate*.[107] That case concerned the submission of details pursuant to an outline planning application. The conditions in the outline permission imposed a time limit for the submission of details. The general development order governing such applications provided for the form of application, but there was no specific provision for amendment. Furthermore, the Act provided that an application for approval of reserved

107 (1981) 43 P & CR 375.

matters, if made after the date by which the conditions require it to be made, should be treated as not made in accordance with the terms of the permission.[108] a

[107] On the facts of that case an application for submission of details had been made within the time limit. However, following an inquiry the Secretary of State had indicated that approval would be appropriate in respect of a more limited area, and had invited submission of detailed plans and information relating to the reduced area. The authority argued that such an amendment would be outside b the scope of the original permission. They accepted that an amendment was possible within the three-year period, but submitted that once that period had come to an end no amendment whatever could validly be made.

[108] Lord Keith rejected this argument:

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> 'It is to be observed that neither in the Act of 1972 nor in the Order of 1975 is any procedure laid down for the manner in which applications of this nature are to be dealt with, apart from the provisions about entry in the register. *This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances.* That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon ...' (My emphasis.)

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In that statutory context, however, having regard to the time limit on applications, he accepted that—

> 'an amendment which would have the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent.'[109] f

[109] I would respectfully adopt the italicised words as an appropriate guide to the functions of a registration authority under the 1965 Act, subject to taking account of the positions of the other parties including the public. It is unnecessary g in this case to consider the precise limits of the power of amendment, since Miss Robinson's proposed amendments were clearly within them, in my view. They involved no extension of the area of the earlier application, and made no material change to the substance of the rights claimed. The same applies to the change of date, to which the city council itself had made no objection.

[110] Mr Laurence suggested that such flexibility would impose an impossible h burden on authorities, who would have to consider a wide variety of potential variations. I do not accept that. Under Mr Chapman's approach, the authority is master of the procedure, and should have no difficulty in applying a commonsense approach to ensure that the resulting registration is as accurate as it can be on the available evidence and that all interests are properly protected. Of j course, if amendments are made to the application which are likely to affect the interests of other parties including the public, the authority will need to consider

108 The relevant provisions are set out at 395–397.
109 See (1981) 43 P & CR 375 at 397.

what publicity arrangements are necessary to ensure that adequate notification is given. I see no need, as Mr Laurence suggested, for this court to lay down precise guidelines. The practical problems involved are no greater than those involved in setting up a non-statutory inquiry, a practice which has grown up without any statutory underpinning or formal guidance of any kind.

[111] Lightman J held that there was no power for the applicant to amend the application or for the authority to authorise an amendment of the application. On the other hand he accepted that the authority could, following its consideration, decide to register a lesser area.[110] The practical consequence of Lightman J's approach, therefore, may not be much different to that which I have held to be correct. If it is open to the authority to register a lesser area, then the applicant, without purporting to amend the application, can simply elect to present no evidence in support of that part of her case.

[112] In any event for the reasons I have given I would answer in the affirmative questions (vi), (vii) and (viii).

(e) Evaluation of evidence

[113] Two particular points were raised: (i) the relevance, taken with the evidence of use of the tracks, of the finding that only about 25% (or less) of 'the scrubland' is reasonably accessible; (ii) the relevance of the existence or potential for the existence of public rights of way, in particular over the circular track.

[114] Lightman J dealt with these issues at some length. However, I think the pith of his analysis can be found in two passages. On the first point, he said:

> 'There is no mathematical test to be applied to decide whether the inaccessibility of part of the land precludes the whole being a green ... Greens frequently include ponds. They may form part of the scenic attraction and provide recreation in the form of, eg, feeding the ducks or sailing model boats. Further overgrown and inaccessible areas may be essential habitat for birds and wildlife, which are the attractions for bird watchers and others.'

He urged the registration authority to take 'a common sense approach' in deciding whether, having regard to its physical characteristics, which may have changed over the 20 years, the whole of the land (or some separately identifiable part of it) satisfies the definition.[111]

[115] On the second point, he noted correctly that use for recreational walking is capable of founding a case of deemed dedication of a highway, unless merely ancillary to other recreational activities.[112] Where the recreational use claimed in support of a class c green included the use of an identifiable track capable of supporting a presumption of a right of way, he said:

> 'The answer must depend on how the matter would have appeared to the owner of the land ... Recreational walking upon a defined track may or may

110 See [2004] Ch 253 at [72]–[73], [82]–[91], [2004] 2 WLR 1291. This accorded with the approach of Sullivan J in *R (on the application of Alfred McAlpine Homes Ltd) v Staffordshire CC* [2002] EWHC 76 (Admin), [2002] 2 PLR 1.

111 See [2004] Ch 253 at [95], [2004] 2 WLR 1291.

112 See *Dyfed CC v Secretary of State for Wales* (1989) 59 P & CR 275 at 279 (a circular way round a lake, used for swimming and sunbathing).

not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year.'[113]

[116] He had begun this part of his judgment by emphasising that guidance on such factual issues could only be of the 'broadest kind';[114] and he concluded it (at [105]) by repeating that: 'The question must in all cases be how a reasonable landowner would have interpreted the user made of his land.' Without questioning the common sense of many of the points made in this part of his judgment, I do not think that it is appropriate for this court to seek to review it in detail. On such matters of evaluation of evidence it is unusual for an appellate court to comment until the facts have been found. They raise issues of fact and degree for the decision-maker, which may not be easy to resolve, but do not for that reason become issues of principle. Indeed, s 14 of the 1965 Act contemplates that the role of the High Court will normally be retrospective. While I readily accept that the issues of principle dealt with in the earlier part of this judgment were suitable for advance consideration as an exception to the ordinary rule, I am not persuaded that same applies to issues (ix) and (x), nor that it is possible for this court properly to provide detailed answers to them.

CONCLUSION

[117] In summary, my answers to the issues on which 'rulings' have been sought by the county council are:

(i) registration of land as a class c green does not of itself confer or imply any rights on the part of local inhabitants (however defined) to indulge in sports and pastimes on that land;

(ii) such registration is conclusive that the land is a town or village green within the scope of (inter alia) s 12 of the Inclosure Act 1857 and s 29 of the Commons Act 1876;

(iii) the words 'continue to do so' in the amended definition mean that the lawful sports and pastimes must continue to the date of registration;

(iv) any applications for registration of land as a class c green made on or after 30 January 2001 automatically engage (and engage only) the amended definition;

(v) the application could not as a matter of law succeed on the basis that the land became a green on 1 August 1990;

(vi) the county council has power to treat the application as if a different date had been specified in Pt 4, and to determine the application on that basis;

(vii) as a matter of law, it would be open to the county council on proper consideration to permit Miss Robinson's application to be amended to refer a lesser area, as proposed by her;

(viii) as a matter of law, it would be open to the county council on proper consideration to register as a green part only of the land included in the application.

Issues (ix) and (x) are matters of fact and degree for evaluation by the authority, the question being how a reasonable landowner would have interpreted the user made of the land.

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113 See [2004] Ch 253 at [102], [2004] 2 WLR 1291.
114 See [2004] Ch 253 at [92], [2004] 2 WLR 1291.

[118] The order made by Lightman J contained a series of detailed declarations on these issues. Subject to any further submissions, I do not think this is necessary. It should be sufficient simply to declare that the authority is required to consider the application in accordance with the principles stated in this judgment.

[119] Finally, I add this comment. The answers given in this judgment (particularly to issue (iii)) may not provide much comfort to Miss Robinson herself, or the other users of the Trap Grounds. On the other hand, I hope that they will assist the wider objective of providing a coherent and transparent system for the protection of village greens in the long term. They should also provide a clearer basis for amending legislation. If the law is as I have stated it, then the task should not be as complex as DEFRA seem to fear. The register can be taken as a definitive statement of the extent of town and village greens for the purposes of the existing (antique) statutory regime. What is needed is modern legislation to provide similar protection and the means of regulation. If it is thought right to give general public access to registered greens for 'sports and pastimes', the legislation needs to include machinery for their management, and for protection of any existing customary rights.

[120] Amending legislation is urgently needed. In my view, it would be a sad betrayal of the work of the Royal Commission, and of all those who have worked for the protection of village greens before and since, if the opportunity offered by the current commons Bill were to be missed.

BLACKBURNE J.

[121] I agree.

PETER GIBSON LJ.

[122] I also agree.

Order accordingly.

Kate O'Hanlon Barrister

R (on the application of Keating and others) v Cardiff Local Health Board (Secretary of State for Health, intervening)

[2005] EWCA Civ 847

COURT OF APPEAL, CIVIL DIVISION
BROOKE, ARDEN AND LONGMORE LJJ
5, 6 JULY 2005

National health service – Health authority – Facilities appropriate as part of health service – Facilities for prevention of illness, care of persons suffering from illness and after-care of persons who have suffered from illness – Meaning of 'facilities' – National Health Service Act 1977, s 3(1)(e).

R was an association which ran a project designed for people who suffered from mental health difficulties. Its purpose was to ensure that they could call on specialist support to help them obtain the welfare benefits to which they were entitled. R had been funded by the defendant local health board which exercised specified health service functions on behalf of the Secretary of State for Health. After a review of all voluntary services a new three-year agreement with R was recommended but the defendant took the view that it had no statutory authority to provide further funding to R. on the basis that the work undertaken by R could not constitute a health service provision that came within the National Health Service Act 1977. Section 3(1)[a] of the 1977 Act provided that it was the Secretary of State's duty to provide, to such extent as he considered necessary to meet all reasonable requirements (a) hospital accommodation; (b) other accommodation for the purpose of any service provided under the 1977 Act; (c) medical, dental, nursing and ambulance services; (d) such other facilities for the care of expectant and nursing mothers and young children as he considered were appropriate as part of the health service; (e) such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considered were appropriate as part of the health service; (f) such other services as were required for the diagnosis and treatment of illness. The claimants, who were clients of R, sought judicial review. The judge found that the R project was targeted at mental health sufferers and that its purpose was to ameliorate the consequences of mental illness exacerbated by their difficulties in coping with the social security system upon which many of them relied. He considered that the only means by which R could bring itself within s 3(1) of the 1977 Act was under para (e) by showing that it provided facilities for the prevention of illness, the care of persons suffering from illness, and the after-care of persons who had suffered from illness. However, he noted that s 3(1) drew a distinction between a facility and a service, and held that there was no obligation resting on the Secretary of State and thus on the defendant to provide a service for the prevention of illness, care, or after-care. The judge therefore found that R's activities were outside the scope of s 3(1) of the 1977 Act and dismissed the application for judicial review. The claimants appealed against that decision. The Secretary of State was granted permission to intervene in support of the

a Section 3, so far as material, is set out at [16], below

claimants' appeal. The main issue before the Court of Appeal was whether the word 'facilities' in s 3(1)(e) could be interpreted as including not only the accommodation, plant and other means by which services were provided or by which they more readily achieved their purpose, but also as including the human beings who actually provided the services referred to in that subsection.

Held – On the true construction of s 3(1)(e) of the 1977 Act, a local health board was lawfully able to provide funding for services such as the R project in the instant case, if it considered it appropriate as part of the health service. The meaning of 'facility' was derived from the context in which the word was used. It meant 'that which facilitates' and could embrace 'services'. The appeal would therefore be allowed (see [41], [43], [44], [48], [53], below).

Notes

For provision of hospital services and facilities, see 33 *Halsbury's Laws* (4th edn reissue) para 135.

For the National Health Service Act 1977, s 3, see 30 *Halsbury's Statutes* (4th edn) (2004 reissue) 472.

Cases referred to in judgments

A v Lambeth London BC [2001] EWCA Civ 1624, (2001) 64 BMLR 88.

Kassam v Immigration Appeal Tribunal [1980] 2 All ER 330, [1980] 1 WLR 1037, CA.

Midland Greyhound Racing Co Ltd v Foley [1973] 3 All ER 324, [1973] 1 WLR 324, DC.

R (on the application of Quintavalle) v Secretary of State for Health [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 AC 687, [2003] 2 WLR 692.

R v Secretary of State ex p Kirklees BC (1971) Times, 24 January.

R v Secretary of State for Social Services, ex p Hincks (1980) 1 BMLR 93, CA.

Westminster City Council v Ray Alan (Manshops) Ltd [1982] 1 All ER 771, [1982] 1 WLR 383, DC.

Appeal

The claimants, Paul Keating, Christine Rees and Andrew Thompson, clients of Riverside Advice Ltd (Riverside), appealed from the decision of Moses J on 23 March 2005 ([2005] EWHC 559 (Admin), [2005] All ER (D) 391 (Mar)) dismissing their application for judicial review of the decision of the defendants, the Cardiff Local Health Board, refusing to provide funding for the Riverside advice project 'Welfare Rights Project for Clients Experiencing Mental Health Difficulties' otherwise than through a special fund administered jointly with the local authority. The Secretary of State for Health was given permission to intervene. The facts are set out in the judgment of Brooke LJ.

Richard Drabble QC (instructed by the *Public Law Project*) for the claimants.

Javan Herberg (instructed by *Mark Harris*, Cardiff) for the defendants.

Sarah Moore (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

6 July 2005. The following judgments were delivered.

BROOKE LJ.

[1] This is an appeal by the claimants, who are clients of Riverside Advice Ltd (Riverside), from a judgment of Moses J on 23 March 2005 ([2005] EWHC 559 (Admin), [2005] All ER (D) 391 (Mar)) when he dismissed their application for judicial review against the defendants, the Cardiff Local Health Board, in relation to their refusal to provide funding for the Riverside Advice project, otherwise than through a special 'Flexibility Fund' administered jointly with the local authority. Because the judge's interpretation of ss 1–3 of the National Health Service Act 1977 was said to have widespread ramifications, we permitted the Department of Health to intervene in this appeal with written and oral submissions. We also received written submissions, in the form of short letters, from both the Welsh Assembly and Mind, the well-known mental health charity.

[2] I draw the facts of the case largely from the judge's admirably clear judgment. Riverside is running a project called a 'Welfare Rights Project for Clients Experiencing Mental Health Difficulties'. It is designed for those who suffer from mental health illness. Its purpose is to ensure that people with mental health difficulties may call on specialist support. Riverside can respond to their needs and help them obtain the benefits to which they are entitled. From April 2003 onwards it received funding from the defendant board, which was later extended until April 2005.

[3] In June–July 2004 the Cardiff and the Vale of Glamorgan Local Health Boards conducted a joint review of voluntary services, in which they concluded that Riverside had met all the criteria they specified, otherwise than in minor and immaterial respects. Riverside achieved the highest achievable score within the review, which recommended a new three-year agreement. At the meeting of the review panel on 12 July 2004, however, the defendants' director of finance took the view that it would be ultra vires for the defendants to fund the project any further.

[4] As a result of this decision, funds could now only be provided to Riverside by the defendants for the 2005–6 period from a National Health Service (NHS) flexibilities grant. This grant was available from a fund known as the flexibilities fund, which is jointly administered by the defendants and the local authority. However, the amount available from this fund for 2005–6 was only about two-thirds of the sum the project had previously been receiving, leaving a shortfall of about £18,000. We have been told that in future years this shortfall would not necessarily continue, because the flexibilities fund would not then be constrained in the amount it could provide as a result of other commitments it had previously made.

[5] The issue at the centre of this appeal does not relate to the value of Riverside's work, which receives universal praise: the defendants have told us that there is no issue as to the valuable nature of its activities in improving the quality of life for those with mental health difficulties. It relates instead to the question whether the defendants are correct when they say that it would be outwith their powers if they were to continue to fund this project. Their view of the law is not shared by the Department of Health or by the Welsh Assembly, although neither had articulated their thinking on the matter until after they had had an opportunity to study a copy of Moses J's judgment.

[6] The aims of the project are embraced by Riverside's purposes as set out in its memorandum of association:

> 'The relief of poverty through the provision of free legal advice and assistance to persons who, for reasons of poverty, would otherwise be unable to obtain such advice, and providing such persons with services they could not otherwise afford through lack of means.'

[7] The only service level agreement that exists between the defendants and Riverside identified Riverside's services as 'Welfare benefits advice to people with mental health problems'. The objectives of the agreement were described as: '... to secure, for the residents of Cardiff, the provision of [a] range of health care for defined client groups and specialities.'

[8] The agreement professed that it was 'underpinned' by the mutual commitment of both parties to ever improving health. The services to be provided were described as including specialist expertise and knowledge of the needs of people with mental health difficulties and their entitlement to social security benefits; representation at Social Security Appeal Tribunals and to commissioners; flexible service delivery to respond to the needs of the client group (including home visits, hospital visits and meetings at other appropriate venues); and consultancy, telephone advice and support to people working with clients with mental health difficulties.

[9] Riverside's end of year report for the period between 1 March 2002 and 31 March 2004 described the project as being all about providing advice to those suffering from mental health, in relation to their benefits. The report identified the strategies and plans pursuant to which Riverside undertook its work. In particular it quoted the Minister for Health and Social Services who had written in her foreword to a publication called 'Improving Health in Wales: A Plan for the NHS with its partners' (February 2001):

> 'Tackling ill health means addressing these challenges including economic and social inequality ... The experience of poverty for some of our citizens often lies at the root of ill health, unhealthy lifestyles and contributes to a sense of hopelessness.'

[10] The need to resolve the difficulties of the mentally ill when they seek to access the benefits to which they are entitled, and thereby prevent their health from deteriorating due to stress, was alluded to by a solicitor at the Public Law Project who is acting for the claimants in these proceedings. She says of the project:

> 'Not only is it a specialist service in terms of the types of benefits applications and appeals ... but also because of the specialist support given to people with mental health difficulties. The added stress and pressure of losing income through benefits, months of uncertainty, and appearing at appeals can lead to a deterioration in the mental health of the clients and they need expert help. That is what the project provides. There is no other such provision in Cardiff.'

[11] Mr Bland, who is a specialist welfare rights caseworker employed by Riverside, described the nature of his work in his witness statement. He said that his clients, who have a range of mental health difficulties, experience an exacerbation of those difficulties due to the challenges and stresses of dealing with the social security system. In contrast, the advice and support Riverside can offer maintains and improves their mental well-being. Clients with mental health problems are particularly concerned about disclosing information to anyone,

because they think this may lead to their being compulsorily detained. For this reason they do not like to disclose the full impact of their problems.

[12] Because Mr Bland is a mental health specialist, Riverside's clients appear more relaxed and able to discuss the full impact of their condition in their discussions with him. He described one client who suffered from such severe anxiety at the prospect of attending an appointment to discuss welfare benefits that he was quite unable to attend that appointment, and he therefore lost his entitlement. When Mr Bland was able to attend the appointment with him and give him support and reassurance, his fear and anxiety were reduced.

[13] The report of the joint review was published in September 2004. It recommended moving to a three-year agreement as opposed to a one-year agreement, subject to the implementation of an agreed action plan. However, there followed a letter from the defendants' chief executive dated 27 September 2004 to the effect that the defendants had decided to give Riverside six months' notice of termination of its service level agreement. The letter contained this sentence: '... [I]t was not felt that your organisation was delivering health outcomes in line with the Local Health Board's service and Financial Framework.'

[14] Soon afterwards Riverside was told that the problem had arisen because the defendants' director of finance was concerned that they had no statutory authority to provide further funding. The chair of the review panel recorded in the panel's conclusions:

> 'In consideration of the recommendations of the Advisory Group, the Review Panel were informed by the Director of Finance that she had concerns that the LHB, by funding such a service, were operating outside the existing financial instructions ... In view of this advice the Review Panel agreed to discuss as soon as possible opportunities for the service to be considered for alternative funding sources, eg flexibilities funding, but that the current [service level agreement] could not be renewed from April 2005.'

[15] The judge considered that the phrase in this letter which described Riverside as merely providing a welfare benefit advice service was plainly inadequate. He said that the project was targeted at mental health sufferers, and that its purpose was to ameliorate the consequences of mental illness, exacerbated by their difficulties in coping with the social security system upon which so many of them relied. But notwithstanding the success of the project in this field, the essential question he had to determine was whether the defendants had statutory authority to fund it. The answer to this question turned on whether the work undertaken by Riverside could constitute a health service provision that came within the the 1977 Act.

[16] The search for an answer necessitates an examination of the provisions of ss 1–3 of the 1977 Act. They provide:

> '**1.** *Secretary of State's duty as to health service.*—(1) It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement—(a) in the physical and mental health of the people of those countries, and (b) in the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with this Act.

(2) The services so provided shall be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.

2. *Secretary of State's general power as to services.*—Without prejudice to the Secretary of State's powers apart from this section, he has power—(a) to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by this Act; and (b) to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

3. *Services generally.*—(1) It is the Secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements—(a) hospital accommodation; (b) other accommodation for the purpose of any service provided under this Act; (c) medical, dental, nursing and ambulance services; (d) such other facilities for the care of expectant and nursing mothers and young children as he considers are appropriate as part of the health service; (e) such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service; (f) such other services as are required for the diagnosis and treatment of illness.'

[17] By reg 3(1) and column 1 of Sch 1 to the National Health Service (Functions of Health Authorities and Administration Arrangements) Regulations 1996, SI 1996/708 (the 1996 regulations), every health authority was charged with the duty of exercising 'the specified health service functions' on behalf of the Secretary of State. These functions included the Secretary of State's functions relating to the health service under ss 2 and 3 of the 1977 Act. Until 2003 the Bro Taf Local Health Authority was the relevant health authority. At midnight on 31 March 2003, as a consequence of the combined effect of s 27 of the Government of Wales Act 1997, s 16BB(1) of the 1977 Act, the Local Health Boards (Establishment) (Wales) Order 2003, SI 2003/148 and the Local Health Boards (Functions) (Wales) Regulations 2003, SI 2003/150, the health service functions previously exercised by the Bro Taf Local Health Authority were transferred first to the National Assembly for Wales, and then to the defendant board. Responsibility for performing the duties of the Secretary of State under s 1 of the 1977 Act has always remained vested in the Secretary of State.

[18] The duty of the Secretary of State under s 1 is to be distinguished from the duties identified in s 3. It has been described in these proceedings as a 'target duty' (see, for instance *R v Secretary of State for Social Services, ex p Hincks* (1980) 1 BMLR 93 and *A v Lambeth London BC* [2001] EWCA Civ 1624, (2001) 64 BMLR 88). The judge correctly observed that it was not at all surprising that this duty was not imposed on local health authorities (so as to be available to be transferred to a Welsh Local Health Board in due course), since it is a duty to continue the promotion in England and Wales of a comprehensive health service, coupled with a duty to provide or secure the effective provision of services for that purpose.

[19] The main issue to be determined on this appeal is whether the word 'facilities' in s 3(1)(e) of the 1977 Act can be interpreted as including not only the accommodation, plant and other means by which services are provided or by

which they more readily achieve their purpose, but also as including the human beings who actually provide the services referred to in that subsection.

[20] The judge's approach was to start by noticing that a distinction is made in s 3(1) between 'services' and 'facilities'. The services specifically mentioned in that subsection are medical, dental, nursing and ambulance services (see s 3(1)(c)). Because their purpose is not identified, the judge said that they might be deployed for any purpose. For instance, they could be used for securing an improvement in physical and mental health and in preventing illness, as well as for diagnosing and treating it, to the extent that the local health board considered it was necessary to provide them to meet all reasonable requirements (see the opening words of s 3(1)).

[21] The judge said that the 'other services' identified by s 3(1)(f) were plainly not medical, dental, nursing and ambulance services, and the purposes for which those services might be provided were limited to diagnosis and treatment of illness. He found it striking that s 3(1)(f) made no reference to the prevention of illness. Thus the obligation to provide 'other services', in contrast to the obligation to provide medical or dental services, was limited to those required for the diagnosis and treatment of illness, and s 3(1)(f) could not therefore avail Riverside, as had been urged upon him in its submissions to him.

[22] The judge said that the only means by which Riverside could bring itself within s 3(1) was by bringing its work within s 3(1)(e). In short, Riverside had to show that it provided '... facilities for the prevention of illness, the care of persons suffering from illness, and the after-care of persons who have suffered from illness ...'

[23] He continued to be struck, however, by the fact that the provisions of s 3(1) drew a distinction between a facility and a service. The word 'facility' was not defined in s 128 (the interpretation section), but it did appear in other parts of the Act. For instance, it was used in s 23 (which confers a power on the Secretary of State to make available to any voluntary organisation eligible for assistance under the Health Services and Public Health Act 1968 'any facilities ... provided by him for any service under this Act'). The word also appeared in s 72 (which makes provision for applications to be made to the Secretary of State for permission to use accommodation or facilities for the purposes of providing medical, dental, nursing or ambulance services).

[24] The judge thought that further light was thrown on the meaning of the word 'facility' in s 3(1) in the structure of that subsection. He said that sub-subsections (1)(a) and (b) refer to accommodation. Sub-subsection (1)(d) refers to 'other facilities', and thereby broadens the earlier reference to a single facility, namely accommodation.

[25] He said he took account of the argument of counsel who then appeared for the claimants who drew attention to the language of s 2(b) in this context. This refers to a power to do any other thing whatsoever calculated to facilitate the discharge of a duty. It was argued that a facility is that which facilitates. Thus it is that which makes a service more readily available, or that which eases the path of access.

[26] The judge was referred to case law which cast light on the meaning of 'facility' in different statutory contexts. Thus in *Midland Greyhound Racing Co Ltd v Foley* [1973] 3 All ER 324, [1973] 1 WLR 324 a 'facility' included anything which facilitated a bookmaker's undertaking and was therefore prohibited under the Betting, Gaming and Lotteries Act 1963. On the other hand, in *Kassam v Immigration Appeal Tribunal* [1980] 2 All ER 330, [1980] 1 WLR 1037 the word was

treated as being akin to goods or services when it was held that the Secretary of State did not provide facilities when he was considering whether to grant leave to enter under the Immigration Act 1971 (so that his activities did not trigger the operation of the Sex Discrimination Act 1975). In *Westminster City Council v Ray Alan (Manshops) Ltd* [1982] 1 All ER 771, [1982] 1 WLR 383 the word 'facility' was used in conjunction with the words 'accommodation' and 'services'. A 'facility' was regarded as that which made things available to customers to use if they were so minded in 'a more passive sense than the activities implied in the word "services"' (see Ormrod LJ, [1982] 1 All ER 771 at 774, [1982] 1 WLR 383 at 386). The judge observed, however, that little assistance could be derived from examining the meaning of a word in a different statutory context, and none of the parties who appeared before us suggested that he was wrong to take this view.

[27] The judge concluded that in the present case the word 'facility' was clearly used in s 3(1) to denote something different from services. If this was not the case, the statute would not have made this distinction. He therefore held that there was no obligation resting on the Secretary of State under s 3(1)(e), and thus on the local health board, to provide a service for the prevention of illness, care, or after-care. On the other hand there was an obligation to provide a facility for those purposes within the narrower meaning of the word 'facility' (if the local health board considered that this provision was appropriate as part of the health service).

[28] Mr Drabble QC, who appeared for the claimants on the appeal, submitted that the draftsman of s 3(1) was concerned to provide not only for what are normally regarded as mainstream health services, but also for those services which fall into a borderland between health care and social services care. Anything which is designed to secure improvement in physical and mental health and in the prevention, diagnosis and treatment of illness can fall within the bailiwick of the Secretary of State for Health, who has a duty under s 1 of the 1977 Act, in the context of her obligation to promote a comprehensive health service, to provide or secure the effective provision of services to that end. But some care services may also be the responsibility of the local social services authority, and the 1977 Act had to do something to make it clear that the Secretary of State shared responsibility in this area with another government department.

[29] Thus, in addition to providing hospital accommodation, providing other accommodation for the purpose of any health care service, and providing medical and dental services (see s 3(1)–(3)), all of which could be described as facilitating health care, the Secretary of State was also obliged to provide other facilities for the care of expectant and nursing mothers and young children (s 3(1)(d)), but on this occasion his obligation was limited by the words 'such other facilities ... as he considers appropriate as part of the health service'. A similar formula is used in s 3(1)(e). (Section 3(1)(f), as the judge observed, is concerned with other services, such as physiotherapy, directed only towards diagnosis and treatment of illness.)

[30] One would expect, if Mr Drabble's argument is right, to find a reference to someone else providing these services, too, and this appears in s 21, which (in its unamended form) read:

'Co-operation and assistance

21. *Local social services authorities.*—(1) Subject to paragraphs (d) and (e) of section 3(1) above, the services described in Schedule 8 to this Act in relation to—(a) care of mothers and young children, (b) prevention, care and

after-care, (c) home help and laundry facilities, are functions exercisable by local social services authorities, and that Schedule has effect accordingly.' a

[31] Schedule 8 provides:

'1. *Care of mothers and young children.*—(1) A local social services authority may, with the Secretary of State's approval, and to such extent as he may direct shall, make arrangements for the care of expectant and nursing b mothers and of children who have not attained the age of 5 years ...

2. *Prevention, care and after-care.*—(1) A local social services authority may, with the Secretary of State's approval, and to such extent as he may direct shall, make arrangements for the purpose of prevention of illness and for the care of persons suffering from illness and for the after-care of persons who c have been so suffering and in particular for ... (b) the provision, for persons whose care is undertaken with a view to preventing them from becoming ill, persons suffering from illness and persons who have been so suffering, of centres or other facilities for training them or keeping them suitably occupied and the equipment and maintenance of such centres ...

3. *Home help and laundry facilities.*—(1) It is the duty of every local social d services authority to provide on such a scale as is adequate for the needs of their area, or to arrange for the provision on such a scale as is so adequate, of home help for households where such help is required ... and every such authority has power to provide or arrange for the provision of laundry facilities for households for which home help is being, or can be, provided e under this sub-paragraph.'

[32] Mr Drabble observed that the proviso at the beginning of s 21(1) suggests that local social services authorities were to provide the services set out in Sch 8 subject to the extent to which they were already being provided or planned by health service authorities. Furthermore, 'laundry facilities' are described among f the 'services' that may be provided, and one of the other 'services' described in Sch 8 relates to the provision of centres or other 'facilities' for training people or keeping them suitably occupied. It would be absurd, Mr Drabble argued, to suggest that the provision of laundry facilities or facilities for keeping people occupied did not include the provision of appropriate staff to deliver those services. g

[33] Mr Herberg, for the defendants, showed us a number of modern statutory schemes that permit a degree of partnership between different statutory authorities in relation to provision of this kind that was not previously possible. One such development is made possible by reg 4 of the National Health Service Bodies and Local Authorities Partnership Arrangements (Wales) Regulations h 2000, SI 2000/2993, made under powers conferred by s 126(4) of the 1977 Act and s 31 of the Health Act 1999. This regulation permits partnership arrangements between NHS bodies and local authorities in relation to the exercise of any NHS functions and health-related functions if the partnership arrangements are likely to lead to an improvement in the way in which those functions are exercised. j

[34] Mr Herberg also showed us s 28A(2A) of the 1977 Act, inserted by s 29 of the Health Act 1999, which empowers a local health board to make payments to a local social services authority towards expenditure incurred by that authority in connection with any of its functions which in the board's opinion have an effect on the health of any individuals, have an effect on, or are affected by, any NHS functions, or are connected with any NHS functions.

[35] We were also shown how s 24(1) of the National Health Service Reform and Health Care Professions Act 2002 imposes a duty on each local authority in Wales and each local health board any part of which lies within the area of that authority, jointly to formulate and implement a strategy for the health and well-being of members of the public in the local authority's area ('a health and well-being strategy').

[36] This exposition of the effect of modern legislation represented, in part, the defendant board's riposte to the submissions we received from Ms Moore, who appeared for the Department of Health (the department). She told us that the department was concerned that the judge's interpretation of ss 1–3 of the 1977 Act could potentially undermine key parts of its public health policy agenda. The department explained to us that a large number of health promotion and disease prevention functions are carried out by a range of professionals (such as dieticians, health trainers and 'gateway' workers) who do not come within the group of medical professionals falling within the scope of s 3(1)(c).

[37] A recent White Paper *Choosing Health* (Cm 6374) (2004), for instance, committed the department to introduce and accredit health trainers in poorer communities to encourage people in those communities to live healthier lives. It is specifically intended that such trainers would not be clinicians, but rather individuals working within the community providing non-medical services for the prevention of illness.

[38] Another example could be taken from the department's planned use of 'Gateway workers' within the NHS to help mental health users (sic) navigate their way round the system. Again, the services provided could not properly be described as medical or nursing services, and the department would be concerned to ensure that it would be lawful for local NHS bodies to provide such services.

[39] The main thrust of Ms Moore's submissions was to the effect that Parliament had imposed on the Secretary of State an obligation to continue the promotion of a comprehensive health service, and the judge's narrow interpretation of the word 'facilities' in s 3 of the 1977 Act favoured fragmentation, the very opposite of what Parliament intended.

[40] The Welsh Assembly contented itself with saying that it agreed with the Department of Health's submissions. Mind, for its part, expressed concern that the judge's restrictive interpretation of s 3(1)(e) might imperil not only advice centres for the mentally ill, but also facilities concerned with mental health advocacy, day centres, art and recreational therapy, counselling, training, assertive outreach and befriending services, which were all currently supported by NHS funding.

[41] I agree that the judge adopted too restrictive an approach to the meaning of the word 'facilities' where it appears in s 3(1)(e). As the case law suggests—and Mr Drabble added *R v Secretary of State ex p Kirklees BC* (1971) Times, 24 January, where Taylor J proceeded on the basis that the provision of the services of a housing steward was the provision of a 'facility' for the occupants of the relevant housing—its meaning will be derived from the context in which the word is used. It means 'that which facilitates'. Sometimes the word refers to tools, or accommodation, or plant, which facilitate the provision of a service. Sometimes it refers to an entire service provision, like a laundry service, or the provision of a day centre, which facilitates the prevention of illness, or the care of persons suffering from illness, or the after-care of persons who have suffered from illness. If a local health board wishes to provide a non-nursing day centre, or a hydrotherapy pool, for s 3(1)(e) purposes, because it thinks it appropriate to

provide these facilities as part of the health service, it would be absurd, as Mr Drabble argued (with the full support of counsel for the department), if it was limited to providing the accommodation and the 'plant', and somebody else had to provide the personnel to run the facility.

[42] Of course it is true, as the judge observed, that in other parts of the 1977 Act, the meaning of the word 'facilities' is more narrowly focused, but that is only what one would expect when the draftsman uses a chameleon-like word like 'facilities' which takes its colour from its context. Mr Herberg, for his part, was constrained to accept that the word 'facilities' might embrace 'services' as well in other statutory contexts, but he continued to maintain his clients' stance robustly, notwithstanding the icy winds that assailed his submissions from other bodies with immense knowledge of how the health service works in practice.

[43] What this case is concerned to identify is the extent of the health service functions under s 3(1)(e) that may be appropriately and lawfully provided by a local health board. The modern legislation which Mr Herberg showed us was not concerned with such basic definitions. It enabled a whole host of sensible ways in which a local health board exercising health service functions can now co-operate with a local social services authority exercising allied functions in providing an optimum service for the public. This co-operation may be achieved through partnership arrangements, through payments of money, or through the preparation and implementation of joint strategies, but at the end of the day the question remains: what is a local health board lawfully obliged to provide under s 3(1)(e) of the 1977 Act if it considers it appropriate as part of the health service? The answer to that question can only be found in the language of the 1977 Act, and in my judgment it is lawfully able to provide funding for services like the Riverside project, if it considers it appropriate as part of the health service.

[44] I would therefore allow this appeal and set aside the judge's order. We will hear counsel as to the precise form of order we should make.

[45] Because of the approach I have adopted to the interpretation of s 3(1), it is unnecessary to reach any conclusion on Ms Moore's alternative submission, which Mr Drabble expressly did not adopt. She argued that a local health board like the defendants, which is empowered to perform the health service functions under ss 2 and 3 of the 1977 Act on behalf of the Secretary of State, is obliged pursuant to s 2(a) of the 1977 Act to provide such services as it considers appropriate for the purpose of discharging any duty imposed on the Secretary of State under the 1977 Act, and this language encompasses the Secretary of State's s 1 duty to promote a *comprehensive*, not a fragmented health service.

[46] This submission requires the word 'he' in the first line of s 2(a) to refer to the local health board, and the word 'him' in the second line to mean the Secretary of State, the argument being that no duties are imposed on local health boards under the 1977 Act: their role is confined to performing certain functions (including those prescribed by ss 2 and 3) on behalf of the Secretary of State. The submission also requires a certain amount of judicial rewriting of s 2(a) in order to limit local health boards' obligations in this regard to the area of the functions they are required to perform on behalf of the Secretary of State, and not to encompass other duties imposed on the Secretary of State under the 1977 Act which she has retained for herself (for example, the duty to provide high security psychiatric services pursuant to s 4).

[47] Fortunately, it is possible to resolve this appeal without plunging further into these rather deep waters, and I will therefore restrict myself to noting the submission we received, without making any further comment upon its merits.

ARDEN LJ.

[48] I agree with the judgment of Brooke LJ for the reasons he gives. I desire to add two short points of my own. First, in my judgment Mr Drabble and Ms Moore were correct to say that the use of the word 'other' in s 3(1)(d) is also an indication that the word 'facilities' must include (at least) services and accommodation, which are the terms used in s 3(1)(a) and (b). Moreover, although I too would pay tribute to the clarity of the learned judge's judgment, I do not consider that it follows, as he held ([2005] EWHC 559 (Admin) at [50]), that it is a necessary implication of the use of the different term 'facilities' that that term covers something different from, or narrower than, the term 'services'.

[49] Second, we were pressed by Mr Drabble with the argument that s 3 of the 1977 Act should be construed dynamically on the basis that a statute must be presumed to be always speaking (see *Bennion on Statutory Interpretation* (2002) para 288). The law on this point was considered by the House of Lords in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at [8], [9], [2003] 2 All ER 113 at [8], [9], [2003] 2 AC 687, per Lord Bingham). In my judgment there is no need to resort to a presumption in this aspect of statutory interpretation. In any event in my judgment the interpretation found by this court is achieved simply by giving Parliament's words their ordinary meaning in the context of the National Health Service Act 1977.

LONGMORE LJ.

[50] At the beginning of his address Mr Richard Drabble QC in answer to a question from Arden LJ described the issue for the court in the following way:

> 'Does the Secretary of State have power to provide services for the prevention of illness, the cure of persons suffering from illness and the after care of persons who have suffered from illness by persons other than persons engaged in providing medical, dental, nursing and ambulance services?'

He submitted that the Secretary of State had a duty to provide such services pursuant to s 3(1)(e) of the National Health Service Act 1977, if she considered them appropriate, and he gave the services of care workers as the most obvious example. He then submitted that, either at common law in the light of such duty or pursuant to s 2 of the 1977 Act, the Secretary of State had the power to provide such services and that, since the duty under s 3 had been devolved to local health boards, the Cardiff Local Health Board likewise had that power.

[51] Mr Herberg for the Cardiff Local Health Board submitted that neither the Secretary of State nor the local health board had such powers because the duty and, therefore, the power, specified in s 3(1)(e) of the 1977 Act was a duty to provide 'facilities for the prevention of illness' in contradistinction to medical, dental, nursing and ambulance services, pursuant to sub-s (1)(c), and such other services as are required for the diagnosis and treatment of illness, pursuant to sub-s (1)(f) which has no reference to services for the prevention of illness.

[52] The judge, while characterising the case as 'dispiriting', accepted Mr Herberg's argument; that has prompted an intervention by the Secretary of State who has submitted that she does indeed have the duty argued for by Mr Drabble and that it is wrong to regard the sub-subsections of 3(1) of the 1977 Act as watertight compartments rather than provisions which have a degree of overlap.

[53] I agree, for the reasons given by Brooke LJ in his judgment, that the arguments of the appellants and the Secretary of State are correct and that the appeal should be allowed.

[54] I would only add that the National Health Service (NHS) is a living and growing organism. It was ambitious when it was set up by the National Health Service Act 1946. Section 1 of the 1946 Act provided that it was to be the duty of the Minister of Health to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness and for that purpose to provide or secure the effective provision of services in accordance with the provisions of the 1946 Act. That central concern is repeated in s 1 of the current National Health Service Act of 1977. Section 3 of the 1946 Act then provided that it was the duty of the minister to provide, to the extent he considered necessary to meet all reasonable requirements, accommodation and services of the following description: (a) hospital accommodation; (b) medical nursing and other services required at or for the purpose of hospitals; (c) the services of specialists.

[55] The reorganisation and unification of the NHS, which occurred in 1974 by the creation of regional health authorities as well as area health authorities, took place at a time when personal social services had already been reorganised pursuant to the Local Authority Social Services Act 1970 which gathered various local health committees into a single committee. But it was recognised that a family or a single individual might at one and the same time need many types of health and social care and that those needs should be met in a co-ordinated way. The two parallel structures of the NHS and local authorities had therefore to work together in both the planning and the operation of health and social services. Opportunity was taken at the time of reorganisation to expand s 3 of the 1946 Act into a form which subsequently became consolidated into the 1977 Act in terms which Brooke LJ has set out in his judgment. In the introduction to the White Paper which preceded the 1974 reorganisation of the NHS (Cmnd 5055) (1972) Sir Keith Joseph, the then Secretary of State, emphasised the need for a comprehensive service and that local and health authorities should work together in partnership for the health and social care of the population.

[56] Of course, one cannot construe the 1977 Act by reference to a minister's preface to a White Paper but it is gratifying that the construction I think is right is at least not inconsistent with the likely intention of Parliament.

Appeal allowed.

Melanie Martyn Barrister.

Ward v Metropolitan Police Commissioner and another

[2005] UKHL 32

HOUSE OF LORDS

LORD STEYN, LORD HUTTON, LORD RODGER OF EARLSFERRY, BARONESS HALE OF RICHMOND, AND LORD CARSWELL

5 APRIL, 5 MAY 2005

Mental health – Mental disorder – Person believed to be suffering from mental disorder being ill-treated, neglected, kept otherwise than under proper control, or living alone being unable to care for himself – Warrant to remove person to place of safety – Warrant specifying named professionals to accompany constable – Named professionals not accompanying constable on execution of warrant – Whether execution lawful – Mental Health Act 1983, s 135.

An approved social worker applied to a magistrate for a warrant relating to the claimant under s 135(1)[a] of the Mental Health Act 1983 which provided that if on information laid by such a social worker it appeared to a justice of the peace that there was reasonable cause to suspect that a person believed to be suffering from mental disorder had been, or was being, ill-treated, neglected or kept otherwise than under proper control, or being unable to care for himself was living alone, the justice could issue a warrant authorising any constable to enter the premises specified in the warrant and, if thought, fit, to remove him to a place of safety. Section 135(4) provided that in the execution of a warrant issued under sub-s (1) a constable was to be accompanied by an approved social worker and a registered medical practitioner. The magistrate issued a warrant specifying that a constable be accompanied by a named consultant psychiatrist, a named approved social worker, and a named doctor who was the claimant's general practitioner. The warrant was executed by a police officer at the claimant's address with the named approved social worker and a doctor on the team of the named consultant in attendance. The claimant was taken to a hospital where she remained until the following day when she was interviewed by her GP who concluded that there was no reason for her to be detained. The claimant brought an action for false imprisonment against the defendant commissioner and the relevant NHS trust alleging that her removal and detention had been unlawful, inter alia, because the police officer had not been accompanied by the claimant's GP as specified in the warrant, thus making its execution unlawful. The judge held that the warrant had been lawfully executed, because it authorised but did not require the officer to take the named doctors with him, and that the detention in hospital was therefore also lawful. The Court of Appeal allowed the claimant's appeal on the ground that there was an implied power for a magistrate to impose any condition which could sensibly relate to the execution of a warrant in a way which protected the interests of the person liable to be removed whilst furthering the object of the grant of the warrant'. It held that the conditions imposed had not

a Section 135, so far as material, is set out at [13], below

been complied with and the removal was therefore unlawful. The NHS trust appealed.

Held – (Per Lord Steyn, Lord Hutton, Baroness Hale of Richmond and Lord Carswell) On the true construction of s 135 of the 1983 Act a magistrate had no power to identify the professionals who were to accompany the police officer in the execution of the warrant. Nothing in s 135 itself or elsewhere in the 1983 Act gave the magistrate such power. There was no requirement that the doctor who accompanied the police officer either knew the person or had specialist knowledge in mental health. Power to identify the professionals could not be implied into the magistrate's power to grant the warrant as that implication was not necessary in order to make the statutory power effective to achieve its purpose of enabling access to be gained in order to make proper arrangements for the treatment and care of someone who was believed to be suffering from mental disorder and suspected of being ill-treated, neglected, out of control or unable to care for him or herself alone. The presence of a doctor and social worker was required, at least in part, so that a person was not removed to a place of safety when they judged that the basis upon which the warrant was granted was not made out. That purpose was assisted if either of them knew the case well or if the doctor had specialist knowledge in mental health but it could not be said that that was necessary for the proper functioning of s 135. It followed that, in the instant case, the names in the warrant were surplus, or (per Lord Rodger of Earlsferry) not specified in the legitimate exercise of any power to do so, and thus had no effect on the legality of the warrant or of its execution. The appeal would therefore be allowed (see [1], [2], [7], [8], [20]–[25], [28]–[30], below).

Notes

For warrants to search for and remove patients, see 30 *Halsbury's Laws* (4th edn reissue) para 1341.

For the Mental Health Act 1983, s 135, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 998.

Cases referred to in opinions

A-G v Great Eastern Railway Co (1880) 5 App Cas 473, [1874–80] All ER Rep Ext 1459, HL.

Bodden v Comr of Police of the Metropolis [1989] 3 All ER 833, [1990] 2 QB 397, [1990] 2 WLR 76, CA.

Winterwerp v Netherlands (1979) 2 EHRR 387, [1979] ECHR 6301/73, ECt HR.

Cases referred to in list of authorities

A-G of Jamaica v Williams [1997] 3 LRC 22, [1998] AC 351, [1997] 3 WLR 389, PC.

British Waterways Board v Severn Trent Water Ltd [2000] 1 All ER 347, [2001] Ch 32, [2000] 3 WLR 1; *rvsd* [2001] EWCA Civ 276, [2001] 3 All ER 673, [2002] Ch 25, [2001] 3 WLR 613.

Comrs of Customs and Excise v Harris (1999) Times, 24 February, DC.

Cowan v Metropolitan Police Comr [2000] 1 All ER 504, [2000] 1 WLR 254, CA.

Duport Steels Ltd v Sirs [1980] 1 All ER 529, [1980] ICR 161, [1980] 1 WLR 142, HL.

Grove v Eastern Gas Board [1951] 2 All ER 1051, [1952] 1 KB 77, CA.

HL v UK (2004) 17 BHRC 418, ECt HR.

IRC v Rossminster Ltd [1980] 1 All ER 80, [1980] AC 952, [1980] 2 WLR 1, HL.
Morris v Beardmore [1980] 2 All ER 753, [1981] AC 446, [1980] 3 WLR 283, HL.
Munjaz v Mersey Care NHS Trust, S v Airedale NHS Trust [2003] EWCA Civ 1036, (2003) 74 BMLR 178, [2004] QB 395, [2003] 3 WLR 1505.
R (on the application of the DPP) v Camberwell Youth Court [2003] EWHC 3217 (Admin), (2003) 168 JP 157, DC.
R v Bournewood Community and Mental Health NHS Trust, ex p L [1998] 3 All ER 289, [1999] 1 AC 458, [1998] 3 WLR 107, HL.
R v Broadmoor Special Hospital Authority ex p S [1998] COD 199, CA.
R v Central Criminal Court, ex p AJD Holdings [1992] Crim LR 669, DC.
R v Central Criminal Court, ex p Hutchinson [1996] COD 14.
R v Chief Constable of the Lancashire Constabulary, ex p Parker [1993] 2 All ER 56, [1993] QB 577, [1993] 2 WLR 428, DC.
R v Liverpool Justices, ex p RM Broudie & Co (1995) 7 Admin LR 242.
R v Leigh Justices, ex p Kara (1981) 72 Cr App R 327, DC.
S-C (Mental Patient: Habeas Corpus), Re [1996] 1 All ER 532, [1996] QB 599, [1996] 2 WLR 146, CA.
Williams v Summerfield [1972] 2 All ER 1334, [1972] 2 QB 512, [1972] 3 WLR 131, DC.
X v UK (1981) 4 EHRR 188, [1981] ECHR 7215/75, ECt HR.

Appeal

The Epsom and St Helier University Hospitals NHS Trust appealed with permission of the House of Lords Appeal Committee given on 27 January 2004 from the decision of the Court of Appeal (Schiemann and Latham LJJ) on 30 July 2003 ([2003] EWCA Civ 1152, 74 BMLR 211) allowing the appeal of Susannah Ward from the decision of Mr Recorder Layton QC in the Central London County Court on 21 October 2002 dismissing her action for false imprisonment brought against the Metropolitan Police Commissioner and the NHS trust. The facts are set out in the opinion of Baroness Hale of Richmond.

Nigel Pleming QC and *Fenella Morris* (instructed by *Capsticks*) for the NHS trust.
Mrs Ward appeared in person.
Hugo Keith (instructed by the *Treasury Solicitor*) as advocate to the court.

Their Lordships took time for consideration.

5 May 2005. The following opinions were delivered.

LORD STEYN.

[1] My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend Baroness Hale of Richmond. For the reasons which she has given I would allow the appeal and dismiss the claim against both defendants.

LORD HUTTON.

[2] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Baroness Hale of Richmond. I agree with it and for the reasons which she gives I would allow the appeal and dismiss the claim against both defendants.

LORD RODGER OF EARLSFERRY.

[3] My Lords, the issue of principle in this appeal is whether, when issuing a warrant under s 135 of the Mental Health Act 1983, a magistrate has power to impose a condition that the constable executing it should be accompanied by a particular approved social worker and/or medical practitioner. The wording of sub–s (1) shows that the magistrate has a discretion whether or not to grant a warrant.

[4] Under the somewhat similar provision in s 15(2) of the Mental Deficiency Act 1913 it was necessary to name the constable and the doctor, but both of these requirements have been abolished. Now s 135(4) simply says that, when executing the warrant, the constable is to be accompanied by an approved social worker and by a registered medical practitioner. The contention for Epsom and St Helier University Hospitals NHS Trust is that where Parliament has regulated, in this more relaxed way, the class of persons who are to accompany the constable, there is no room for implying any power for the magistrate to stipulate any particular member of that class.

[5] In *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473 at 478, [1874–80] All ER Rep Ext 1459 at 1462, Lord Selborne LC held that the doctrine of ultra vires—

> 'ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.'

Lord Blackburn said that—

> 'those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.' (See (1880) 5 App Cas 473 at 481, [1874–80] All ER Rep Ext 1459 at 1464.)

Here there is no express prohibition on the magistrate imposing the condition. So, looking at the matter reasonably, can imposing such a condition be fairly regarded as incidental to the magistrate's power to issue the warrant?

[6] The requirement relates to the manner of execution of the warrant. Obviously, as my noble and learned friend, Baroness Hale of Richmond, points out, a requirement of this kind could often make it more difficult in practice to execute the warrant. So it could never be appropriate for a magistrate to impose the requirement unless, in his considered judgment, there was a justification for doing so which would outweigh that potential disadvantage. On any view it would only be appropriate in exceptional cases. But the magistrate might be told of circumstances where, exceptionally, such a condition seemed appropriate. The execution of the warrant will often be upsetting for the patient. Sometimes, a specially vulnerable patient might be greatly reassured if the constable were accompanied by a social worker or a medical practitioner whom she knew and trusted. Conversely, the presence of a social worker or medical practitioner whom she distrusted might make the situation much worse. In such cases, if made aware of the position, a magistrate might reasonably consider that, in order to facilitate the execution of the warrant, he should specify or exclude a particular social worker or medical practitioner. In my view, a power to impose such a condition in the

interests of the patient could properly be regarded as incidental to the statutory power to issue the warrant. The same would apply, for instance, to a condition that the warrant should not be executed at night.

[7] It appears that in this case the informant completed the form containing the warrant and did so most ineptly. The informant inserted the names of two medical practitioners and an approved social worker who were to accompany the constable. The magistrate signed the form. There is nothing in the affidavit of Mr Reed, the principal administrative clerk of the court, to suggest that, in signing and issuing the warrant, the magistrate would actually have applied his mind to whether, or why, these individuals should be specified. In particular, there is nothing to show why he specified the names of two medical practitioners. This was plainly ultra vires since s 135(4) provides that only one need be present. That being so, it is clear that in this case there was no legitimate exercise of any power to specify the names. In the circumstances they can be severed from the rest of the warrant. Shorn of the names, the warrant was valid, as was its execution.

[8] For these reasons I agree that the appeal should be allowed and the claim against both defendants dismissed.

BARONESS HALE OF RICHMOND.

[9] My Lords, this case concerns a little known and little used provision in the Mental Health Act 1983, designed to cater for people who are believed to be suffering from mental disorder and may be in need of care or protection. Mrs Ward, who complains about its use in her case, is acting in person, so I shall try to give a fuller explanation of how and why the case has come before us than would be necessary had she had lawyers acting for her. She has been in the unenviable situation of being deprived of her liberty so that assessments could be made which revealed that compulsory intervention was not warranted. Anyone who has been through that distressing experience would feel deeply aggrieved and a profound sense of injustice. It can only have made matters worse that she has had to defend a judgment of the Court of Appeal in her favour without legal representation. We are grateful to Mr Hugo Keith, who has done his best to uphold that judgment, but as our amicus curiae and not as her representative.

[10] For centuries it was assumed that people of unsound mind (a much narrower category than the mental disorders of today) should be locked up, whether in their own homes or, increasingly during the nineteenth century, in institutions designed for that purpose. The twentieth century saw a progressive retreat from that position. Now it is assumed that people with mental disorders and disabilities should be treated just like everyone else: see *Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency 1954–1957* (Cmnd 169) (1957) pp 3–4 (para 7). But we have kept the possibility of detaining and treating them against their will in the interests of their own health or safety or for the protection of others. We rightly regard this as a serious step which should only be taken when the patient has reliably been shown to have a mental disorder of a nature or degree which warrants it: see *Winterwerp v Netherlands* (1979) 2 EHRR 387.

[11] Hence the compulsory procedures require that there be a professional assessment and diagnosis before the patient is compulsorily admitted to hospital. Unless there is an emergency, the opinions of two doctors, one of

them an approved specialist in mental disorder and if possible one of them having prior knowledge of the patient, are required: ss 2(3), 3(3), 12(2) of the Mental Health Act 1983. Both must have examined the patient before making their recommendations: s 12(1). In an emergency, one is sufficient: s 4(3). Admission is on the application, either of the patient's nearest relative or of an approved (ie specialist) social worker, who must have seen the patient within the 14 days ending when the application is made: s 11(1), (5). The social worker must interview the patient before making an application: s 13(2). These days, the nearest relative rarely makes the formal application, although he or she has a right to require that a social worker assess the case: s 13(4).

[12] Very occasionally, a crisis will arise in which there is good reason to suppose that a person ought to be admitted to hospital (or otherwise taken care of) but the necessary assessments cannot be made in advance because of problems in gaining access and speaking to the prospective patient. Section 135(1) of the Mental Health Act 1983 is designed to cater for that difficulty. In certain quite narrowly defined circumstances, an approved social worker may apply to a magistrate for a warrant authorising a police officer to gain access to premises, by force if need be, and if thought fit to remove the person to a place of safety, such as a hospital or nursing home, with a view to making an application for her compulsory admission or other arrangements for her treatment and care. When executing the warrant, the police officer must have with him an approved social worker and a doctor: s 135(4). In practice, it is likely that the social worker will have co-ordinated the arrangements for everyone to attend. Once access has been gained, the professionals may be able to complete the formalities for an emergency admission there and then. But if that is not possible or appropriate, the professionals should be able to help the police officer to decide whether or not it is 'fit' to take the person concerned to a place of safety. If removed, the person is in legal custody with all that that entails: s 137(1). Once at the place of safety, she may be detained for up to 72 hours: s 135(3); but there is no power to impose medical treatment: see s 56(1)(b).

[13] Of necessity, therefore, s 135(1) applies to a person who is 'believed to be suffering from mental disorder' but has not yet reliably been shown to be so. Fortunately, the power is comparatively rarely used, although it appears to be on the increase. It is not known how many warrants are applied for or granted. Nor is it known how many people are admitted to places of safety other than hospitals. But there are official figures for hospital admissions under this section. In England, these rose from 108 in 1993–1994 to 337 in 2003–2004. Nevertheless, this is a serious step which ought only to be taken when there is no other solution to the problem and with the greatest possible care to ensure that its criteria and requirements are observed. In 1997, the relevant parts of s 135 read as follows:

> '**135.** *Warrant to search for and remove patients.*—(1) If it appears to a justice of the peace, on information on oath laid by an approved social worker, that there is reasonable cause to suspect that a person believed to be suffering from mental disorder—(a) has been, or is being, ill-treated, neglected or kept otherwise than under proper control, in any place within the jurisdiction of the justice, or (b) being unable to care for himself, is living alone in any such place, the justice may issue a warrant authorising any constable ... to enter, if need be by force, any premises specified in the

warrant in which that person is believed to be, and, if thought fit, to remove him to a place of safety with a view to the making of an application in respect of him under Part II of this Act, or of other arrangements for his treatment or care ...

(3) A patient who is removed to a place of safety in the execution of a warrant issued under this section may be detained there for a period not exceeding 72 hours.

(4) In the execution of a warrant issued under subsection (1) above, a constable shall be accompanied by an approved social worker and by a registered medical practitioner ...

(5) It shall not be necessary in any information or warrant under subsection (1) above to name the patient concerned.

(6) In the section "place of safety" means residential accommodation provided by a local social services authority under Part III of the National Assistance Act 1948, a hospital as defined by this Act, a police station, a mental nursing home or residential home for mentally disordered persons or any other suitable place the occupier of which is willing temporarily to receive the patient.'

[14] The issue before us is whether the magistrate is entitled to impose additional conditions in the warrant, other than those expressly provided for in the section, and in particular whether he or she is entitled to insist that only named professionals are involved in its execution. That is the only issue for us to decide. It is a pure question of law. Putting the case before a jury, as Mrs Ward would have liked, would have made no difference. The jury is only there to decide upon the facts. The judge would always have had to rule upon the question of law. If the answer to that question is 'Yes', the case goes back for the facts to be found and damages assessed. If it is 'No', then that is the end of the matter. This must be a source of great concern and frustration to Mrs Ward, who has seen her case come all the way to the highest court in the land without anyone having heard any evidence or decided whether this was indeed a proper case for the use of the power. Her problem is that it was never alleged that the power should not have been invoked, merely that the formalities were not properly complied with.

[15] The relevant facts are these. On 10 July 1997, an approved social worker (named in the warrant as David Alan Baker) applied to a magistrate for a warrant under s 135(1). The warrant granted was unsatisfactory in a number of respects. First, it consisted of a typed pro forma which left gaps for names to be filled in where there is no longer any requirement for the people concerned to be named. Second, the form was sloppily completed. It recited that the informant—

> 'states that there is reasonable cause to suspect that a person Mrs Susannah Ward believed to be suffering from a mental disorder (a) ~~has been (or is being) ill treated, neglected~~ or kept otherwise than under proper control at the address below ~~or~~ (b) being unable to care for ~~himself~~/herself is living alone at Ashleigh, 22 Golfside, Cheam, Surrey ...'

Too much of (a) was crossed out, while (b) was left in when it almost certainly should have been crossed out. On the information which we have, Mrs Ward was not living alone at the time. The warrant itself states among 'the grounds for the said suspicions' that her husband had requested an assessment. Third,

it directs a constable of the Metropolitan Police Force 'on one occasion within one month of the date hereof, to enter, if need be by force, premises at .....' but no address is filled in along that dotted line. Fourth, it continues '..... accompanied by Dr AN Forrest, Consultant Psychiatrist, Mrs M C'Arcomo-Morley, an approved social worker, and Dr DVP Thomas, a medical practitioner'. The typed form left gaps for the approved social worker and a medical practitioner to be named. The warrant itself went even further and named two doctors, one of them a consultant psychiatrist at the hospital to which Mrs Ward was taken.

[16] In the afternoon of 24 July 1997, an approved social worker, Mrs M C'Arcomo-Harley attended at Mrs Ward's address with a Dr Frances from Dr Forrest's team at the hospital, but not with Dr Thomas. Dr Thomas was Mrs Ward's general practitioner, who had known her for a long time and was also familiar with the context of marital breakdown in which these events occurred. Mrs Ward locked herself in her car, but PC Welch gained access to the car and eventually Mrs Ward was taken to Sutton Hospital in an ambulance. She remained there until the following day when she was interviewed by Dr Thomas, who concluded that there was no reason for her to be detained in hospital. He later wrote to Mrs Ward stating that whenever he had seen her in the years since 1993 he had 'never found her to have a psychiatric problem but considered that there was considerable marital disharmony'.

[17] Mrs Ward brought an action for false imprisonment against the Metropolitan Police Commissioner and the relevant NHS trust. The particulars of claim, drafted by counsel, alleged that her removal and later detention were unlawful for two reasons: first, because the police officer was not accompanied by Dr Thomas and second, because the warrant did not specify the premises which the officer was entitled to enter. There was no separate claim in negligence against anyone involved. There was no claim that the information resulting in the warrant should never have been laid. Accordingly, we are not in a position to make any comment about that. The particulars of claim did allege that the police officer had acted without reasonable care; but this was because s 139(1) of the 1983 Act provides that no person shall be liable to any civil proceedings in respect of any act 'purporting to be done in pursuance of' that Act 'unless the act was done in bad faith or without reasonable care'; this does not apply to an NHS trust: s 139(4). Section 139(2) required her to obtain the leave of a High Court judge in order to sue the police and this was granted by Smedley J in November 1999. No leave was required to sue the NHS trust and at first they took no steps to defend the action, seeking instead to come to some agreement with Mrs Ward. Judgment in default was entered against them on 30 June 2001.

[18] When the case eventually came on for trial before Mr Recorder Layton QC on 21 October 2002, Mrs Ward was acting in person. It was agreed that the issue of the lawfulness of the warrant and its execution be tried first, before any of the evidence was heard, because if the warrant and its execution were lawful, there was no false imprisonment and thus on the pleaded case there could be no liability. The recorder held that the warrant was lawful, because it sufficiently identified the address to be entered. He also held that it was lawfully executed, because, as he read it, it authorised but did not require the officer to take the named doctors with

him. This meant that the detention in hospital was also lawful. He therefore set aside the default judgment against the NHS trust.

[19] Before the Court of Appeal Mrs Ward had the benefit of counsel instructed by the Bar Pro Bono Unit. On 30 July 2003, the Court of Appeal ([2003] EWCA Civ 1152, (2003) 74 BMLR 211, [2003] 1 WLR 2413) allowed her appeal on the second point (relating to who had gone with the police officer to execute the warrant). There was an implied power for the magistrate to impose—

> 'any condition which can sensibly relate to the execution of a warrant in a way which protects the interests of the person liable to be removed whilst furthering the object of the grant of the warrant ...' (See (2003) 74 BMLR 211 at [15].)

The conditions imposed had not been complied with and the removal was unlawful. Hence they remitted the case for a determination of the merits of the claim for damages. The NHS trust now appeal to this House.

[20] The simple issue is whether the magistrate had power to identify the professionals who were to accompany the police officer in the execution of the warrant. If he had, it is common ground that the warrant was unlawfully executed and thus that Mrs Ward's removal to and detention in hospital were unlawful. If he had not, it is also common ground that the names were surplusage and the requirements of the section were complied with. Several factors point strongly to the conclusion that on its true construction s 135 contains no such power.

[21] First, the statutory history indicates a progressive relaxation of the requirement to name names in the warrant. The origins of s 135(1) can be found in s 15(2) of the Mental Deficiency Act 1913, dealing with people with a mental disability. There was no exact equivalent in the Lunacy and Mental Treatment Acts, dealing with people who were mentally ill. It has always been and remains necessary to name the premises to be entered. General warrants are not allowed. It has never been necessary to name the patient, for the obvious reason that in the circumstances contemplated by para (a) or (b) of s 135(1) the patient may be completely unknown to the authorities. But s 15(2) of the 1913 Act did require that the constable and doctor be named. (Duly authorised officers, the forerunners of today's approved social workers, had their own powers to take defectives to a place of safety and to admit mentally ill patients to hospital without medical advice.) When mental health law was fundamentally re-cast in the Mental Health Act 1959, s 15(2) of the 1913 Act was adapted to cater for all forms of mental disorder. There was no longer any requirement to name the doctor but it remained necessary to name the constable. That last requirement was removed by the Police and Criminal Evidence Act 1984 (PACE), s 119, Sch 7 and para 26 of Sch 6.

[22] Second, if, when retaining the requirement to name the constable, while removing the need to name the doctor, Parliament had wished to include the power to name the professionals, it would have been simple to say so. But nothing in the section itself, or elsewhere in the 1983 Act, gives the magistrate power to impose conditions in the warrant or to name the professionals to be involved in its execution. Nor is there any equivalent of s 12(2), which prescribes the qualifications but not the identity of the doctors who make recommendations for compulsory admission to hospital. There is thus no

requirement that the doctor who accompanies the police officer either knows the patient or has specialist expertise in mental health.

[23] Third, as a general principle, there can be implied into a statutory power such incidental powers as are necessary for its operation: see *Bennion: Statutory Interpretation* (4th edn, 2002) section 174. Thus a magistrate's power to order the detention of someone who wilfully interrupted the proceedings of the court included 'all incidental powers necessary to enable the court to exercise the jurisdiction in a judicial manner', specifically the power to direct that the person be brought before him: see *Bodden v Comr of Police of the Metropolis* [1989] 3 All ER 833, [1990] 2 QB 397. In s 135(1), for example, the power to enter the premises in question must also include the power to search those premises in order to find the person believed to be suffering from mental disorder. It would be ridiculous to give the police officer power to break down the door to get into the premises but not the power to search them once he was inside. Section 135 is headed 'warrant to search for and remove patients'. It may also be that the police officer can authorise others, such as the ambulance service or an approved social worker, to transport the person to the place of safety rather than doing it himself.

[24] Fourth, the issue here is not what can be implied into the constable's power to execute the warrant, but what can be implied into the magistrate's power to grant it. It is not sufficient that such a power be sensible or desirable. The implication has to be necessary in order to make the statutory power effective to achieve its purpose. That simply cannot be said here. The main purpose of s 135(1) is to enable access to be gained in order to make proper arrangements for the treatment and care of someone who is believed to be suffering from mental disorder and suspected of being ill-treated, neglected, out of control or unable to care for herself alone. These are potentially very vulnerable people. The object is to protect them from harm. Far from its being necessary to limit the powers granted by the warrant in this way, that purpose is more likely to be achieved if the powers are not cut down by insisting that named people be present, or by allowing the magistrate to impose other limitations, however 'sensible' they may seem at the time. It may take some time before the warrant can be executed. It may not be possible to assemble the named professionals when it can. A doctor, for example, may go off duty at a particular time but another may take his place. Social services may have a day roster and an out-of-hours duty team. If there is indeed reasonable cause to suspect that a person is being ill-treated or neglected or is out of control, it makes little sense to delay efforts to protect her until the named professionals are back on duty.

[25] Fifth, although principally intended for the protection of the person concerned, the warrant does authorise a substantial interference with her civil liberties. The Court of Appeal called it draconian. The presence of a doctor and social worker is required at least in part so that a person is not removed to a place of safety when they judge that the basis upon which the warrant was granted is not made out. That purpose is assisted if either of them knows the case well or if the doctor is skilled and experienced in mental health. But it cannot be said that it is necessary for the proper functioning of the section that this be so. The prospective patient's civil liberties would be arguably better protected by the professionals' duty to exercise reasonable care and skill in making the judgments they are there to make.

[26] Sixth, for the purpose of deciding this case, it is not necessary to consider whether the power to impose other conditions, in particular a time limit, can be implied. Unlike an application for compulsory admission to hospital under ss 2, 3 or 4, s 135 contains no express time limit within which the warrant must be executed: cf s 6(1). The desirability of having such a time limit weighed heavily with the Court of Appeal. People should not be deprived of their liberty on the basis of stale information. In mental health cases, where the conditions and circumstances of the person concerned may rapidly change, the object is always to try and benefit the sufferer rather than to dwell on the past. But it is possible that s 135 is covered by the safeguards contained in ss 15 and 16 of PACE.

[27] There are several good reasons for thinking this. The safeguards apply to 'the issue to constables under any enactment ... of warrants to enter and search premises ...': PACE, s 15(1). Although, as already seen, s 135 contains no express power to search, this must be implied. Sections 15 and 16 are expressed to apply to any such power 'under any enactment'. Section 135 was clearly in the minds of the draftsman and legislature when PACE was passed, as it was amended to enable any constable to execute the warrant. Sections 15 and 16 introduce some sensible safeguards, such as the need for the information to be in writing, a time limit of one month from grant, the limitation to only one attempt at execution, and the insistence on copies and records. Furthermore, by making provision in s 15(2) and (4) for what is to happen if a constable applies for a warrant, the section might be thought also to be contemplating warrants applied for by others, such as the approved social worker in this case. There appears to be no obvious policy reason why ss 15 and 16 should not apply to these warrants. For what it is worth, the proposed successor to s 135 in cl 227 of the draft Mental Health Bill 2004 expressly refers to the application of PACE to this power. If ss 15 and 16 do apply, there is no need to imply a power to impose a time limit into s 135 itself. I therefore incline to the view, previously expressed by Richard Jones in his *Mental Health Act Manual* (8th edn, 2003), p 496 (para 1-1183), that these sections do apply. However, the warrant in this case was executed within the month prescribed in s 15 and stated on the face of the warrant and it is unnecessary for us to reach a final conclusion on the point.

[28] There are many reasons, however, to conclude that it is not permissible to imply into s 135 of the Mental Health Act 1983 a power to insist that named professionals are there when the police officer executes the warrant. This means that the names in the warrant were surplus to requirements and thus had no effect on the legality of the warrant or of its execution.

[29] I would therefore allow this appeal and dismiss the claim against both defendants. However, I would make no order for costs against Mrs Ward either in this House or in the courts below. Mr Pleming QC, on behalf of the NHS trust, very properly accepts that this is the proper order. The trust was not unsympathetic to the position in which Mrs Ward had found herself, but brought the appeal to this House because of its importance for the practical working of the law. It is enough both for them and for the police that they should have achieved the interpretation of the law which they sought.

LORD CARSWELL.

[30] My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Baroness Hale of Richmond. For the reasons which she has given I would allow the appeal and dismiss the claim against both defendants.

Appeal allowed.

Celia Fox Barrister.

Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and the Attorney General

[2005] EWCA Civ 78

COURT OF APPEAL, CIVIL DIVISION
BUXTON, RIX AND JONATHAN PARKER LJJ
17, 18 NOVEMBER 2004, 4 FEBRUARY 2005

Mistake – Mistake of law – Money paid under mistake of law – Restitution – Limitation of action – Claimant company United Kingdom subsidiary of German parent – Claimant unable to utilise group income election to avoid paying advance corporation tax on dividends paid to parent as election only available if both subsidiary and parent resident in United Kingdom – European Court of Justice finding that such treatment contrary to Community law – Claimant commencing action for restitution – Whether action time-barred – Whether payments of advance corporation tax made under mistake of law – Whether English law recognising claim in restitution to recover taxes paid under mistake of law – Limitation Act 1980, s 32(1)(c).

The claimant was the United Kingdom subsidiary of a German company. Advance corporation tax was payable on the dividends it paid to its German parent because, at the relevant time, the Income and Corporation Taxes Act 1988 provided that a group income election, which enabled dividends to be paid without the paying subsidiary having to pay advance corporation tax, could only be made if the subsidiary and its parent were both resident in the United Kingdom. In March 2001, the Court of Justice of the European Communities held that the denial of the right of election to holding companies established in member states other than the United Kingdom and their United Kingdom subsidiaries was contrary to Community law. The court further held that, in respect of payments of advance corporation tax which had already been made, Community law conferred a right of compensation or restitution. The claimant had been able to set off the advance corporation tax it had paid against its liability to mainstream corporation tax, but the effect of having to pay the advance corporation tax was that it had suffered a disadvantage of timing. In October 2000, the claimant commenced an action against the Revenue seeking compensation or restitution in respect of that timing disadvantage. The claim for restitution was made in the particulars of claim in respect of 'dividends' which were defined as amounts which 'include, but are not limited to' the payments specified in schedules to the particulars. The schedules were amended in August 2001, giving details of a payment made in October 1993. A further amendment, giving particulars of payments made in February 1995 and January 1996 respectively, was made in August 2002. The Revenue considered that limitation period applicable to the claim in respect of those three payments was six years from the date of payment; that the 1993 payment was therefore time barred; and that the claims in relation to the 1995 and 1996 payments had not been brought until August 2002 and were also therefore time barred. The claimant contended (i) that it had made the payments under a mistake of law so that, pursuant to s 32(1)(c)[a] of the Limitation Act 1980 the limitation period began to run from the date it had discovered its mistake, or could with reasonable diligence have discovered it, which

was, at the earliest, on the delivery of the Advocate General's opinion in the proceedings in the Court of Justice in September 2000; and (ii) that the amendment to the schedules to its particulars of claim had not had the effect of adding new claims. The judge found for the claimant and the Revenue appealed, submitting inter alia, (i) that the principle that there was a general right to recover money paid under a mistake of law did not apply to overpayments of tax (ii) that the claimant's cause of action was that of a person who had made a payment to the Revenue pursuant to an unlawful demand and was entitled to a restitutionary remedy regardless of whether when making the payment it had been acting under any mistake of law; and (ii) that s 32(1)(c) of the 1980 Act did not apply.

Held – (1) A claimant who made a payment to the Revenue under a mistake of law was not entitled to a restitutionary remedy in respect of that payment otherwise than (where the demand was unlawful) under the principle that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority was prima facie recoverable by the citizen as of right or (where the demand was lawful) under the relevant statutory regime. The remedy for an ultra vires demand turned on the nature of the demand and not on any mistake by the payer. The cause of action under the principle which applied where the demand was unlawful subsumed any cause of action which might otherwise exist for mistake of law and it was complementary to the various statutory régimes for the recovery of overpaid tax. It followed in the instant case that the limitation period of six years from the date of payment applied, and the claim in respect of the 1993 payment was therefore statute barred (see [195]–[208], [227], [249], [261], [263], [270]–[273], [291], [298] below); *Woolwich Equitable Building Society v IRC (No 2)* [1992] 3 All ER 737 applied, *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 considered.

(2) (Buxton LJ dissenting) It followed from the statements that the claims included, but were not limited to the payments specified in the schedules that, on its true interpretation, the particulars of claim pleaded claims in respect of all payments of advance corporation tax made by the claimant. The amendments to the schedules to include particulars of the 1995 payment and the 1996 payment therefore did not have the effect of adding new claims. Accordingly the appeal in relation to the 1993 payment would be allowed and the appeal in relation to the 1995 and 1996 payments would be dismissed (see [247]–[250], [263], [298], below).

Notes

For ultra vires demands by a public authority, see 40(2) *Halsbury's Laws* (4th edn reissue) paras 1359–1362, and for money paid under mistake of law, see 32 *Halsbury's Laws* (4th edn reissue) para 71.

With effect in relation to actions brought on or after 8 September 2003, s 320 of the Finance Act 2004 provides that s 32(1)(c) of the Limitation Act 1980 does not apply in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners of Inland Revenue.

For the Limitation Act 1980, s 32, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 972.

a Section 32, so far as material, is set out at [12], below

Appeal

The Commissioners of Inland Revenue and the Attorney General appealed from the decision of Park J on 18 July 2003 ([2003] EWHC 1779 (Ch), [2003] 4 All ER 645) giving judgment on liability in favour of Deutsche Morgan Grenfell Group plc (DMG) in its claim for compensation or restitution in respect of payments of advance corporation tax on the ground that those payments were made pursuant to a provision of United Kingdom law which, in March 2001, had been declared to be contrary to Community law by the Court of Justice of the European Communities. The facts are set out in the judgment of Jonathan Parker LJ.

Notes

For postponement of limitation period for relief from consequences of mistake, see 28 Halsbury's Laws (4th edn, reissue) para 1129.

Advance corporation tax was abolished by s 31 of the Finance Act 1998 with effect from 6 April 1999.

For the Limitation Act 1980, ss 2, 5, 32(1)(c), 35, see 24 Halsbury's Statutes (4th edn) (2003 reissue) 935.

Cases referred to in judgments

A-G v Wilts United Dairies Ltd (1921) 37 TLR 884, CA; *affd* 91 LJKB 897, HL.

Air Canada v British Columbia (1989) 59 DLR (4th) 161, Can SC.

Amministrazione delle Finanze dello Stato v San Giorgio SpA Case 199/82 [1983] ECR 3595, ECJ.

Baker v Courage & Co [1910] 1 KB 56, [1908–10] All ER Rep 65.

Bilbie v Lumley (1802) 2 East 469, [1775–1802] All ER Rep 425, 102 ER 448.

Brennan v Bolt Burden (a firm) [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321, CA.

British Steel plc v Customs and Excise Comrs [1997] 2 All ER 366, CA; *rvsg* [1996] 1 All ER 1002.

Burton v MBC (Builders-Ashington) Ltd (1995) 69 P&CR 496, CA.

Comr of State Revenue v Royal Insurance Australia Ltd (1994) 126 ALR 1, Aus HC.

Cooke v Gill (1873) LR 8 CP 107.

David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353, Aust HC.

Eagerpath Ltd v Edwards (Inspector of Taxes) [2001] STC 26, CA; *affg* [1999] STC 771; *affg* sub nom *Grafton Ltd v IRC* [1998] STC (SCD) 278.

Goldman v Hargrave [1966] 2 All ER 989, [1967] 1 AC 645, [1966] 3 WLR 513, PC.

Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London BC [1998] 2 All ER 272, [1999] QB 215, [1998] 3 WLR 829, CA.

Hazell v Hammersmith and Fulham London BC [1991] 1 All ER 545, [1992] 2 AC 1, [1991] 2 WLR 372, HL.

Hoechst UK Ltd v IRC [2003] EWHC 1002 (Ch), [2004] STC 1486.

Kleinwort Benson Ltd v Lincoln City Council [1998] 4 All ER 513, [1999] 2 AC 349, [1998] 3 WLR 1095, HL.

Kleinwort Benson Ltd v Sandwell BC [1994] 4 All ER 890, QBD and CA; *rvsd* sub nom *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL.

Leakey v National Trust for Places of Historic Interest or Natural Beauty [1980] 1 All ER 17, [1980] QB 485, [1980] 2 WLR 65, CA.

Mallusk Cold Storage Ltd v Dept of Finance and Personnel [2003] NIQB 58.

Marcic v Thames Water Utilities Ltd [2003] UKHL 66, [2004] 1 All ER 135, [2004] 2 AC 42, [2003] 3 WLR 1603; *rvsg* [2002] EWCA Civ 64, [2002] 2 All ER 55, [2002] QB 929, [2002] 2 WLR 932; *rvsg in part* [2001] 3 All ER 698, [2002] QB 929.

Maskell v Horner [1915] 3 KB 106, [1914–15] All ER Rep 595, CA.

Mason v New South Wales (1959) 102 CLR 108, Aus HC.

Metallgesellschaft Ltd v IRC, Hoechst AG v IRC Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620, [2001] 2 WLR 1497, ECJ.

National & Provincial Building Society v UK (1997) 25 EHRR 127, [1997] ECHR 21319/93, ECt HR.

Nepean Hydro Electric Commission v Ontario Hydro (1982) 132 DLR (3d) 193, Can SC.

Nurdin & Peacock plc v DB Ramsden & Co Ltd [1999] 1 All ER 941, [1999] 1 WLR 1249.

Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound) [1961] 1 All ER 404, [1961] AC 388, [1961] 2 WLR 126, PC.

Palmisani v Instituto Nazionale della Previdenza Social (INPS) Case C-261/95 [1997] ECR I-4025.

Paragon Finance plc v Thakerar & Co (a firm), Paragon Finance plc v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA.

Platform Home Loans Ltd v Oyston Shipways Ltd [1999] 1 All ER 833, [2000] 2 AC 190, [1999] 2 WLR 518, HL.

R v IRC, ex p Woolwich Equitable Building Society [1987] STC 654; *rvsd* [1989] STC 463, CA; *varied* [1991] 4 All ER 92, [1990] 1 WLR 1400, HL.

R v Secretary of State for Social Security, ex p Sutton Case C-66/95 [1997] All ER (EC) 497, [1997] ICR 961, [1997] ECR I-2163, ECJ.

Sion v Hampstead Health Authority [1994] 5 Med LR 170, CA.

Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue (1992) (4) SA 202, SA SC.

Woolwich Equitable Building Society v IRC (No 2) [1992] 3 All ER 737, [1993] AC 70, [1992] 3 WLR 366, HL; *affg* [1991] 4 All ER 577, [1993] AC 70, [1991] 3 WLR 790, CA; *rvsg in part* [1989] STC 111, [1989] 1 WLR 137.

Cases referred to in skeleton arguments

Apple and Pear Development Council v K J Lewis Ltd (Case 222/82) [1983] ECR 4083.

Baker (GL) Ltd v Medway Building and Supplies Ltd [1958] 3 All ER 540, [1958] 1 WLR 1216, CA.

Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd [1979] 3 All ER 522, [1980] QB 677, [1980] 2 WLR 218.

Barra v Belgium and City of Liége (Case 309/85) [1988] ECR 355.

Beatty (Earl) v IRC [1953] 2 All ER 758, [1953] 1 WLR 1090.

British Steel plc v Customs and Excise Comrs [1997] 2 All ER 366, CA.

First Roodhill Leasing Ltd v Gillingham Operating Co Ltd [2001] NPC 109.

Kelly v Solari (1841) 9 M & W 54, [1835–42] All ER Rep 320, 152 ER 24.

Letang v Cooper [1964] 2 All ER 929, [1965] 1 QB 232, [1964] 3 WLR 573, CA.

Pigs and Bacon Commission v McCarren & Co Ltd (Case 177/78) [1979] ECR 2161.

R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 All ER 70, [1991] 1 AC 603, [1990] 3 WLR 818, HL and ECJ (Case C-213/89).

R v Secretary of State for Transport, ex p Factortame Ltd (No 7) [2001] 1 WLR 942.

Savings and Investment Bank Ltd v Fincken [2001] EWCA Civ 1639, [2001] All ER (D) 70 (Nov).

Shields v E Coomes (Holdings) Ltd [1979] 1 All ER 456, [1978] ICR 1159, [1978] 1 WLR 1408, CA.

Appeal

The Commissioners of Inland Revenue and the Attorney General appealed from the decision of Park J on 18 July 2003 ([2003] EWHC 1779 (Ch), [2003] STC 1017) allowing claims by Deutsche Morgan Grenfell Group plc for compensation or restitution in respect of payments of advance corporation tax on the ground that those payments were made pursuant to a provision of United Kingdom law which, in March 2001, had been declared to be contrary to Community law by the Court of Justice of the European Communities. The principal issue for determination was whether the claim in respect of three payments of advance corporation tax was time-barred under s 2 or s 5 of the Limitation Act 1980. The facts and grounds of appeal are set out in the judgment of Jonathan Parker LJ.

Ian Glick QC, *Bruce Carr* and *David Ewart* (instructed by the *Solicitor of Inland Revenue*) for the appellants.

Laurence Rabinowitz QC and *Francis Fitzpatrick* (instructed by *Slaughter & May*) for DMG.

Cur adv vult

4 February 2005. The following judgments were delivered.

CONTENTS

Jonathan Parker LJ:

PART I:	Introduction (paras [1]–[11])
PART II:	The relevant statutory provisions (paras [12]–[15])
PART III:	The issues on this appeal (paras [16]–[34])
PART IV:	The relevant UK tax law (paras [35]–[36])
PART V:	The detailed facts (para [37])
PART VI:	*Metallgesellschaft* (paras [38]–[47])
PART VII:	Authorities in this jurisdiction (paras [48]–[122])
PART VIII:	Authorities in other jurisdictions (paras [123]–[127])
PART IX:	The judge's judgment (paras [128]–[143])
PART X:	The grounds of appeal (paras [144]–[145])
PART XI:	The arguments on this appeal (paras [146]–[191])
PART XII:	Conclusions (paras [192]–[248])
PART XIII:	Result (para [249])

Rix LJ (paras [250]–[263])

Buxton LJ (paras [264]–[298])

JONATHAN PARKER LJ (delivering the first judgment at the invitation of Buxton LJ).

PART I: INTRODUCTION

[1] By its decision in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349 (*Kleinwort Benson*) the House of Lords abrogated the common law rule that no restitutionary claim lies in respect of money paid under a mistake of law, holding that the claimant bank was entitled to a restitutionary remedy in respect of sums paid to a local authority under an illegal transaction. The instant appeal raises a question of general importance as to the scope of the principle established by that decision. The question is whether the principle applies where the payment in question is a payment to the Revenue on account of a supposed liability to tax (in the instant case, advance corporation tax (ACT)). The appellants on this appeal contend that it does not apply to such a payment, given (a) that statute provides for the recovery of tax overpaid by error or mistake in certain, albeit limited, circumstances (the statutory provision relating to overpayments of ACT is to be found in s 33 of the Taxes Management Act 1970 (TMA)); and (b) that, as the House of Lords held in *Woolwich Equitable Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70 (*Woolwich*), a party who has made a payment to the Revenue pursuant to an unlawful demand is entitled as of right to a restitutionary remedy, regardless of whether in making the payment the payer was acting under any mistake of law.

[2] The answer to the above question has significant limitation consequences. For it is common ground that whereas (absent fraud, concealment or mistake) a restitutionary claim based on the *Woolwich* principle will, by virtue of s 5 of the Limitation Act 1980 (the 1980 Act), become statute-barred on the expiry of six years after the payment was made, s 32(1)(c) of the 1980 Act provides that (subject to immaterial exceptions) the six-year limitation period for a claim for relief from the consequences of a mistake—including (as the House of Lords held in *Kleinwort Benson*) a mistake of law—does not start to run until the claimant has discovered the mistake or could with reasonable diligence have done so.

[3] The question identified in para [1] above did not arise directly for decision either in *Woolwich* or in *Kleinwort Benson* (in *Woolwich* the payment was a payment to the Revenue but it was not made under a mistake of law; whereas in *Kleinwort Benson* the payment was made under a mistake of law but it was a payment under a private transaction and not a payment to the Revenue). None the less, in order to answer that question it is necessary to undertake a close examination of the reasoning of their Lordships in *Woolwich* and in *Kleinwort Benson*, and in particular that of Lord Goff of Chieveley, who gave the leading speech in each of the two cases. Indeed, distinguished leading counsel have devoted the greater part of the four-day hearing before the judge and the two-day hearing in this court to that task.

[4] The appeal is brought by the Commissioners of Inland Revenue and Her Majesty's Attorney General, the defendants in the action, from an order made on 18 July 2003 by Park J (see [2003] EWHC 1779 (Ch), [2003] 4 All ER 645) whereby he entered judgment on liability in favour of Deutsche Morgan Grenfell Group plc (DMG), with quantum to be agreed between the parties.

[5] The instant case is one of a large number of claims which have been brought against the appellants following the decision of the European Court of Justice (the ECJ) in the joined cases of *Metallgesellschaft Ltd v IRC; Hoechst AG v IRC*

Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620 (*Metallgesellschaft*). I refer to *Metallgesellschaft* in some detail in Pt VI of this judgment, but the following brief account of the decision may suffice by way of introduction.

[6] In *Metallgesellschaft*, the claimant taxpayers challenged the legality of the provisions of the Income and Corporation Taxes Act 1988 (ICTA) relating to the imposition of a charge to ACT on dividends paid by a subsidiary resident in the United Kingdom to its parent, contending that the provisions in question contravened art 52 of the EC Treaty (now art 43 EC) (freedom of establishment) in that they discriminated between those United Kingdom subsidiaries whose parent companies were resident in the United Kingdom and those whose parent companies were resident in other member states. Since, in the event, the claimants had set off the sums paid by way of ACT against their subsequent liability for 'mainstream' corporation tax (as they were entitled to do under the provisions in question) they did not seek recovery of the sums paid; rather, they sought compensation to reflect the fact that the sums in question had been paid prematurely.

[7] By its decision, which was delivered on 8 March 2001, the ECJ upheld the claimants' challenge. It found that the statutory provisions in question contravened art 52, and that the claimants were entitled to compensation for premature payment. However, it left the assessment of the compensation, together with all ancillary matters, to the national court.

[8] The judge's decision in the instant case is one of a number of decisions which he has made in cases brought forward as test cases pursuant to a group litigation order, the purpose of which is to enable the claims arising from the ECJ's decision in *Metallgesellschaft* to be managed in an orderly way.

[9] In the instant case, DMG seeks relief against the appellants in respect of various payments of ACT made prematurely by DMG, including payments made on 14 October 1993 (the 1993 payment), 15 February 1995 (the 1995 payment) and 14 January 1996 (the 1996 payment). Its primary claim is for a restitutionary remedy, based on the ECJ decision in *Metallgesellschaft*. In the alternative, it claims damages for breach of statutory duty by the appellants in failing to ensure that the relevant statutory regime complied with Community law.

[10] I shall have to refer to the pleadings in more detail later in this judgment, but I note at this stage that the claim form describes the claim as an unquantified claim for damages for breach of Community law, with no mention of any restitutionary claim. However, para 13 of the particulars of claim, under the heading 'Restitution and Compensation', pleads that (in the alternative to the claim for damages for breach of statutory duty) DMG is entitled to compensation in respect of sums paid by way of ACT as set out in attached schedules (to which the 1993 payment, the 1995 payment and the 1996 payment were later added by amendment); sub-para (B) of the particulars of loss and damage pleaded under para 20 of the particulars of claim describes the compensation sought as being 'for loss of use of the said ACT to be calculated from the dates of payment until the dates of set-off against [DMG's] liability to mainstream corporation tax'; and the prayer for relief contains claims for 'Restitution' and 'Compensation', in addition to damages. The appellants have at no stage objected to the fact that the particulars of claim pleads a claim which does not appear in the claim form.

[11] The appellants plead a limitation defence in relation to the 1993 payment, the 1995 payment and the 1996 payment. DMG counters by relying on s 32(1)(c)

of the 1980 Act. The limitation issues so raised, which (as will become apparent) are of some considerable complexity, were the only issues which, pursuant to the group litigation order, fell to be decided by the judge in the instant case. He resolved those issues in favour of DMG, holding that none of the three payments in question was statute-barred. He entered judgment for DMG accordingly. The appellants petitioned the House of Lords under the leapfrog procedure for permission to appeal, but their petition was refused. Accordingly, with the permission of the judge, the appellants now appeal to this court.

PART II: THE RELEVANT STATUTORY PROVISIONS

[12] The relevant provisions of the 1980 Act are as follows (so far as material):

> '2. *Time limit for actions founded on tort.*—An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued ...
>
> 5. *Time limit for actions founded on simple contract.*—An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued ...
>
> 32. *Postponement of limitation period in case of fraud, concealment or mistake.*—(1) ... where in the case of any action for which a period of limitation is prescribed by this Act, either—(a) ... or (b) ... or (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the ... mistake ... or could with reasonable diligence have discovered it.'

[13] I turn next to TMA, s 33. It is common ground that, for a reason which will become apparent, TMA, s 33 does not apply in the instant case. However, the appellants rely heavily on the section in support of their arguments on this appeal.

[14] The statutory ancestry of TMA, s 33 can be traced back to s 24 of the Finance Act 1923, which laid down a three-year time limit in relation to claims based on error or mistake by a taxpayer relating to his liability to income tax under Sch D. Section 26 of the Finance Act 1926 extended the time limit to six years. Sections 42 and 45 of the Finance Act 1927 extended the provision to cover surtax and income tax under Sch E. Subsequently it was further extended to cover capital gains tax (in 1965) and corporation tax (in 1966). It now appears in TMA, s 33, which provides as follows (so far as material):

> '33. *Error or mistake.*—(1) If any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than six years after the end of the year of assessment (or, if the assessment is to corporation tax, the end of the accounting period) in which the assessment was made, make a claim to the Board for relief.
>
> (2) On receiving the claim the Board shall inquire into the matter and shall, subject to the provisions of this section, give by way of repayment such relief in respect of the error or mistake as is reasonable and just: Provided that no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in

accordance with the practice generally prevailing at the time when the return was made.

(3) In determining the claim the Board shall have regard to all the relevant circumstances of the case, and in particular shall consider whether the granting of relief would result in the exclusion from charge to tax of any part of the profits of the claimant, and for this purpose the Board may take into consideration the liability of the claimant and assessments made on him in respect of chargeable periods other than that to which the claim relates.

(4) [Provision for appeals.]

(5) In this section "profits"—(a) ... (b) ... (c) in relation to corporation tax, means profits as computed for the purposes of that tax.'

[15] The reason why the section has no application in the instant case is that none of the payments in question was made under an assessment.

PART III: THE ISSUES ON THIS APPEAL

[16] In summary, the respective contentions of the appellants and of DMG on this appeal are as follows.

[17] The appellants contend that there are only two causes of action available to DMG in relation to the payments in question, that is to say (1) a claim for damages for breach of statutory duty (which, as is common ground, will become statute-barred six years from the date of payment, pursuant to s 2 of the 1980 Act) and (2) a cause of action in restitution based on the *Woolwich* principle (which, as is once again common ground, will also become statute-barred six years after the date of payment, pursuant, in this case, to s 5 of the 1980 Act). The appellants contend, in particular, that the *Kleinwort Benson* principle, properly analysed, does not extend to overpayments of tax.

[18] In the alternative, the appellants contend that even if (contrary to their primary submission) the *Kleinwort Benson* principle extends to overpayments of tax, the mistake made by DMG in the instant case was not a mistake of such a nature as is capable of founding a claim based on that principle. This contention was not raised before the judge, but the appellants sought permission to raise it on appeal. DMG not objecting, we granted such permission.

[19] The appellants accordingly contend that s 32(1)(c) of the 1980 Act has no application in the instant case; and that, whether DMG founds its claims on breach of statutory duty or on the *Woolwich* principle, the applicable limitation period in either case is six years from the date of the overpayment.

[20] Thus, in relation to the 1993 payment, the appellants contend that since more than six years passed between the date when the payment was made (14 October 1993) and the date on which the claim form was issued (13 October 2000) DMG's claim in respect of the 1993 payment is statute-barred. The 1995 payment and the 1996 payment were made less than six years before the issue of the claim form (they were made on 15 February 1995 and 14 January 1996 respectively), but the appellants contend that DMG's claims in relation to those two payments were not brought until the date on which the schedules to the particulars of claim were amended to include such payments. It was agreed between the parties at an interlocutory stage that that date should be taken to be 19 August 2002 (ie more than six years after the payments were made). Thus the appellants contend that the 1995 payment and the 1996 payment are also statute-barred.

[21] As already indicated, DMG accepts that the applicable limitation period in relation to the pleaded claim for damages for breach of statutory duty, and in relation to a restitutionary claim based on the *Woolwich* principle, is six years from the date of payment. However, it contends that it is also entitled to a restitutionary remedy on the *Kleinwort Benson* principle (a claim which, as indicated earlier, is pleaded in the alternative to the claim for damages for breach of statutory duty); and that its mistake in making the three payments in question was of such a nature as to engage s 32(1)(c).

[22] As to the application of s 32(1)(c), DMG contends that it did not discover, and could not with reasonable diligence have discovered, its mistake until the ECJ gave its decision in *Metallgesellschaft* (8 March 2001), alternatively until the publication of the Advocate General's decision in *Metallgesellschaft* (12 September 2000). Accordingly it contends that the limitation period did not start to run in relation to any of the three payments in question until (at the earliest) 12 September 2000; and that in consequence its restitutionary claims are not statute-barred.

[23] If and so far as necessary, it contends that for limitation purposes its claims in relation to each of the three payments in question were brought on the date on which the claim form was issued (13 October 2000).

[24] In response, the appellants contend (so far as necessary) that DMG discovered its mistake by July 1995 at the latest, by which time it knew about the issues raised by the claimants in *Metallgesellschaft* (the appellants do not rely on the 'reasonable diligence' aspect of s 32(1)(c)); and that for limitation purposes the restitutionary claim in relation to the 1993 payment was not brought until the schedules to the particulars of claim were amended to include details of it (16 August 2001). Thus, the appellants contend that even if s 32(1)(c) is engaged, DMG's claims in relation to all three payments are statute-barred.

[25] The Revenue further contends (so far as necessary) that it has a defence to DMG's claims on the ground that the payments in question were made by DMG under a settled view or understanding of the law (referred to in argument as a 'settled law defence'). This contention was not raised before the judge, but he gave the appellants permission to amend their defence so as to raise it on appeal.

[26] Thus the broad issues which arise on this appeal are as follows:

A Can a taxpayer who has made an overpayment of ACT under a mistake of law recover that payment *otherwise than* under either TMA, s 33 or the *Woolwich* principle: in particular, can he recover it under the *Kleinwort Benson* principle? I will refer to this issue as 'the cause of action issue'.

B If he can: Was the mistake which DMG made in the instant case a mistake of such a nature as is capable of founding a cause of action based on the *Kleinwort Benson* principle? I will refer to this issue as 'the mistake of law issue'.

C As to the application of s 32(1)(c):

(i) Was DMG's mistake in making the 1993 payment and the 1995 payment discovered in July 1995 (as the appellants contend) or not until 8 March 2001 or 12 September 2000 (as DMG contends)? And

(ii) Was the 1996 payment also made under a mistake (for if it was, it must follow that the mistake was not discovered until 8 March 2001 or 12 September 2000)?

I will refer to these issues as 'the s 32(1)(c) issues'.

D Does the Revenue have, in any event, a 'settled law defence' to DMG's claims? I will refer to this issue as 'the "settled law defence" issue'.

E For the purposes of the 1980 Act, were DMG's claims in relation to the three payments in question brought when the claim form was issued (13 October 2000), as DMG contends; or not until the schedules to the particulars of claim were amended to include details of such payments (the relevant dates being 16 August 2001 in relation to the 1993 payment and 19 August 2002 in relation to the 1995 and 1996 payments), as the appellants contend? I will refer to this issue as 'the pleading issue'.

[27] Since the above issues to some extent overlap, and since different groups of issues arise in relation to each of the three payments in question, it may be convenient to set out the particular issues which arise in relation to each such payment.

[28] In this connection, I begin by noting two concessions by the appellants. First, the appellants accept that the 1993 payment and the 1995 payment (but not the 1996 payment) were made by DMG under a mistake of law, although there is an issue (the mistake of law issue) as to the precise nature of the mistake. As will be seen in due course, the judge held that, notwithstanding the decision of the ECJ in *Metallgesellschaft*, the ACT in question was due when it was paid, and that DMG's mistake lay in its erroneous belief that it was not open to it to make a group income election. The appellants support that conclusion, submitting that a mistake of that nature cannot on any basis found an entitlement to a restitutionary remedy at common law. DMG, on the other hand, contends that its mistake lay in its erroneous belief that the statutory regime was lawful under Community law.

[29] Second, the appellants accept that to the extent that the payments in question were made under a mistake of law (whatever the nature of that mistake), the losses in respect of which DMG seeks compensation were caused by that mistake. So causation is not in issue.

[30] In the light of the above, the detailed issues which arise in relation to each of the three payments in issue are as set out below. The following table of dates may render what follows somewhat easier to assimilate:

14 October 1993	the 1993 payment
15 February 1995	the 1995 payment
July 1995	discovery of mistake (as alleged by the appellants)
14 January 1996	the 1996 payment
12 September 2000	Advocate General's opinion in *Metallgesellschaft*
13 October 2000	issue of claim form
8 March 2001	ECJ decision in *Metallgesellschaft*
16 August 2001	amendment re the 1993 payment
19 August 2002	amendment re the 1995 payment and the 1996 payment

The 1993 payment

[31] A. If (as the appellants contend) DMG has no cause of action at common law for relief from the consequences of its mistake of law (for convenience I will refer to such a cause of action as 'a cause of action for mistake of law'), then

DMG's restitutionary claim in relation to the 1993 payment will be statute-barred, since the 1993 payment was made more than six years before the commencement of proceedings. On the other hand:

B. If (as DMG contends) it has a cause of action for mistake of law, then whether or not its claim based on that cause of action is statute-barred will turn on when it discovered its mistake. As noted earlier, the three possibilities, as canvassed in argument, are:

(i) July 1995;
(ii) 12 September 2000; or
(iii) 8 March 2001.

The appellants contend for (i). DMG contends for (ii) or (iii) (on the facts it makes no difference which of (ii) or (iii) is the correct date). If the correct date is July 1995, the claim in relation to the 1993 payment will be statute-barred only if (as the appellants contend) the claim was not brought until 16 August 2001.

C. So in order to defeat the appellants' limitation defence in relation to the 1993 payment, DMG must establish:

(a) that it has a cause of action for mistake of law; *and*

(b) that its mistake was not discovered until 12 September 2000, (alternatively 8 March 2001); *or* (if, contrary to that contention, the mistake was discovered in July 1995) that its claim in relation to the 1993 payment was brought on 13 October 2000.

D. Conversely, in order for their limitation defence in relation to the 1993 payment to succeed the appellants must establish:

(a) that DMG has no cause of action for mistake of law; *or* (if it does have such a cause of action):

(b) that DMG discovered its mistake in July 1995 *and* that the claim was not brought until 16 August 2001.

The 1995 payment

[32] A. If (as the appellants contend) DMG has no cause of action for mistake of law, then DMG's claim in relation to the 1995 payment will be statute-barred only if the claim was not brought until the schedule to the particulars of claim was amended to include details of the payment (19 August 2002). On the other hand:

B. If (as DMG contends) it has a cause of action for mistake of law in relation to the 1995 payment, then its claim based on that cause of action will be statute-barred only if (a) the mistake was discovered in July 1995 *and* (b) the claim was not brought until 19 August 2002.

C. So in order to defeat the appellants' limitation defence in relation to the 1995 payment DMG must establish *either* that the claim in relation to that payment was brought on 13 October 2000; *or* (if the claim was not brought until 19 August 2002) that it has a cause of action for mistake of law *and* that its mistake was not discovered until 8 March 2001 (alternatively 12 September 2000).

D. Conversely, in order for the appellants' limitation defence in relation to the 1995 payment to succeed the appellants must establish:

(a) that the claim was not brought until 19 August 2002; *and*

(b) that DMG has no cause of action for mistake of law *or* (if it has such a cause of action) that it discovered its mistake in July 1995.

The 1996 payment

[33] A. If (as the appellants contend) DMG has no cause of action for mistake of law, its claim in relation to the 1996 payment will be statute-barred only if the claim was not brought until 19 August 2002—ie the claim in relation to the 1996 payment is in this respect in the same position as the claim in relation to the 1995 payment. On the other hand:

B. If (as DMG contends) it has a cause of action for mistake of law in relation to the 1996 payment, its claim based on that cause of action will be statute-barred only if:

(a) the claim was not brought until 19 August 2002 *and*

(b) the mistake (the existence of which the appellants dispute) was discovered prior to 19 August 1996.

C. So in order to defeat the appellants' limitation defence in relation to the 1996 payment DMG must establish:

(a) that the claim was brought on 13 October 2000; *or* (if the claim was not brought until 19 August 2002):

(b) that the payment was made under a mistake of law which was not discovered until 12 September 2000 (alternatively 8 March 2001).

D. Conversely, in order for the appellants' limitation defence in relation to the 1996 payment to succeed the appellants must establish:

(a) that DMG's claim in relation to the 1996 payment was not brought until 19 August 2002 *and*

(b) that DMG has no cause of action for mistake of law; *alternatively* (ie if it has a cause of action for mistake of law) that the 1996 payment was not made under a mistake of law. (As indicated earlier, if the 1996 payment was made under a mistake of law, it has not been suggested by the appellants that that mistake was, or could with reasonable diligence have been, discovered at any time prior to 12 September 2000 at the earliest.)

As to all three payments

[34] The appellants contend that in any event they have a 'settled law defence'.

PART IV: THE RELEVANT UNITED KINGDOM TAX LAW

[35] I gratefully adopt the judge's summary of the relevant United Kingdom tax law in paras [6] and [7] of his judgment, as follows:

'[6] At the times with which this case is concerned the general rule of United Kingdom tax law was that, if a company resident in the United Kingdom paid a dividend, it had to pay ACT to the Revenue: ICTA s 14. The rate of ACT varied over the years. At the times with which the present case is concerned it was normally 25% of the dividend. In the usual case the amount so paid could be set off against the company's normal liability to pay corporation tax on its profits, sometimes referred to as mainstream corporation tax or (as in this judgment) MCT. Where the ACT was so set off

the payment of it did not cause the company to suffer an absolute loss of the money, because the set-off reduced on a pound for pound basis a later payment of MCT which the company would otherwise have had to make anyway. However, it did have the effect that the company had to pay some of its corporation tax bill early, so the ACT meant that the company suffered a timing disadvantage and the United Kingdom Revenue received a corresponding timing advantage. (There could be cases where a subsidiary had paid ACT and could not set it off against MCT. In such cases the ACT payment did represent an absolute loss of the money and not just a timing disadvantage. However, in the case of DMG all the relevant ACT payments were eventually set off against MCT, so that the disadvantage for which DMG seeks relief is a timing disadvantage only.)

[7] There was an exception to the rule that a company which paid a dividend had to pay ACT. If it was a subsidiary of a United Kingdom holding company the two companies could jointly make a group income election under s 247 of ICTA. The effect was that the subsidiary did not have to pay the ACT after all. It did still have to pay its full MCT when the due date came round, but the group income election removed the timing disadvantage. However, if the dividend-paying company was a subsidiary of a non-United Kingdom holding company the two companies could not make a group income election, so the subsidiary had to pay ACT and suffer the timing disadvantage, in circumstances where a subsidiary of a United Kingdom holding company, if it and its parent had made a group income election, did not. That was the feature of United Kingdom law which, in [*Metallgesellschaft*], the [ECJ] held to have been contrary to EC law and also to entitle the companies which had suffered from it to claim compensation or restitution. Where, as in this case and as in the cases of the [groups of companies involved in *Metallgesellschaft*], the ACT had been set off against MCT, the compensation or restitution would be an amount calculated by reference to interest over the period from the payment of the ACT until it was set off against MCT.'

[36] (For a more detailed account of the relevant statutory regime, reference may be made to paras 3–25 of the ECJ's judgment in *Metallgesellschaft*.

PART V: THE DETAILED FACTS

[37] I also gratefully adopt the judge's account of the facts as set out in paras [9]–[12] of his judgment, as follows:

'[9] At the times when the ACT payments relevant to this case were made the ... structure [of the group of which DMG was a member] was a little more complicated than a parent company with a 100% direct subsidiary, but nothing turns on the extra complications. The German holding company was DBAG. It was not the simple 100% owner of DMG. Instead it owned 14% of the shares in DMG directly. It owned all of the shares in DBI, an interposed United Kingdom holding company, and DBI owned the other 86% of the shares in DMG. ...

[10] According to the terms of ICTA s 247, group income elections could not have been made between DMG and DBAG or between DBI and DBAG, because DBAG was not a company resident in the United Kingdom. A group income election could have been made between DMG and DBI (because

a both companies were resident in the United Kingdom), but no such election was made. The reason was that, although an election would have enabled dividends to flow from DMG to DBI without ACT, onward dividends from DBI to DBAG would have had to be paid subject to a liability on the part of DBI to pay ACT: or at least that was how the matter appeared on the terms of the domestic United Kingdom legislation. In the circumstances DMG paid b ACT by reference to all its dividends—the 86% of them paid to DBI as well as the 14% of them paid to DBAG—and DBI did not pay ACT when it paid onward dividends to DBAG. DBI did not have to pay ACT on those onward dividends because of the rules about franked investment income in ICTA ss 238 and 241.

c [11] DMG has pleaded in this case, and the Revenue admit, that, if s 247 had permitted group income elections to be made between a United Kingdom subsidiary and a parent company in another member state, elections would have been made between DMG and DBI, between DMG and DBAG, and between DBI and DBAG. The corollary is that, because s 247 appeared clearly not to permit group income elections to which a d parent company in another member state was a party, the companies did not attempt to make group income elections. There is no doubt that, if they had attempted to make them, the Revenue would have rejected the elections and pointed to the clear terms of the United Kingdom statute [ie ICTA] in justification of the rejection.

e [12] Over the years several dividends flowed through from DMG to DBAG, either directly as to 14% of them or through DBI as to 86% of them. In the case of all of them DMG paid ACT. As respects some of the ACT payments no issue arises in the present case (because no limitation arguments arise), but as respects three dividends and associated ACT payments there are limitation issues in dispute which I must decide. ...'

f

PART VI: *METALLGESELLSCHAFT*

[38] Since, as explained earlier, the whole of this drama is played out against the backcloth of the ECJ's decision in *Metallgesellschaft*, and since there is an issue (the mistake of law issue) between the parties as to the effect of that decision, and g hence as to the nature of DMG's mistake of law, it is convenient to return to it at this point.

[39] In *Metallgesellschaft* [2001] All ER (EC) 496, [2001] Ch 620, the claimant companies, which were resident in Germany and which had subsidiaries resident in the United Kingdom, brought proceedings in the English High Court claiming h compensation for the cashflow disadvantage which they had suffered by reason of their not being entitled to make a group income election under ICTA, s 247, on the footing that the absence of such an entitlement amounted to an unjustified restriction on their freedom of establishment, contrary to art 52 of the EC Treaty (now art 43 EC).

j **[40]** Article 52 (now art 43 EC) provides as follows (so far as material):

> '[R]estrictions on the freedom of establishment of nationals of a Member State ... shall be abolished. ... Such ... abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.'

[41] The High Court stayed the proceedings and referred to the ECJ for a ruling on the following questions (among others): (i) whether in the circumstances art 52 had been infringed; and (ii) if so, whether the claimants were entitled, whether by way of restitution or by way of an award of damages, to a capital sum representing interest on the sums paid by way of ACT from the date the payments were made until the date when they were set off against mainstream corporation tax, notwithstanding that English law prohibited the payment of interest on a sum which was no longer owed.

[42] Before the ECJ, the Commission submitted that the claimants were entitled to a restitutionary remedy, on the footing that the early receipt of the money by the Revenue constituted a financial benefit which had been obtained in breach of art 52, that is to say unlawfully. The United Kingdom government, on the other hand, submitted that the distinction drawn in the legislation between resident subsidiaries of resident parents and resident subsidiaries of non-resident parents was objectively justified and did not breach art 52. In the result, the ECJ ruled that the distinction was discriminatory and not capable of objective justification, and that it was accordingly contrary to art 52. It further ruled that it was basic Community law that the right to a refund of charges levied in a member state in breach of rules of Community law was a consequence of, and complementary to, rights conferred on individuals by that law; that the member state was accordingly required to repay charges levied in breach of Community law; and that in the instant case the award of compensation in the form of a capital sum representing interest for the relevant period was essential in order to restore the equal treatment guaranteed by art 52, whether the claim was formulated as a claim for restitution or as a claim for damages.

[43] In the course of his opinion, which (as noted earlier) was published on 12 September 2000, the Advocate General (Fennelly) said this:

> '51. ... The ACT payments made by the [claimants] were made on the basis of national legislation which allowed them no choice. Since such legislation is not compatible, in my view, with Community law, they should, in principle, be entitled to seek restitution for those payments.
>
> 52. I believe that it is more correct and more logical to treat the claimants' claim as restitutionary rather than as a compensatory claim for damages. ACT was ... exacted from them in contravention of Community law and, therefore, unlawfully. In the period between payment of ACT and its being taken into account in respect of the corporation tax liability of the subsidiaries, it should have been repaid to the claimants by the United Kingdom. If it had been possible to bring legal proceedings during this period, the claimants would, in my view, have been entitled to interest. It is neither logical nor just to deprive them of this entitlement merely because, in the meantime, the liability of the United Kingdom to repay the principal sum has been discharged. In a practical sense, also, the claim for interest is closer to a restitutionary rather than a compensatory claim. The underlying sums are known and indisputable. All that is necessary is for the national court to establish an appropriate interest rate for the relevant period.' (See [2001] All ER (EC) 496 at 522, [2001] Ch 620 at 645.)

[44] The ECJ, addressing the first question on which its ruling was sought (whether the tax regime in question contravened art 52), said this in the course of its judgment:

'35. By its first question, the national court is in substance asking whether it is contrary to arts ... 52 ... of the EC Treaty for the tax legislation of a member state, such as that in issue in the main proceedings, to afford companies resident in that member state the possibility of benefiting from a taxation regime allowing them to pay dividends to their parent company without having to pay ACT where their parent company is also resident in that member state but to deny them that possibility where their parent company has its seat in another member state ...

43. With regard to the right to make a group income election, the legislation in question creates a difference in treatment between subsidiaries resident in the United Kingdom depending on whether or not their parent company has its seat in the United Kingdom. Resident subsidiaries of companies having their seat in the United Kingdom may, subject to certain conditions, avail themselves of the group income election regime and thus be relieved of the obligation to pay ACT when distributing dividends to their parent companies. By contrast, that advantage is denied to the resident subsidiaries of companies not having their seat in the United Kingdom and which are therefore obliged to pay ACT whenever they distribute dividends to their parent companies ...

76. The answer to the first question must therefore be that it is contrary to art 52 of the EC Treaty for the tax legislation of a member state, such as that in issue in the main proceedings, to afford companies resident in that member state the possibility of benefiting from a taxation regime allowing them to pay dividends to their parent company without having to pay ACT where their parent company is also resident in that member state but to deny them that possibility where their parent company has its seat in another member state.' (See [2001] All ER (EC) 496 at 531, 532–533, 536–537, [2001] Ch 620 at 655–656, 661.)

[45] The ECJ then turned to the second question on which its ruling was sought: whether a subsidiary resident in the United Kingdom which has been wrongfully deprived of the benefit of a taxation regime which would have enabled it to pay dividends to its parent company resident in another member state without incurring a charge to ACT is entitled by way of compensation to a capital sum representing interest on the payments in question from the date of payment until the date of set off, notwithstanding that English law prohibits the payment of interest on a principal sum which is not due. Addressing that question, the ECJ said this:

'77. Having regard to the answer given to the first question, the second question seeks in substance to ascertain whether, on a proper construction of art 52 of the EC Treaty, where a subsidiary resident in the member state concerned and its parent company having its seat in another member state have been wrongfully deprived of the benefit of a taxation regime which would have enabled the subsidiary to pay dividends to its parent company without having to pay ACT, that subsidiary and/or its parent company are/is entitled to obtain a sum equal to the interest accrued on the advance payments made by the subsidiary from the date of those payments until the date on which the tax became chargeable, even when national law prohibits the payment of interest on a principal sum which is not due. The national court frames that question in two hypotheses: in the first alternative, where

the claim by the subsidiary and/or parent company is made in an action for restitution of taxes levied in breach of Community law and, in the second, where the claim is made in an action for compensation for damage resulting from the breach of Community law.

78. The United Kingdom government maintains, first, that if it should be held that it was contrary to Community law to deny resident subsidiaries of parent companies not resident in the United Kingdom the benefit of the group income election regime, Community law would require that breach to be remedied, not through an action for restitution but through an action brought against the state for damages for loss occasioned by its breach of Community law. In its view, ACT is not a tax levied contrary to Community law, since subsidiaries are in any event bound to pay by way of MCT [mainstream corporation tax] the sums paid by way of ACT. It is the fact that the United Kingdom legislature failed to provide for the possibility of a resident subsidiary and its non-resident parent making a group income election that is at the origin of the disputes in the main proceedings and that might cause the United Kingdom to incur non-contractual liability. In *R v Secretary of State for Social Security, ex p Sutton* Case C-66/95 [1997] All ER (EC) 497, [1997] ECR I-2163, the court held, in particular, that in the case of damage arising out of breach of a directive, Community law does not require a member state to pay a sum equivalent to the interest on a sum paid late, in that case arrears of social security benefits. From this the United Kingdom government concludes that Community law does not require interest to be paid in respect of the loss of use of a sum of money for a certain period on account of the advance levying of a tax contrary to Community law.

79. Second, the United Kingdom government argues that, even if the claimants' claims were to be treated as claims for recovery of sums paid in breach of Community law, such claims cannot be upheld inasmuch as settled case law states that it is for national law to determine whether interest is payable in connection with reimbursement of charges improperly levied in the light of Community law. Under English law, entitlement to interest depends on whether or not proceedings were commenced before payment of the sum on which interest is claimed.

80. In consequence, the United Kingdom government submits that the claimants in the main proceedings cannot claim interest under a claim for restitution or for damages inasmuch as the principal sums claimed were repaid by set-off of ACT against the amounts due by way of MCT payable by the subsidiaries before the proceedings were brought.

81. It must be stressed that it is not for the court to assign a legal classification to the actions brought by the claimants before the national court. In the circumstances, it is for Metallgesellschaft and others and Hoechst to specify the nature and basis of their actions (whether they are actions for restitution or actions for compensation for damage), subject to the supervision of the national court.

82. First, on the assumption that the actions brought by the claimants in the main proceedings are to be treated as claims for restitution of a charge levied in breach of Community law, the question is whether, in circumstances such as those in the main proceedings, a breach of art 52 of the Treaty by a member state entitles taxpayers to reimbursement of interest

accrued on the tax they have paid from the date of its premature payment until the date on which it properly fell due.

83. It is important to bear in mind in this regard that what is contrary to Community law, in the disputes in the main proceedings, is not the levying of a tax in the United Kingdom on the payment of dividends by a subsidiary to its parent company but the fact that subsidiaries, resident in the United Kingdom, of parent companies having their seat in another member state were required to pay that tax in advance whereas resident subsidiaries of resident parent companies were able to avoid that requirement.

84. According to well-established case law, the right to a refund of charges levied in a member state in breach of rules of Community law is the consequence and complement of the rights conferred on individuals by Community provisions as interpreted by the court ... The member state is therefore required in principle to repay charges levied in breach of Community law ...

85. In the absence of Community rules on the restitution of national charges that have been improperly levied, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) ...

86. It is likewise for national law to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as payment of interest, including the rate of interest and the date from which it must be calculated ...

87. In the main proceedings, however, the claim for payment of interest covering the cost of loss of the use of the sums paid by way of ACT is not ancillary, but is the very objective sought by the claimants' actions in the main proceedings. In such circumstances, where the breach of Community law arises, not from the payment of the tax itself but from its being levied prematurely, the award of interest represents the reimbursement of that which was improperly paid and would appear to be essential in restoring the equal treatment guaranteed by art 52 of the EC Treaty.

88. The national court has said that it is in dispute whether English law provides for restitution in respect of damage arising from loss of the use of sums of money where no principal sum is due. It must be pointed out that in an action for restitution the principal sum due is none other than the amount of interest which would have been generated by the sum, use of which was lost as a result of the premature levy of the tax.

89. Consequently, art 52 of the Treaty entitles a subsidiary resident in the United Kingdom and/or its parent company having its seat in another member state to obtain interest accrued on the ACT paid by the subsidiary during the period between the payment of ACT and the date on which MCT became payable, and that sum may be claimed by way of restitution.' (See [2001] All ER (EC) 496 at 537–539, [2001] Ch 620 at 662–664.)

[46] The ECJ accordingly answered the second question in the following terms:

> '96 ... Where a subsidiary resident in one member state has been obliged to pay advance corporation tax in respect of dividends paid to its parent company having its seat in another member state even though, in similar circumstances, the subsidiaries of parent companies resident in the first member state were entitled to opt for a taxation regime that allowed them to avoid that obligation, art 52 of the EC Treaty requires that resident subsidiaries and their non-resident parent companies should have an effective legal remedy in order to obtain reimbursement or reparation of the financial loss which they have sustained and from which the authorities of the member state concerned have benefited as a result of the advance payment of tax by the subsidiaries.
>
> The mere fact that the sole object of such an action is the payment of interest equivalent to the financial loss suffered as a result of the loss of use of the sums paid prematurely does not constitute a ground for dismissing such an action.
>
> While, in the absence of Community rules, it is for the domestic legal system of the member state concerned to lay down the detailed procedural rules governing such actions, including ancillary questions such as the payment of interest, those rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.' (See [2001] All ER (EC) 496 at 540, [2001] Ch 620 at 665.)

[47] I will return to *Metallgesellschaft* later in this judgment, when addressing the mistake of law issue.

PART VII: AUTHORITIES IN THIS JURISDICTION

[48] I turn next to the authorities in this jurisdiction.

[49] The principal authorities in this jurisdiction which were cited to us in the course of argument were as follows. As already noted, the two authorities which are of central relevance to the cause of action issue are the decisions of the House of Lords in *Woolwich* and *Kleinwort Benson*. *Kleinwort Benson* is also of central relevance to the mistake of law issue and to the s 32(1)(c) issues. Also cited to us on the cause of action issue were *British Steel plc v Customs and Excise Comrs* [1997] 2 All ER 366 (Court of Appeal) (*British Steel*), *Eagerpath Ltd v Edwards (Inspector of Taxes)* [2001] STC 26 (Court of Appeal) (*Eagerpath*), and the House of Lords' decision in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 1 All ER 135, [2004] 2 AC 42 (*Marcic*). On the s 32(1)(c) issues we were referred to *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249 (a decision of Neuberger J) (*Nurdin*).

[50] Also cited to us on the cause of action issue was the decision of the Queen's Bench Division (Northern Ireland) in *Mallusk Cold Storage Ltd v Dept of Finance and Personnel* [2003] NIQB 58 (*Mallusk*).

[51] It is convenient to refer to these authorities at this stage. I take them in chronological order.

Woolwich

[52] In *Woolwich* the building society challenged the validity of transitional provisions in the Income Tax (Building Societies) Regulations 1986, SI 1986/482

on the ground that they were ultra vires. The regulations in question required the building society to pay income tax on dividends and interest which it had paid to its members. The payments of income tax were to be made on specified quarterly dates.

[53] The building society decided to pursue its challenge by way of proceedings for judicial review, but in order to avoid adverse publicity and the imposition of penalties, it paid three instalments of tax in accordance with the regulations but on a without prejudice basis. There was thus no question of the payments having been made under any mistake of law.

[54] The judge at first instance in the judicial review proceedings upheld the building society's challenge (see *R v IRC, ex p Woolwich Equitable Building Society* [1987] STC 654). The Court of Appeal reversed his decision (see [1989] STC 463), but the House of Lords restored it (see [1991] 4 All ER 92, [1990] 1 WLR 1400). In due course the Revenue repaid the tax, with interest from the date of the judge's decision; but it refused to pay interest in respect of any earlier period.

[55] The building society then commenced fresh proceedings against the Revenue claiming interest from the dates on which the respective payments were made until the date of the judge's decision, on the ground that the payments had been made pursuant to an unlawful demand. The judge at first instance dismissed the building society's claim (see [1989] STC 111, [1989] 1 WLR 137), but the Court of Appeal reversed his decision (see [1991] 4 All ER 577, [1993] AC 70). The House of Lords, by a majority (Lord Goff, Lord Browne-Wilkinson and Lord Slynn of Hadley; Lord Keith of Kinkel and Lord Jauncey of Tullichettle dissenting), dismissed the Revenue's appeal (see [1992] 3 All ER 737, [1993] AC 70).

[56] As I have already indicated, the relevance of the decision in *Woolwich* for present purposes lies in the reasoning of the majority of their Lordships (and in particular the speech of Lord Goff), and in the analysis of *Woolwich* in *Kleinwort Benson* (where, once again, the speech of Lord Goff is of central relevance).

[57] I turn first to the speech of Lord Goff in *Woolwich*. At the commencement of his speech ([1992] 3 All ER 737 at 752, [1993] AC 70 at 163) he identified the question which lay at the heart of the appeal as being: '... whether money exacted as taxes from a citizen by the Revenue ultra vires is recoverable by the citizen as of right'.

[58] He went on to describe that question as being of importance for the future of the law of restitution, since a decision of the House of Lords 'could have a profound effect on the structure of this part of our law' (see [1992] 3 All ER 737 at 752, [1993] AC 70 at 163).

[59] Turning to the authorities, Lord Goff encapsulated their effect in a number of propositions, as follows (see [1992] 3 All ER 737 at 753–754, [1993] AC 70 at 164–166):

> '(1) Whereas money paid under a mistake of fact is generally recoverable, as a general rule money is not recoverable on the ground that it was paid under a mistake of law. This principle was established in *Bilbie v Lumley* (1802) 2 East 469, [1775–1802] All ER Rep 425. It has, however, been the subject of much criticism, which has grown substantially during the second half of the present century. The principle had [sic] been adopted in most, if not all, Commonwealth countries; though in some it has now been modified or abandoned, either by statute or by judicial action. No such principle applies in civil law countries, and its adoption by the common law has been

criticised by comparative lawyers as unnecessary and anomalous. This topic is the subject of the consultation paper published by the Law Commission last year (Law Com no 120), in which serious criticisms of the rule of non-recovery are rehearsed and developed, and proposals for its abolition are put forward for discussion.

(2) But money paid under compulsion may be recoverable. In particular: (a) money paid as a result of actual or threatened duress to the person, or actual or threatened seizure of a person's goods, is recoverable. For an example of the latter, see *Maskell v Horner* [1915] 3 KB 106, [1914–15] All ER Rep 595. Since these forms of compulsion are not directly relevant for present purposes, it is unnecessary to elaborate them; but I think it pertinent to observe that the concept of duress has in recent years been expanded to embrace economic duress; (b) money paid to a person in a public or quasi-public position to obtain the performance by him of a duty which he is bound to perform for nothing or for less than the sum demanded by him is recoverable to the extent that he is not entitled to it. Such payments are often described as having been demanded colore officii. There is much abstruse learning on the subject (see, in particular, the illuminating discussion by Windeyer J in *Mason v New South Wales* (1959) 102 CLR 108 at 139–142), but for present purposes it is not, I think, necessary for us to concern ourselves with this point of classification ... (c) money paid to a person for the performance of a statutory duty, which he is bound to perform for a sum less than that charged by him, is also recoverable to the extent of the overcharge ... (d) in cases of compulsion, a threat which constitutes the compulsion may be expressed or implied ... (e) I would not think it right, especially bearing in mind the development of the concept of economic duress, to regard the categories of compulsion for present purposes as closed.

(3) Where a sum has been paid which is not due, but it has not been paid under a mistake of fact or under compulsion as explained under proposition 2 above, it is generally not recoverable. Such a payment has often been called a voluntary payment. In particular, a payment is regarded as a voluntary payment and so as irrecoverable in the following circumstances:

> (a) The money has been paid under a mistake of law (see proposition (1) above) ...
>
> (b) The payer has the opportunity of contesting his liability in proceedings, but instead gives way and pays ... So where money has been paid under pressure of actual or threatened legal proceedings for its recovery, the payer cannot say that for that reason the money has been paid under compulsion and is therefore recoverable by him. If he chooses to give way and pay, rather than obtain the decision of the court on the question whether the money is due, his payment is regarded as voluntary and so is not recoverable ...
>
> (c) The money has otherwise been paid in such circumstances that the payment was made to close the transaction. Such would obviously be so in the case of a binding compromise; but even where there is no consideration for the payment, it may have been made to close the transaction and so be irrecoverable. Such a payment has been treated as a gift ...

a (4) A payment may be made on such terms that it has been agreed, expressly or impliedly, by the recipient that, if it shall prove not to have been due, it will be repaid by him. In that event, of course, the money will be repayable ... On the other hand, the mere fact that money is paid under protest will not give rise of itself to the inference of such an agreement; though it may form part of the evidence from which it may be inferred that b the payee did not intend to close the transaction ...'

[60] Lord Goff continued ([1992] 3 All ER 737 at 754, [1993] AC 70 at 166):

'The principles which I have just stated had come to be broadly accepted, at the level of the Court of Appeal, at least by the early part of this century. But a formidable argument has been developed in recent years by leading c academic lawyers that this stream of authority should be the subject of reinterpretation to reveal a different line of thought pointing to the conclusion that money paid to a public authority pursuant to an ultra vires demand should be repayable, without the necessity of establishing compulsion, on the simple ground that there was no consideration for the d payment.'

[61] Lord Goff went on to refer in this connection to an essay by Professor Birks in which he reviewed the authorities ('Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (Finn (ed) *Essays on Restitution* (1990) pp 164–265)), referring in particular to an obiter dictum of Atkin e LJ in *A-G v Wilts United Dairies Ltd* (1921) 37 TLR 884 at 887 to the effect that a payment to a public authority under an ultra vires demand, if made under protest, was recoverable on the simple ground that it was a sum received by the public authority to the use of the citizen. Lord Goff also referred to an obiter dictum of Dixon CJ in *Mason v New South Wales* (1959) 102 CLR 108 at 117 as an example of a similar approach. Lord Goff observed ([1992] 3 All ER 737 at 756, f [1993] AC 70 at 168) that the principle of justice expressed in these dicta, and in other authorities, still called for attention. He continued:

'the central question in the present case is whether your Lordships' House, deriving their inspiration from the example of those two great judges, should g rekindle that fading flame and reformulate the law in accordance with that principle. I am satisfied that, on the authorities, it is open to your Lordships' House to take that step. The crucial question is whether it is appropriate for your Lordships to do so.'

[62] Lord Goff then turned to the relevant statutory provisions. With h reference to TMA, s 33, Lord Goff said this ([1992] 3 All ER 737 at 757–758, [1993] AC 70 at 169–170):

'There is some doubt whether this section is in any event applicable in the case of composite rate tax, which was the tax demanded of Woolwich in the present case. By [TMA] s 118(1), the interpretation section of the [TMA], it j is provided that, where neither income tax nor capital gains tax nor corporation tax nor development tax is specified, the word "tax" means any of those taxes. Composite rate tax is not defined as falling within the description of income tax, but only as "an amount representing income tax" (see s 343 of the Income and Corporation Taxes Act 1970). However, there is, in my opinion, a more fundamental reason why the section has no

application in the present case. This is because the present case is not one in which an excessive assessment was made on a taxpayer, through some error of fact or law, as is contemplated by s 33(1). This is a case where there is no lawful basis whatever for any demand of tax to be made by the Revenue. In such circumstances, the demand itself is ultra vires and is therefore a nullity. It follows that in a case such as the present there can be no valid assessment. No assessment was in fact raised on Woolwich in the present case, because the money alleged to be due by way of tax was paid, though under protest. It was pointed out in argument that, pursuant to reg 7 of the Income Tax (Building Societies) Regulations 1986, SI 1986/482, tax which was due but not paid on or before the due date could have been the subject of an assessment on Woolwich under para 4(2) or (3) of Sch 20 to the Finance Act 1972; but for the reasons I have already given any such assessment would, in my opinion, have been a nullity in the circumstances of the present case. In particular, I do not see how there could have been an appeal against such an assessment pursuant to para 10(3) of Sch 20; because such an appeal presupposes an assessment which, apart from the impugned error, would otherwise have been valid. If the assessment is alleged to have been made (as here) under ultra vires regulations, the proper course is to take proceedings by way of judicial review to quash the aberrant regulations and the assessment made thereunder, not by way of an appeal under procedure which presupposes that the assessment, although it may be erroneous, is basically lawful. Just as the appeal procedure presupposes a lawful assessment, so does s 33(1) of the [TMA], which is concerned with a lawful assessment which is excessive by reason of some error or mistake in a return ... This is, in my opinion, a point of some significance in the present case. It is for these reasons that Woolwich is not enabled or required to seek its remedy through the statutory framework, but must fall back on the common law. It also follows that the common law principles, whatever they may be, are applicable to a case such as the present, unconstrained by the provisions of any statute. It was submitted by Mr Glick [QC] for the Crown that statutory provisions creating a discretionary regime for the repayment of taxes or charges presuppose that the common law principles give no right to recovery. Historically, that may be correct; but having, where applicable, overlaid and replaced the common law principles, whatever those principles may be, they become neutral in their effect when the development of those principles is considered by the courts. Of course, Mr Glick was fully entitled to point out to your Lordships that the vast majority of cases concerned with the recovery of tax which is not due will indeed be covered by statutory provisions regulating the right of recovery; he also suggested that, if it should be held that s 33 has no application in the present case, steps can easily, and may well, be taken at an early opportunity to bring cases such as the present, which are in any event likely to be very rare, within its ambit. These are practical considerations, the force of which I accept and understand. But in my opinion they cannot, in the last analysis, touch the point of principle, which is that we are here concerned with the question of the basis of the common law right of recovery in these circumstances, upon which statute law has no direct impact.'

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[63] At [1992] 3 All ER 737 at 759, [1993] AC 70 at 171 Lord Goff turned to the building society's primary submission—

> 'that your Lordships' House should, despite the authorities to which I have referred, reformulate the law so as to establish that the subject who makes a payment in response to an unlawful demand of tax acquires forthwith a prima facie right in restitution to the repayment of the money.'

[64] Addressing that submission, Lord Goff said this ([1992] 3 All ER 737 at 759, [1993] AC 70 at 171–172):

> 'The justice underlying Woolwich's submission is, I consider, plain to see. Take the present case. The Revenue has made an unlawful demand for tax. The taxpayer is convinced that the demand is unlawful, and has to decide what to do. It is faced with the Revenue, armed with the coercive power of the State, including what is in practice a power to charge interest which is penal in its effect. In addition, being a reputable society which alone among many building societies is challenging the lawfulness of the demand, it understandably fears damage to its reputation if it does not pay. So it decides to pay first, asserting that it will challenge the lawfulness of the demand in litigation. Now, Woolwich having won that litigation, the Revenue asserts that it was never under any obligation to repay the money, and that it in fact repaid it only as a matter of grace. There being no applicable statute to regulate the position, the Revenue has to maintain this position at common law. Stated in this stark form, the Revenue's position appears to me, as a matter of common justice, to be unsustainable; and the injustice is rendered worse by the fact that it involves, as Nolan J pointed out, the Revenue having the benefit of a massive interest-free loan as the fruit of its unlawful action. I turn then from the particular to the general. Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right.'

[65] Lord Goff went on to consider a number of possible objections to what he described as 'the simple call of justice'. The first was the historical fact that English law had not developed so as to recognise an action for the recovery of money on the ground that it was not due (condictio indebiti); instead, it had recognised actions at common law for the recovery of money paid under a mistake of fact, and under certain forms of compulsion. Lord Goff continued ([1992] 3 All ER 737 at 759–760, [1993] AC 70 at 172):

> 'What is now being sought is, in a sense, a reversal of that development, in a particular type of case; and it is said that it is too late to take that step. To that objection, however, there are two answers. The first is that the retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law—enshrined in a famous constitutional document, the Bill of Rights (1688)—that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right. The second is that, when the Revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state and may well entail (as in the present

case) unpleasant economic and social consequences if the taxpayer does not pay. In any event, it seems strange to penalise the good citizen, whose natural instinct is to trust the Revenue and pay taxes when they are demanded of him.'

[66] The second objection identified by Lord Goff was that (as Mr Ian Glick QC, for the Revenue, had submitted) the development of the law in this area was a matter for Parliament, and not for the courts. Mr Glick had further submitted that it would be impossible for the House of Lords, were it to accept the building society's argument, to set the appropriate limits to the principle; and that an unqualified right to recover overpaid taxes and duties subject only to the usual six-year time bar would be unacceptable. Addressing these submissions, Lord Goff recognised that what he described as 'the armoury of common law defences' might be inapposite to a claim to recover tax paid under an unlawful demand. He continued ([1992] 3 All ER 737 at 761, [1993] AC 70 at 174): 'It may well therefore be necessary to have recourse to other defences, such as for example short time limits within which such claims have to be advanced.'

[67] After referring to German law as 'an instructive example' of such a regime, Lord Goff continued ([1992] 3 All ER 737 at 761–763, [1993] AC 70 at 174–176):

'At this stage of the argument, I find it helpful to turn to recent developments in Canada. First, in a notable dissenting judgment ... in *Nepean Hydro Electric Commission v Ontario Hydro* (1982) 132 DLR (3d) 193, Dickson J subjected the rule against recovery of money paid under a mistake of law to a devastating analysis and concluded that the rule should be rejected. His preferred solution was that, as in cases of mistake of fact, money paid under a mistake of law should be recoverable if it would be unjust for the recipient to retain it. Next, in the leading case of *Air Canada v British Columbia* (1989) 59 DLR (4th) 161, the question arose whether money in the form of taxes paid under a statute held to be ultra vires was recoverable. It is impossible for me, for reasons of space, to do more than summarise the most relevant parts of the judgments of the Supreme Court of Canada. Of the seven judges who heard the appeal, four thought it necessary to consider whether the taxes paid were recoverable at common law. The leading judgment was delivered by La Forest J, with whom Lamer and L'Heureux-Dube JJ agreed. First, he decided (at 192) to follow Dickson J's lead, and to hold that the distinction between mistake of fact and mistake of law should play no part in the law of restitution. This did not, however, imply that recovery would follow in every case where a mistake had been shown to exist:

> "If the defendant can show that the payment was made in settlement of an honest claim, or that he has changed his position as a result of the enrichment, then restitution will be denied."

However he went on to hold that, where "unconstitutional or ultra vires levies" are in issue, special considerations arose. These were twofold. First, if the plaintiff had passed on the relevant tax to others, the taxing authority could not be said to have been unjustly enriched at the plaintiff's expense, and he was not therefore entitled to recover. As La Forest J said (at 193): "The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss." On that basis alone, he held that the plaintiff's claim

in the case before the court must fail (at 193–194). However, he went on to hold that the claim failed on another ground, viz, that as a general rule there will, as a matter of policy, be no recovery of taxes paid pursuant to legislation which is unconstitutional or otherwise invalid. Basing himself on authority from the United States, La Forest J concluded that any other rule would at best be inefficient, and at worst could lead to financial chaos (at 194–197). The rule against recovery should not, however, apply where a tax is exacted, not under unconstitutional legislation, but through a misapplication of the law. He added that, in his opinion, if recovery in all cases is to be the general rule, then that was best achieved through the route of statutory reform (at 198). Wilson J dissented. She did not think it necessary to consider whether the old rule barring recovery of money paid under mistake of law should be abolished, though had she thought it necessary to do so, she would have followed the approach of Dickson J. She considered (at 169) that money paid under unconstitutional legislation was generally recoverable:

> "The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments "under protest". Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so."

Furthermore, she was unable to accept the view of La Forest J that the principle of recovery should be reversed for policy reasons. She spoke in forthright terms (also at 169):

> "What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me), it should be one that distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due."

She also rejected the proposed defence of "passing on" (at 169–170). Accordingly in her opinion the taxpayer should be entitled to succeed. I cannot deny that I find the reasoning of Wilson J most attractive. Moreover I agree with her that, if there is to be a right of recovery in respect of taxes exacted unlawfully by the Revenue, it is irrelevant to consider whether the old rule barring recovery of money paid under mistake of law should be abolished, for that rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the

demand by the Revenue. Furthermore, like Wilson J, I very respectfully doubt the advisability of imposing special limits on recovery in the case of "unconstitutional or ultra vires levies". I shall revert a little later to the defence of passing on. In all the circumstances, I do not consider that Mr Glick's argument, powerful though it is, is persuasive enough to deter me from recognising, in law, the force of the justice underlying Woolwich's case.'

[68] At [1992] 3 All ER 737 at 764, [1993] AC 70 at 177–178 Lord Goff expressed his conclusion as follows:

'I would therefore hold that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right. As at present advised, I incline to the opinion that this principle should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example because the authority misconstrued a relevant statute or regulation. It is not, however, necessary to decide the point in the present case, and in any event cases of this kind are generally the subject of statutory regimes which legislate for the circumstances in which money so paid either must or may be repaid. Nor do I think it necessary to consider for the purposes of the present case to what extent the common law may provide the public authority with a defence to a claim for the repayment of money so paid; though for the reasons I have already given, I do not consider that the principle of recovery should be inapplicable simply because the citizen has paid the money under a mistake of law. It will be a matter for consideration whether the fact that the plaintiff has passed on the tax or levy so that the burden has fallen on another should provide a defence to his claim. Although this is contemplated by the European Court of Justice of the European Communities in the *San Giorgio* case [see *Amministrazione delle Finanze dello Stato v San Giorgio SpA* Case 199/82 [1983] ECR 3595], it is evident from *Air Canada v British Columbia* that the point is not without its difficulties; and the availability of such a defence may depend on the nature of the tax or other levy. No doubt matters of this kind will in any event be the subject of consideration during the current consultations with the Law Commission.'

[69] Lord Browne-Wilkinson, agreeing with Lord Goff, concluded ([1992] 3 All ER 737 at 782, [1993] AC 70 at 198) that there were sound reasons by way of analogy for establishing the law in the sense proposed by Lord Goff. At [1992] 3 All ER 737 at 781, [1993] AC 70 at 197 he described the case as: 'the paradigm of a case of unjust enrichment.'

[70] Lord Slynn, also agreeing with Lord Goff on the central question, addressed a number other issues which had arisen in the course of argument. The first of those issues is of no materiality for present purposes. However, Lord Slynn continued ([1992] 3 All ER 737 at 783, [1993] AC 70 at 199–200):

'Second, this is not a case where the tax was paid under a mistake of law made by the payer and the Revenue thus cannot, and does not, rely on the authorities which rule that a claim for money had and received does not lie where they were paid under a mistake of law. It is thus not necessary in this

case to consider whether that rule is well-founded, though it seems to me that it is open to review by your Lordships' House. Third there is, as I see it, no statutory provision on which Woolwich can rely to reclaim this money or any interest. Section 33 of the [TMA], even if it applies to composite rate tax, is not applicable for a number of reasons, not least that no valid assessment could be made under an invalid regulation, that no assessment was in fact made and that, even if made, the assessment could not on the facts of the present case have been said to be "excessive by reason of some error or mistake in a return". In other areas Parliament has specifically provided that tax paid which was not lawfully due to be paid may be recovered and it has laid down the machinery and the conditions for repayment, including the payment of interest. None of these other statutory provisions applies to the present case. I do not consider that the fact that Parliament has legislated extensively in this area means that no principle of recovery at common law can or should at this stage of the development of the law be found to exist. If the principle does exist that tax paid on a demand from the Crown when the tax was the subject of an ultra vires demand can be recovered as money had and received then, in my view, it is for the courts to declare it. In so doing they do not usurp the legislative function. I regard the proper approach as the converse. If the legislature finds that limitations on the common law principle are needed for reasons of policy or good administration then they can be adopted by legislation, eg by a short limitation period, presumptions as to validity, even (which I mention but do not necessarily think appropriate since the matter has not been discussed) a power in the courts to limit the effects of any order for recovery comparable to that conferred on the Court of Justice of the European Communities by art 174 of the EEC Treaty. Because of the other legislative provisions dealing with repayment of various taxes it seems in any event that the number of cases where any principle of common law would need to be relied on is likely to be small. The "floodgates" argument is therefore not a persuasive one in this case. If it were a risk, then the Revenue would need to consider appropriate legislation.'

British Steel

[71] In *British Steel* the claimant company paid excise duty on hydrocarbon oil used in its blast furnaces, pursuant to s 6(1) of the Hydrocarbon Oil Duties Act 1979, whilst consistently contending that it was entitled to relief under s 9(1) of that Act on the ground that the oil was not used as fuel. The Commissioners of Customs and Excise consistently rejected that contention.

[72] The claimant brought an action against the commissioners claiming restitution of the excise duty which it had paid on the basis that it qualified for relief, and that the commissioners' demands for payment of the duty had accordingly been unlawful. A preliminary issue was directed as to whether it was open to the claimant to challenge the commissioners' decision otherwise than by way of judicial review. The judge at first instance (see [1996] 1 All ER 1002) held that a claim for repayment of the duty could be brought only under the procedure prescribed by s 9(4) of the relevant Act, and that a complaint by the claimant that it had not been afforded relief under s 9 could only be pursued in judicial review proceedings. The claimant appealed.

[73] The headnote in the report of *British Steel* in the Court of Appeal includes a reference (see [1997] 2 All ER 366 at 366*h*) to a concession by the commissioners that a mistake by them on the issue whether the plaintiff qualified for relief would have been a mistake going to jurisdiction; and that if relief had been refused on an erroneous basis, the decision to refuse relief would have been unlawful.

[74] The relevance of *British Steel* for present purposes is that it is relied on by the appellants as an early application by the Court of Appeal of the *Woolwich* principle.

[75] The leading judgment was given by Sir Richard Scott V-C. At [1997] 2 All ER 366 at 374 he identified the points for decision, as follows:

> 'So there are, in my opinion, two points for decision on this appeal. First, if relief from duty under s 9(1) was unlawfully refused, does it follow that the demands for duty under s 6 were unlawful? Second, if the demands for duty were unlawful, can a common law action for restitution be brought or is the payer restricted to such repayment remedy as may be available under s 9(4)?'

[76] The Vice-Chancellor addressed the second of those two points first, as follows (at 374 and 376):

> 'If the demands by the commissioners for excise duty to be paid on the hydrocarbon oil to be delivered to British Steel's blast furnaces were unlawful demands, it would follow, in my opinion, from the decision of the House of Lords in [*Woolwich*] that whoever paid the duty would have a common law restitutionary right to repayment ... In the present case, it is contended that the commissioners' demand for excise duties was unlawful because the commissioners had made an error in deciding that the use of the oil in the British Steel blast furnaces was not a "qualifying use" and, consequently, had wrongly refused to grant relief from duty under s 9(1). I have yet to examine whether that premise justifies a conclusion that the demands were unlawful, but, if it does, I can see no reason why the principle expressed by Lord Goff should not apply. An unlawful demand for duty must, in a sense, always be an ultra vires demand. Whether the demand is based on ultra vires regulations, or on a mistaken view of the legal effect of valid regulations, or on a mistaken view of the facts of the case, it will, as it seems to me, be bound to be a demand outside the taxing power conferred by the empowering legislation. If, for any of these reasons, a demand for tax is an unlawful demand, it seems to me to follow from the speeches of the majority in [*Woolwich*] that the taxpayer would, prima facie, become entitled, on making payment pursuant to the unlawful demand, to a common law restitutionary right to repayment. The empowering legislation in question, or other legislation, might remove the taxpayer's common law right to repayment. That would depend on the construction of the Act or Acts in question. In the present case, if the demands for excise duty were unlawful, the payer would, in my judgment, have a prima facie common law right to repayment. I would not construe s 9(4) as removing that common law right. First, the common law right is not expressly removed. Second, s 9(4) does not purport to constitute a comprehensive statutory scheme for recovery of excise duty paid but not due. If duty were demanded and paid on oil that did not correspond to the description of "hydrocarbon oil" in ss 1 and 2, s 9(4) would not enable recovery to be claimed. The common law claim would be the appropriate means of

redress. If prospective relief under s 9(1) had been granted but, unlawfully, duty had none the less been demanded and, perforce, paid, s 9(4) would not apply. The common law claim for restitution would be the means of redress. Third, s 9(4) assumes, implicitly, that the excise duty has been paid pursuant to a lawful demand. It is expressed to deal with a situation in which prospective relief could have been given under s 9(1) but, for some reason or other, has not been given. Prima facie, if prospective relief has not been given under s 9(1), duty will have been properly demanded under s 6. For these reasons, if British Steel has an arguable case that the demands for payment of excise duty were unlawful demands, I would not be willing to strike out its action on the ground that s 9(4) had removed the common law right of recovery.'

[77] Saville LJ agreed with the Vice-Chancellor. Millett LJ also concurred in the result, albeit he considered that the only concession which the commissioners had made was that a refusal of relief in circumstances where relief should have been granted would amount to an unlawful demand for payment. In the course of his judgment, Millett LJ said this ([1997] 2 All ER 366 at 382):

'What the appellants have done is to seek to obtain retrospective relief by bringing private law proceedings in restitution to recover duty unlawfully demanded of them by a public authority. They can do this if (i) the demand for payment of the duty was unlawful and (ii) the private law remedy is not excluded by the statutory regime: see [*Woolwich*]. They have no difficulty with the second of these requirements: the statutory regime established by s 9(1) and (4) is not comprehensive; it is limited to persons who possessed the necessary approval at the relevant time, and the appellants did not. But while this enables the appellants to satisfy the second requirement, it creates an insuperable obstacle in the shape of the first. The commissioners' demand for duty was not unlawful: they were authorised to demand the duty by the combined effect of s 6 of the 1979 Act and s 43(1) of the Customs and Excise Management Act 1979. Section 9(1) of the former Act authorised them to permit the release of oil from bond to an approved person, but they had no power to permit its release to the appellants, even if they were intending to put it to an intended use, unless they could show that they had been approved.'

Kleinwort Benson

[78] This case, which consisted of conjoined claims by the claimant bank against four local authorities, concerned the (now notorious) interest rate 'swap' transactions entered into by local authorities. Following the decision of the House of Lords in *Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, [1992] 2 AC 1 that such transactions were ultra vires local authorities, the bank commenced proceedings against four local authorities claiming restitution of the sums which it had paid them. Some of the payments had been made outside the primary six-year limitation period, and in respect of those payments a preliminary issue was ordered as to whether the bank's claim that such payments had been made by it in the mistaken belief that they were being made pursuant to a binding contract disclosed a cause of action for mistake of law; and, if so, whether the mistake was one in respect of which the bank could rely on

s 32(1)(c), so that the period of limitation had not begun to run until the bank had discovered the mistake or could with reasonable diligence have discovered it. a

[79] The judge at first instance concluded that on the authorities as they then stood he was bound to conclude that money paid under a mistake of law was not recoverable. He accordingly declined to address the preliminary issue. Leave was given for consolidated appeals by the bank direct to the House of Lords. By a majority (Lord Goff, Lord Hoffmann and Lord Hope of Craighead; b Lord Browne-Wilkinson and Lord Lloyd of Berwick dissenting) the House of Lords allowed the bank's appeals (see [1999] 2 AC 349).

[80] Lord Browne-Wilkinson and Lord Lloyd dissented on the single ground that when the payments in question were made the bank was not labouring under any mistake of law. As Lord Browne-Wilkinson put it ([1998] 4 All ER 513 at 517, [1999] 2 AC 349 at 357): c

> 'Were it not for one matter, I would be in full agreement with [Lord Goff's] views. But unfortunately he and the majority of your Lordships take the view that when established law is changed by a subsequent decision of the courts, money rightly paid in accordance with the old established law is recoverable as having been paid under a mistake of law. I take the view that d the moneys are not recoverable since, at the time of payment, the payer was not labouring under any mistake.'

[81] As to *Hazell*'s case, Lord Browne-Wilkinson said this ([1998] 4 All ER 513 at 517, [1999] 2 AC 349 at 358):

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> 'My view ... is that although the decision in *Hazell* is retrospective in its effect, retrospection cannot falsify history: if at the date of each payment it was settled law that local authorities had capacity to enter into swap contracts, Kleinworts were not labouring under any mistake of law at that date. The subsequent decision in *Hazell*'s case could not create a mistake where no mistake existed at the time.' f

[82] Lord Browne-Wilkinson accordingly concluded ([1998] 4 All ER 513 at 521, [1999] 2 AC 349 at 362) that—

> 'if, at the date of payment, the law was settled by clear judicial authority then a payment in accordance with such law was not made under a mistake g of law even if the law has subsequently been changed by later judicial decision.'

[83] Lord Browne-Wilkinson concluded his speech as follows ([1998] 4 All ER 513 at 523, [1999] 2 AC 349 at 364):

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> 'My Lords, I agree with the views of the Law Commission and would therefore have held that Kleinworts would not be entitled to recover on the grounds of mistake of law if at the time of payment Kleinworts were, or if they had sought advice would have been, advised by all lawyers skilled in the field that the swaps agreements were valid. My Lords, in these circumstances I find myself in a quandary. I am convinced that the law j should be changed so as to permit moneys paid under a mistake of law to be recovered. I also accept, for the reasons given by my noble and learned friend, Lord Goff of Chieveley, that the relevant limitation period applicable to such a claim would be that laid down by s 32(1)(c) of the Limitation Act 1980, ie six years from the date on which the mistake was, or could with

reasonable diligence have been, discovered. The majority of your Lordships consider that such claim will arise when the law (whether settled by existing authority or by common consensus) is changed by a later decision of the courts. The consequence of this House in its judicial capacity introducing such a fundamental change would be as follows. On every occasion in which a higher court changed the law by judicial decision, all those who had made payments on the basis that the old law was correct (however long ago such payments were made) would have six years in which to bring a claim to recover money paid under a mistake of law. All your Lordships accept that this position cannot be cured save by primary legislation altering the relevant limitation period. In the circumstances, I believe that it would be quite wrong for your Lordships to change the law so as to make money paid under a mistake of law recoverable since to do so would leave this gaping omission in the law. In my judgment the correct course would be for the House to indicate that an alteration in the law is desirable but leave it to the Law Commission and Parliament to produce a satisfactory statutory change in the law which, at one and the same time, both introduces the new cause of action and also properly regulates the limitation period applicable to it. I would dismiss these appeals.'

[84] Lord Lloyd agreed with the majority that if there was a mistake of law on which the bank could rely, it could not have discovered that mistake until the House of Lords gave judgment in *Hazell*'s case; and that by virtue of s 32(1)(c) time would not begin to run until then. However, like Lord Browne-Wilkinson, he concluded that there had been no such mistake.

[85] I turn next to Lord Goff's speech, which Lord Hoffmann described at the outset of his own speech ([1998] 4 All ER 513 at 552, [1999] 2 AC 349 at 398) as one of the most distinguished of Lord Goff's contributions to the development of the law of restitution.

[86] Lord Goff identified the issues for decision as follows ([1998] 4 All ER 513 at 525, [1999] 2 AC 349 at 367):

'I propose to consider the issues in the following order. I shall first consider issue (1) as ordered by Langley J, which raises the question whether the rule precluding recovery of money paid under a mistake of law should remain part of English law. As part of that issue [(1)] I shall also consider whether, if the answer to that question is "No," there should be an exception to recovery on the ground of mistake of law (A) in cases where the money has been paid under a settled understanding of the law which has subsequently been changed by judicial decision, or (B) in cases where the money has been the subject of an honest receipt by the defendant. I shall refer to these two issues as issue (1A) and issue (1B) respectively. I shall then consider the issue concerned with the impact upon recovery of the fact that all the interest rate swap transactions in question were fully performed. I shall refer to that issue as issue (2). Finally I shall turn to consider the second issue as ordered by Langley J which raises the question whether, on the true construction of section 32(1)(c) of the Act of 1980, the subsection applies to mistakes of law. That I shall refer to as issue (3).'

[87] Lord Goff then set out issue (1) in his list of issues in the following terms:

'Issue 1: Whether the present rule, under which in general money is not recoverable in restitution on the ground that it was paid under a mistake of law, should be maintained as part of English law.' a

[88] Addressing that issue, Lord Goff began by tracing the history of what he called 'the mistake of law rule'. He then reviewed the lengthy catalogue of academic and judicial criticism of the mistake of law rule. In the next section of his speech, headed 'Rejection of the mistake of law rule in the common law world', Lord Goff drew attention to the fact that the mistake of law rule had already been abrogated in a number of common law jurisdictions, either by legislation or by judicial decision. In this context, he drew particular attention to the dissenting judgment of Dickson J in the Canadian case of *Hydro Electric*, which was subsequently adopted in the *Air Canada* case. Turning to jurisdictions which apply a system based on the civil law, Lord Goff cited the South African case of *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) SA 202 as an example of a case in which the mistake of law rule was rejected. b c

[89] After noting that the Law Commission had recommended that the mistake of law rule be abrogated in this jurisdiction, Lord Goff turned, in a section of his speech headed 'Comparative law', to a consideration of the policy adopted in a number of civil law systems in Europe towards the recovery of money paid under a mistake of law. He noted that in a number of European cases (he referred in particular to cases in Germany and France) it had been held that it was unnecessary for the plaintiff to prove that he was mistaken; and that such cases were concerned with the recovery of taxes. He continued ([1998] 4 All ER 513 at 532, [1999] 2 AC 349 at 375): d e

'In such cases, as was recently held by this House in *Woolwich Equitable Building Society (No 2) v IRC* [1992] 3 All ER 737, [1993] AC 70, English law too dispenses with any requirement that the money should have been paid under a mistake and indeed goes further, allowing recovery even if the taxpayer pays in the belief that the money is not due. Here is food for thought for both German and English comparative lawyers. In this connection I wish to add in passing that, in *Comr of State Revenue v. Royal Insurance Australia Ltd* (1994) 126 ALR 1 at 10, Mason CJ stated that in the *Woolwich* case the House of Lords was "unwilling to acknowledge that causative mistake of law is a basis of recovery;" but, with respect, no question of recovery on the ground of a mistake of law arose in that case, because the Woolwich Building Society throughout asserted that the money was not due.' f g

[90] In the next section of his speech, which is headed 'Conclusion on the first issue', Lord Goff said this ([1998] 4 All ER 513 at 532, [1999] 2 AC 349 at 375): h

'For all these reasons, I am satisfied that your Lordships should, if you decide to consider the point yourselves rather than leave it to the Law Commission, hold that the mistake of law rule no longer forms part of English law. I am very conscious that the Law Commission has recommended legislation. But the principal reasons given for this were that it might be some time before the matter came before the House, and that one of the dissentients in the *Woolwich* case (Lord Keith of Kinkel) had expressed the opinion that the mistake of law rule was too deeply embedded to be uprooted judicially ... Of these two reasons, the former has not proved to be justified, and the latter does not trouble your Lordships because a more j

robust view of judicial development of the law is, I understand, taken by members of the Appellate Committee hearing the present appeals. Moreover, especially in the light of developments in other major common law jurisdictions, not to mention South Africa and Scotland, the case for abrogation is now so strong that the respondents in these appeals have not argued for its retention. In these circumstances I can see no good reason for postponing the matter for legislation, especially when we do not know whether or, if so, when Parliament may legislate. Finally I believe that it would, in all the circumstances, be unjust to deprive the appellant, Kleinwort Benson, of the benefit of the decision of the House on this point. I would therefore conclude on issue (1) that the mistake of law rule should no longer be maintained as part of English law, and that English law should now recognise that there is a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution.'

[91] Lord Goff then turned to what he described as 'a central question in these appeals', as to whether payments made on the basis of a settled understanding of the law which is later changed by judicial decision should be recoverable on the ground of mistake of law. He said this:

'This [question] relates to the fact that the payments of which recovery is sought in these cases were made under contracts which at the time were understood by all concerned to be valid and binding, so that the payments themselves were believed to be lawfully due under those contracts. This misunderstanding was, of course, removed by the decision of this House in *Hazell v Hammersmith and Fulham London BC* ... that the contracts were beyond the powers of the local authorities involved and so void. The argument now advanced by the local authorities is that payments so made on the basis of a settled understanding of the law which is later changed by a judicial decision should not be recoverable on the ground of mistake of law.' (See [1998] 4 All ER 513 at 533, [1999] 2 AC 349 at 376.)

[92] After referring to the declaratory theory of judicial decisions (that is to say, the theory that judicial decisions do not themselves constitute the law but are merely evidence of the law), Lord Goff turned ([1998] 4 All ER 513 at 536, [1999] 2 AC 349 at 379) to the question whether the bank was labouring under a mistake of law when it paid money to the local authorities under interest swap agreements which it believed to be valid. He began his consideration of this question by saying this ([1998] 4 All ER 513 at 536, [1999] 2 AC 349 at 379):

'It is in the light of the foregoing that I have to ask myself whether the Law Commission's "settled understanding of the law" proposal forms part of the common law. This, as I understand the position, requires that I should consider whether parties in the position of Kleinwort Benson were mistaken when they paid money to local authorities under interest swap agreements which they, like others, understood to be valid but have later been held to be void. To me, it is plain that the money was indeed paid over under a mistake, the mistake being a mistake of law. The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay

it. Plainly, therefore, he paid the money under a mistake of law, and accordingly, subject to any applicable defences, he is entitled to recover it.' a

[93] At [1998] 4 All ER 513 at 537–540, [1999] 2 AC 349 at 381–384 Lord Goff addressed the question whether it was appropriate for the House of Lords to recognise a limit to recovery on the lines of the Law Commission's 'settled understanding of the law' proposal. In the course of the argument, both before the judge and in this court, this section of Lord Goff's speech has been subjected by both Mr Glick and by Mr Lawrence Rabinowitz QC (for DMG) to the most minute, not to say microscopic, analysis. I must therefore quote it in full: b

'The question then arises whether, having regard to the fact that the right to recover money paid under a mistake of law is only now being recognised for the first time, it would be appropriate for your Lordships' House so to develop the law on the lines of the Law Commission's proposed reform as a corollary to the newly developed right of recovery. I can see no good reason why your Lordships' House should take a step which, as I see it, is inconsistent with the declaratory theory of judicial decision as applied in our legal system, under which the law as declared by the judge is the law applicable not only at the date of the decision but at the date of the events which are the subject of the case before him, and of the events of other cases in pari materia which may thereafter come before the courts. I recognise, of course, that the situation may be different where the law is subject to legislative change. That is because legislation takes effect from the moment when it becomes law, and is only retrospective in its effect to the extent that this is provided for in the legislative instrument. Moreover even where it is retrospective, it has the effect that as from the date of the legislation a new legal provision will apply retrospectively in place of that previously applicable. It follows that retrospective legislative change in the law does not necessarily have the effect that a previous payment was, as a result of the change in the law, made under a mistake of law at the time of payment. (I note in parenthesis that in *Comr of State Revenue v Royal Insurance Australia Ltd* (1994) 126 ALR 1, the High Court of Australia was divided on the question whether the retrospective legislation there under consideration had the effect that a previous payment had been made under a mistake of law.) As I have already pointed out, this is not the position in the case of a judicial development of the law. But, for my part, I cannot see why judicial development of the law should, in this respect, be placed on the same footing as legislative change. In this connection, it should not be forgotten that legislation which has an impact on previous transactions can be so drafted as to prevent unjust consequences flowing from it. That option is not, of course, open in the case of judicial decisions. At this point it is, in my opinion, appropriate to draw a distinction between, on the one hand, payments of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions. The former category of cases was considered by your Lordships' House in *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70, in which it was held that at common law taxes exacted ultra vires were recoverable as of right, without the need to invoke a mistake of law by the payer. Moreover reference was made, in the course of the hearing, to the various statutory provisions (usefully summarised in the Law Commission's Consultation c d e f g h j

Paper (Law Com no 120) at pp 74–84) which regulate the repayment of overpaid tax. For present purposes it is of interest that, in the case of some taxes (including income and corporation tax), no relief is given "in respect of an error or mistake as to the basis on which the liability ... ought to have been computed where the return was in fact made on the basis of or in accordance with the practice generally prevailing at the time when the return was made": see the proviso to s 33(2) of the [TMA]. Two observations may be made about the present situation. (I of course have it in mind that this is the subject of proposals for legislative reform contained in the Law Commission's Report *Restitution: mistakes of law and ultra vires public authority receipts and payments* (Law Com no 227) (1994), but your Lordships are concerned with the law as it stands at present.) The first observation is that, in our law of restitution, we now find two separate and distinct regimes in respect of the repayment of money paid under a mistake of law. These are (1) cases concerned with repayment of taxes and other similar charges which, when exacted ultra vires, are recoverable as of right at common law on the principle in the *Woolwich* case, and otherwise are the subject of statutory regimes regulating recovery; and (2) other cases, which may broadly be described as concerned with repayment of money paid under private transactions, and which are governed by the common law. The second observation is that, in cases concerned with overpaid taxes, a case can be made in favour of a principle that payments made in accordance with a prevailing practice, or indeed under a settled understanding of the law, should be irrecoverable. If such a situation should arise with regard to overpayment of tax, it is possible that a large number of taxpayers may be affected; there is an element of public interest which may militate against repayment of tax paid in such circumstances; and, since ex hypothesi all citizens will have been treated alike, exclusion of recovery on public policy grounds may be more readily justifiable. In the present case, however, we are concerned with payments made under private transactions. It so happens that a significant number of payments were in fact made under interest rate swap agreements with local authorities before it was appreciated that they were void; but the number is by no means as great as might conceivably occur in the case of taxes overpaid in accordance with a prevailing practice, or under a settled understanding of the law. Moreover the element of public interest is lacking. In cases such as these I find it difficult to understand why the payer should not be entitled to recover the money paid by him under a mistake of law, even if everybody concerned thought at the time that interest rate swap agreements with local authorities were valid. Of course, I recognise that the law of restitution must embody specific defences which are concerned to protect the stability of closed transactions. The defence of change of position is one such defence; the defences of compromise, and settlement of an honest claim (the scope of which is a matter of debate), are others. It is possible that others may be developed from judicial decisions in the future. But the proposed "settled understanding of the law" defence is not, overtly, such a defence. It is based on the theory that a payment made on that basis is not made under a mistake at all. Once that reasoning is seen not to be correct, the basis for the proposed defence is, at least in cases such as the present, undermined. I wish further to add that the proposal that a payment made under a settled

understanding of the law, later proved to be erroneous, should be irrecoverable, does not depend upon the lapse of any period of time after the date of the payment in question. Take the present case. Suppose that, shortly after the payment by Kleinwort Benson to a local authority of the first sum due under an interest rate swap contract, it transpires that the contract was ultra vires the local authority and so void, and that the sum so paid was therefore not due. Let it also be assumed that there have been relatively few transactions of this kind with local authorities, but enough for it to be said that that sum was paid on the basis of a settled understanding that the money was lawfully due. I find it difficult to accept that, for that reason alone, the payment would be irrecoverable as having been paid under a mistake of law. Indeed it is a remarkable feature of the proposed principle that, the longer ago the payment was made, the less likely is it to have been made under a settled understanding of the law. An appropriately drawn limitation statute would surely produce a more just result. This is a point to which I will return later in this opinion. For these reasons alone, therefore, I would reject the argument of the local authorities on this point. But I wish to refer also to the insecure foundation upon which the proposed provision is based, arising from the difficulty of defining the circumstances in which it should apply. The New Zealand statutory provision (s 94A(2) of the Judicature Act 1908) excludes relief in respect of "any payment made at a time when the law requires or allows, or *is commonly understood to require or allow*, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of payment". The Western Australian statutory provision (s 23(2) of the Law Reform (Property, Perpetuities and Succession) Act 1962) takes the same form. It is recognised, however, that the concept of "common understanding" of the law has given rise to difficulty ... and, on this score at least, the statutory provision has been the subject of criticism. In this country the Law Commission has attempted to improve on the New Zealand statute by referring not to a common understanding of the law, but instead to a "settled view of the law" which has been departed from by a subsequent judicial decision. However, as [counsel for Kleinwort Benson] pointed out in argument, there could be much scope for argument over what constituted a settled view of the law. Take the case of interest rate swap agreements. These were assumed by the banks (and indeed by others concerned) to be within the powers of local authorities; but this assumption appears to have been based on practical grounds, rather than on advice about the legal position. Nor do the local authorities appear to have addressed the legal position until after the matter was raised by the Audit Commission in 1987, over five years after agreements of this kind began to be entered into by local authorities. Had the point arisen under a statute in the form recommended by the Law Commission, it would have been necessary to consider whether the above circumstances gave rise to a "settled view of the law." It is only necessary to pose the question to realise how difficult it would have been to answer it in the present case, and very possibly in the case of other payments made under private transactions. For this reason alone it comes as no surprise that the Law Reform Commission of British Columbia decided ... not to recommend the adoption of any such provision in that Province, though they also considered ... that the New Zealand

statutory provision "goes far beyond what is required". The Law Reform Committee of South Australia ... likewise did not recommend the adoption of any such provision, though three years later the Law Reform Commission of New South Wales ... proposed the legislative adoption of a similar but not identical provision. In Scotland ... the Scottish Law Commission at first recommended its adoption, but later resiled from that recommendation ... This division of opinion does not encourage statutory adoption of a provision in these or comparable terms, still less its recognition as part of the common law of this country.'

[94] In the following two sections of his speech, Lord Goff turned to the question of 'honest receipt' (issue (1B) in his list of issues) and to the significance of the fact that the transactions in issue were completed transactions (issue (2) in his list of issues). Since neither of these issues is material for present purposes I can take up Lord Goff's speech at [1998] 4 All ER 513 at 543, [1999] 2 AC 349 at 387, where he turned to the question whether s 32(1)(c) applies to mistakes of law (issue (3) on his list of issues). He concluded that s 32(1)(c) does so apply. He said this ([1998] 4 All ER 513 at 544, [1999] 2 AC 349 at 389):

'I recognise that the effect of s 32(1)(c) is that the cause of action in a case such as the present may be extended for an indefinite period of time. I realise that this consequence may not have been fully appreciated at the time when this provision was enacted, and further that the recognition of the right at common law to recover money on the ground that it was paid under a mistake of law may call for legislative reform to provide for some time limit to the right of recovery in such cases. The Law Commission may think it desirable, as a result of the decision in the present case, to give consideration to this question; indeed they may think it wise to do so as a matter of some urgency. If they do so, they may find it helpful to have regard to the position under other systems of law, notably Scottish and German law. On the section as it stands, however, I can see no answer to the submission of Kleinwort Benson that their claims in the present case, founded upon a mistake of law, fall within the subsection.'

[95] Lord Goff summarised his conclusions on the various issues as follows ([1998] 4 All ER 513 at 544, [1999] 2 AC 349 at 389):

'In the result, I would answer the questions posed for your Lordships under the various issues as follows.

Issue 1. The present rule, under which in general money is not recoverable in restitution on the ground that it has been paid under a mistake of law, should no longer be maintained as part of English law, from which it follows that the facts pleaded by Kleinwort Benson in each action disclose a cause of action in mistake.

Issue 1A. There is no principle of English law that payments made under a settled understanding of the law which is subsequently departed from by judicial decision shall not be recoverable in restitution on the ground of mistake of law.

Issue 1B. It is no defence to a claim in English law for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to retain the money or property.

Issue 2. There is no principle of English law that money paid under a void contract is not recoverable on the ground of mistake of law because the contract was fully performed.

Issue 3. Section 32(1)(c) of the Limitation Act 1980 applies in the case of an action for the recovery of money paid under a mistake of law.'

[96] Lord Hoffmann agreed with Lord Goff, and confined his speech to a consideration of the one issue which divided their Lordships, viz whether the bank made the payments in question under a mistake of law. In the course of his speech he expressed the clear view that the question whether the law should recognise a 'settled law defence' (he referred to it as a 'settled view rule') was a question for Parliament. He concluded his speech by saying this ([1998] 4 All ER 513 at 555, [1999] 2 AC 349 at 401):

'I should say in conclusion that your Lordships' decision leaves open what may be difficult evidential questions over whether a person making a payment has made a mistake or not. There may be cases in which banks which have entered into certain kinds of transactions prefer not to raise the question of whether they involve any legal risk. They may hope that if nothing is said, their counter-parties will honour their obligations and all will be well, whereas any suggestion of a legal risk attaching to the instruments they hold might affect their credit ratings. There is room for a spectrum of states of mind between genuine belief in validity, founding a claim based on mistake, and a clear acceptance of the risk that they are not. But these questions are not presently before your Lordships.'

[97] Finally, so far as *Kleinwort Benson* is concerned, I turn to the speech of Lord Hope. Lord Hope agreed ([1998] 4 All ER 513 at 558, [1999] 2 AC 349 at 405) with Lord Goff that a decision as to whether the mistake of law rule should be abrogated should not be left to Parliament. Under the heading 'Was there a mistake?', Lord Hope said this ([1998] 4 All ER 513 at 560, [1999] 2 AC 349 at 407–408):

'Subject to any defences that may arise from the circumstances, a claim for restitution of money paid under a mistake raises three questions: (1) was there a mistake? (2) did the mistake cause the payment? and (3) did the payee have a right to receive the sum which was paid to him? The first question arises because the mistake provides the cause of action for recovery of the money had and received by the payee. Unless the payer can prove that he acted under a mistake, he cannot maintain an action for money had and received on this ground. The second question arises because it will not be enough for the payer to prove that he made a mistake. He must prove that he would not have made the payment had he known of his mistake at the time when it was made. If the payer would have made the payment even if he had known of his mistake, the sum paid is not recoverable on the ground of that mistake. The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground. In the present case the second and third questions do not appear to present any difficulty. But the first question raises an issue of very real

> importance. The answer which is given to it will have significant implications for the future development of the law of restitution on the ground of unjust enrichment. In my opinion the proper starting point for an examination of this issue is the principle on which the claim for restitution of these payments is founded, which is that of unjust enrichment. The essence of this principle is that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive. This has been the basis for the law of unjust enrichment as it has developed both in the civilian systems and in Scotland, which has a mixed system—partly civilian and partly common law. On the whole, now that the common law systems see their law of restitution as being based upon this principle, one would expect them to apply it, broadly speaking, in the same way and to reach results which, broadly speaking, were similar ... What, then, is the function of mistake in the field of restitution on the ground of unjust enrichment? The answer, one may say, is that its function is to show that the benefit which has been received was an unintended benefit. A declaration of intention to confer the benefit, even if unenforceable, will be enough to justify the retention of the enrichment. A mistake, on the other hand, will be enough to justify the restitutionary remedy, on the ground that a benefit which cannot be legally justified should not be retained where it was a mistaken—and thus unintended—benefit.'

[98] With reference to the doctrine of unjust enrichment, Lord Hope said ([1998] 4 All ER 513 at 561, [1999] 2 AC 349 at 409): 'It is the mistake by the payer which, as in the case of failure of consideration and compulsion, renders the enrichment of the payee unjust.'

[99] He continued:

> 'The common law accepts that the payee is enriched where the sum was not due to be paid to him, but it requires the payer to show that this was unjust. Whereas in civilian systems proof of knowledge that there was no legal obligation to pay is a defence which may be invoked by the payee, under the common law it is for the payer to show that he paid under a mistake. My impression is that the common law tends to place more emphasis on the need for proof of a mistake. But the underlying principle in both systems is that of unjust enrichment. The purpose of the principle is to provide a remedy for recovery of the enrichment where no legal ground exists to justify its retention. But does it matter whether the mistake is one of fact or one of law?'

[100] Lord Hope observed ([1998] 4 All ER 513 at 562, [1999] 2 AC 349 at 409) that there is no essential difference as between fact and law in regard to the payer's state of mind. He continued ([1998] 4 All ER 513 at 561, [1999] 2 AC 349 at 409–410):

> 'This may vary from one of complete ignorance to a state of ample knowledge but a misapplication of what is known to the facts. The mistake may have been caused by a failure to take advice, by omitting to examine the available information or by misunderstanding the information which has been obtained. Or it may have been due to a failure to predict correctly how the court would determine issues which were unresolved at the time of the

payment, or even to foresee that there was an issue which would have to be resolved by the court. As Mason CJ said in [*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 374], the concept of mistake includes cases of sheer ignorance as well as of positive but incorrect belief. Cases where the payer was aware that there was an issue of law which was relevant but, being in doubt as to what the law was, paid without waiting to resolve that doubt may be left on one side. A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong—and that is so whether the issue is one of fact or one of law. As for mistake, this may arise where there is no suggestion that the law has changed since the payment was made. If it can be demonstrated by reference to statute or to case law that the law was overlooked or was applied wrongly, the position will be the same as that where the mistake was one as to the state of the facts. It is very unusual for a statute to provide for the law to be changed retrospectively, but this is not unknown: see the War Damage Act 1965. If the law is changed retrospectively by statute, so that a payment which was legally due when it was paid has now become undue, the correct analysis will be that there was no mistake at the time when it was made. The enrichment will have been due to the fact that the law was changed retrospectively by the statute.'

[101] Lord Hope went on to consider the position where the fact that the payment was not legally due at the time it was made was only revealed later by subsequent case law: ie where the payment was made on the understanding that the law on the point was settled and that understanding was shown by subsequent case law to have been wrong. He concluded ([1998] 4 All ER 513 at 563, [1999] 2 AC 349 at 411) that the critical question in this respect was: 'whether the payer would have made the payment if he had known what he is now being told was the law.'

[102] As to the effect of the decision in *Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, [1992] 2 AC 1, Lord Hope said ([1998] 4 All ER 513 at 564, [1999] 2 AC 349 at 411) that if it were necessary to decide the point, he would conclude that it would not be right to say that the decision changed the law; rather, it clarified a point which had been overlooked and which was in need of determination by the court. He continued:

> 'But the situation seems to me to be no different in principle from one where the facts are shown, as a result of inquiries which at the time of the payment were overlooked or not thought to be necessary, to have been different from what they had been thought to be at the time of the payment by the payer. Prima facie the bank is entitled to restitution on the ground of mistake.'

[103] In the next section of his speech, Lord Hope addressed the question whether there should be defences in mistake of law cases which were not available in mistake cases generally. In this context he referred once again ([1998] 4 All ER 513 at 564, [1999] 2 AC 349 at 412) to the requirement that the claimant show that he acted under a mistake which caused him to pay a sum which the payee was not legally entitled to receive, saying that '[a] payment made in the knowledge that there was a ground to contest liability will be irrecoverable'. He

turned ([1998] 4 All ER 513 at 566–567, [1999] 2 AC 349 at 414–414) to the 'settled law defence' favoured by the Law Commission, saying this:

> 'The "settled law" defence is the one favoured by the Law Commission, after consultation, in its report ... They have recommended that a restitutionary claim in respect of any payment, service or benefit that has been made, rendered or conferred under a mistake of law should not be permitted merely because it was done in accordance with a settled view of the law at the time, which was later departed from by a subsequent judicial decision ... One of the objections to the "settled law" defence is that it is incapable of precise definition. Each case would have to be decided on the evidence, that would create uncertainty, and it is difficult to predict the absurdities which may result. One point however does appear to emerge from the discussions so far. This is that a payment made on a settled view of the law is more likely to be excusable, and thus to be one where restitution would more obviously be justified, than a payment made as a result of one man's mistake or ignorance. Yet a mistake of law which only the payer himself had made would not be caught by the defence. As [counsel for Kleinwort Benson] said, the worse the legal advice the more likely the payer could show that the defence was not applicable. But I do not need to elaborate on this point. The valuable work done by the Scottish Law Commission has shown a need for caution which I consider to be entirely justified. I would not favour the introduction of such a defence judicially. Nor do I think that it would be right to apply it to this case, even if its recognition were to be thought to be desirable on grounds of public policy. The fact that restitution has already been given in many of the interest swap cases, albeit on the ground of failure of consideration, would create a situation which I would find unacceptable. Unless the defence can satisfy the test of denying restitution in all cases on the same facts it ought not, in fairness to all parties, to be applied in any of them.'

[104] Lord Hope turned ([1998] 4 All ER 513 at 568, [1999] 2 AC 349 at 416) to the question whether the bank's action was an action for relief from the consequences of a mistake, within the meaning of s 32(1)(c). He concluded that it was, since there was nothing in the wording of the provision to restrict its application to a mistake of fact. He continued ([1998] 4 All ER 513 at 569, [1999] 2 AC 349 at 417, 418):

> 'The objection may be made that time may run on for a very long time before a mistake of law could have been discovered with reasonable diligence, especially where a judicial decision is needed to establish the mistake. It may also be said that in some cases a mistake of law may have affected a very large number of transactions, and that the potential for uncertainty is very great. But I do not think that any concerns which may exist on this ground provide a sound reason for declining to give effect to the section according to its terms. The defence of change of position will be available, and difficulties of proof are likely to increase with the passage of time. I think that the risk of widespread injustice remains to be demonstrated. If the risk is too great that is a matter for the legislature ... It may be that even in mistake of fact cases where restitution is available under English law some further restriction of the circumstances where indefinite

postponement is available may be appropriate. But that is a matter which is best considered by the Law Commission.' a

Nurdin

[105] In *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249 the plaintiff made overpayments of rent, including one payment which it made in May 1997 in reliance on advice that the payment would be recoverable following litigation establishing that it was an overpayment. The court held that the payments in question were indeed overpayments. The plaintiff then sought repayment of the sums overpaid (including the payment made in May 1997), on the basis that they were made under a mistake of fact, and were therefore recoverable; alternatively, that even if they were made under a mistake of law, it would be right to order repayment. The defendant landlord conceded that the payments other than the May 1997 payment were repayable, but it contended that the May 1997 payment had been made not as a result of a mistake as to whether the plaintiff was liable to make it, but because of a mistake as to its right to recover it. b c d

[106] The relevance of the *Nurdin* case for present purposes lies in Neuberger J's analysis of the circumstances in which it can be said that a payment has been made under a mistake (whether of fact or law). Neuberger J held that all the overpayments were recoverable, including the payment made in May 1997, as having been made under a mistake of fact. Neuberger J turned ([1999] 1 All ER 941 at 961, [1999] 1 WLR 1249 at 1271) to the submission of Mr Nugee QC (for the defendant landlord) that the plaintiff's case based on mistake was logically unsustainable since if the May 1997 payment were to be held to be recoverable, there would, by definition, have been no mistake; and if it were held *not* to be recoverable, that would be the end of the matter and no question of mistake would arise. In support of this submission, Mr Nugee had relied on Lord Hope's observation in *Kleinwort Benson* to the effect that a person who pays when in doubt takes the risk that he may be wrong (quoted in [100], above) and on his observation that it is the mistake by the payer which renders the enrichment of the payee unjust (quoted in [97], above). Neuberger J considered that these observations of Lord Hope were of little assistance to the defendant landlord since, among other things, the decision of the House of Lords in the *Kleinwort Benson* case was concerned with a case where a payment had been made under a mistake as to liability and Lord Hope's observations had to be read in that context. e f g

[107] Neuberger J then turned ([1999] 1 All ER 941 at 962, [1999] 1 WLR 1249 at 1271) to a submission by Mr Nugee based on the distinction drawn by Lord Goff in *Woolwich* between a case in which money is paid under a mistake of law and a case where the payer makes the payment notwithstanding that he is aware that he can contest his liability in proceedings. Neuberger J said: h

> 'In my judgment, Nurdin's argument on this point is correct. First, as a matter of principle, it seems to me that the correct question for the court to ask itself when considering whether money was paid under a mistake of law (and is therefore prima facie recoverable) would at least normally be whether the payment would have occurred if the payer had not made the alleged mistake. It is hard to see a good reason, either in principle or in practice, for holding that a person should be entitled to recover a payment made under a mistake, if that mistake relates to the question of his liability, but that he j

should not be entitled to recover the payment if the mistake was of some other nature. As I see it, if there was a mistake, and particularly if it related directly and closely to the payment and to the relationship between payer and payee, and, above all, if the mistake had not been made there would have been no payment, then the payment in question is prima facie recoverable. I would hesitate, particularly so soon after the *Kleinwort Benson* case, before trying to lay down any general principle, but it does seem to me clear that in order to found a claim for repayment of money paid under a mistake of law, it is necessary for the payer to establish not only that the mistake was made but also that, but for the mistake, he would not have paid the money. It may be that the payer must go further and establish, for instance, that the mistake was directly connected to the overpayment and/or was connected to the relationship between payer and payee. I doubt whether such further requirements, if they exist, would take matters any further in most cases. However, if such further requirements do exist, I believe that they are satisfied here in relation to the May 1997 overpayment ...' (See [1999] 1 All ER 941 at 962–963, [1999] 1 WLR 1249 at 1272.)

[108] The judge turned ([1999] 1 All ER 941 at 964, [1999] 1 WLR 1249 at 1273) to the question of causation, saying:

> 'It may be said that the mistake did not "cause" the payment, and it is fair to say that the concept of causation is one of which the courts and writers have had much to say in many areas of law. As I have mentioned already, I consider that the "but for" test (possibly coupled with a requirement for a close and direct connection between the mistake and the payment and/or a requirement that the mistake impinges on the relationship between payer and payee), is sufficient, in my judgment, to found a claim based on mistake. This seems to me to receive some support from the words used in earlier authorities, "material" and "vital", to describe the necessary quality of the mistake.'

Eagerpath

[109] As noted earlier, the only relevance of *Eagerpath Ltd v Edwards (Inspector of Taxes)* [2001] STC 26 for present purposes lies in Brooke LJ's apparent assumption that a taxpayer who has made a payment of tax under a mistake of law has a cause of action at common law for relief from the consequences of his mistake.

[110] In the *Eagerpath* case, the claimant company's appeal against a corporation tax assessment for the accounting period to 30 April 1987 was settled by agreement under TMA, s 54. In 1990 the claimant ceased trading. In 1992 it made a claim for relief under TMA, s 33 in relation to the accounting period in question on the basis that by mistake interest charges had been treated as trading expenses rather than as a charge on income. The Revenue rejected the claim. The Special Commissioners dismissed the claimant's appeal, holding that relief on the ground of mistake was precluded by reason of the settlement under s 54 (see *Grafton Ltd v IRC* [1998] STC (SCD) 278). On the claimant's appeal to the High Court, the Revenue argued that the High Court had no jurisdiction since, by virtue of s 33(4), there was no appeal from a decision of the Special Commissioners save 'on a point of law arising in connection with the computation of profits'. Arden J dismissed the claimant's appeal (see [1999]

STC 771), holding that s 33(4) could not be circumvented by submitting that the Special Commissioners had failed to deal with the appeal properly; that could only be done, if at all, by judicial review. She further held that the question whether the treatment of interest was included in the s 54 agreement was not a point of law arising in connection with the computation of profits.

[111] The Court of Appeal upheld Arden J's decision (see [2001] STC 26). The leading judgment was given by Robert Walker LJ, but the relevance of the case for present purposes lies in the concurring judgment of Brooke LJ. In the course of his judgment, Brooke LJ said this with reference to TMA, s 33:

> '33. The continued existence of a statutory scheme of this kind, founded on executive and legislative benevolence, is strangely inconsistent with modern rights-based law and the ability of the High Court to correct all manner of errors of law, whether or not Parliament has created a statutory avenue to that court by appeal or case stated. Given that the House of Lords has now recognised that the citizen has a right to recover money paid under a mistake of law (see [*Kleinwort Benson*]) it is odd to find a statutory scheme lingering on which denies that right after six years even when the citizen was unaware of the mistake and could not have discovered it with reasonable diligence (see Lord Goff of Chieveley in [*Kleinwort Benson*] (at 389) on the effect of s 32(1)(c) of the [1980 Act] in these cases).
>
> 34. In his ground-breaking speech in [*Woolwich*] Lord Goff spoke of the way in which the recognition by the House of Lords of a right of recovery of wrongly paid taxes at common law (at that time limited to payments made in response to ultra vires demands) afforded "an immediate opportunity for the authorities concerned to reformulate, in collaboration with the Law Commission, the appropriate limits to recovery, on a coherent system of principles suitable for modern society".
>
> 35. The Law Commission published its proposals in response to Lord Goff's invitation in its report ... no 227. ... In its report the commission was sharply critical of certain features of s 33 of the [TMA]. Its preferred solution can be seen in the draft tax clauses set out in its report ... This solution, however, has been rejected by the government, and s 33 still remains on the statute book very much in its original form.
>
> 36. Since 1994 the need for the reform of s 33 has quickened, for three main reasons. The first is the decision of the House of Lords in *Kleinwort Benson*. The second is the judgment of the European Court of Human Rights in *National & Provincial Building Society v United Kingdom* [1997] STC 1466. In that case the court at Strasbourg held that restitution proceedings for taxes paid under regulations later declared invalid involved the determination of the applicant's civil rights within the meaning of art 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the convention). The third is the coming into force of the Human Rights Act 1998 (the 1998 Act) which bars public authorities (an expression which includes the Revenue as well as the courts) from acting in a way which is incompatible with a convention right (see s 6(1) of the 1998 Act).
>
> 37. In the rights-based culture in which we now live, it is with something resembling the curiosity of an antiquary that I examine the features of s 33 of the [TMA] that are in issue in the proceedings. Although the scheme bears none of the features of modern rights-based law that are so evident in the Law Commission's draft clauses, this does not necessarily mean that the

court can avoid giving effect to them on this occasion. It goes without saying that if Arden J is right, the scheme provides no facility at all for express recourse to the High Court on a point of law of a preliminary kind such as exercised the mind of the commissioner in this case. During the course of argument other examples were given of possible errors of law which did not fall within the rubric of s 33(4), as interpreted by the judge.

38. On the interpretation of s 33(4), however, I have read the judgment of Robert Walker LJ and I have nothing to add to his reasons for upholding the decision of the judge, with which I agree. This does not mean that an aggrieved taxpayer has no potential right of redress. One of the reasons for the overhaul in the procedures for judicial review was to facilitate access to the supervisory jurisdiction of the High Court in cases where inferior tribunals, such as the Special Commissioners, were said to have made errors of law in relation to which no statutory rights of redress were available. The judges of the Administrative Court now adopt a benevolent approach to the interpretation of the time limits for judicial review applications in cases where the taxpayer was concerned first with exhausting his statutory remedies. There is also, as I have made clear, a private law action available through the ordinary courts, although this seems a less than ideal forum for complicated disputes about tax law ...

40. Whatever may be the position in the type of case where the only detectable error of law is founded on allegations of irrationality, this should provide no reasonable grounds for inhibition where the error of law complained of is a pure error of law, as it is in the present case which turns on the correct legal interpretation of the settlement reached between Eagerpath Ltd and the Revenue in February 1989.

41. For these reasons, while I do not anticipate a very long span of future happy life for s 33 of the [TMA], now that it is well past pensionable age in a new rights-based legal culture, I agree that this appeal should be dismissed.'

Mallusk

[112] Mr Rabinowitz relies on *Mallusk Cold Storage Ltd v Dept of Finance and Personnel* [2003] NIQB 58 as providing direct support for his submission as to the existence of a common law cause of action where an overpayment of tax has been made under a mistake of law.

[113] In the *Mallusk* case the first plaintiffs constructed cold storage premises which were rated as from 1 April 1987. Having taken expert advice, they sought to appeal the rating assessment on the ground that the premises ought to have been categorised as industrial premises, and as such to have been treated as having a nil rateable value. The appeal was rejected, and the first plaintiffs accordingly paid the rates demanded. They subsequently joined with other companies in the cold storage business who had also sought to challenge the rating assessment on their premises. They obtained an opinion from senior counsel, but after discussion decided that it was not commercially worthwhile to pursue the matter further. Subsequently, in a different case the Lands Tribunal for Northern Ireland held that cold store premises were to be categorised for rating purposes as industrial premises. The rates paid by the first plaintiffs were refunded, but only as from the date of the decision. The second plaintiffs, who occupied cold storage premises, also received a refund of the rates which they had paid as from the date of the decision.

[114] The plaintiffs brought actions to recover the rates paid prior to that date, relying on the *Kleinwort Benson* case. The respondent department accepted that the *Kleinwort Benson* case had abrogated the mistake of law rule in cases involving what Lord Goff had described as 'private transactions', but contended that it had not abrogated the rule in cases involving repayment of taxes and other similar public charges. It further contended that the *Woolwich* case did not apply, since the demand for the rates was not ultra vires.

[115] Coghlin J, in a judgment delivered after Park J had delivered judgment in the instant case, concluded that a claim for restitution of money paid under a mistake of law was available in respect of sums paid by way of taxes. However, he went on to hold that both actions were statute-barred, on the ground that the limitation period started to run when the plaintiffs received senior counsel's opinion, since as from that date they were in a state of doubt as to the state of the law, rather than labouring under a mistake of law.

[116] In paras 25 and 26 of his judgment, Coghlin J said this:

> '25. While it is not difficult to appreciate the concern of Lord Goff about the large number of cases that might be affected should the abrogation of the rule against recovery for money paid under a mistake of law apply to public impositions such as taxes, rates etc such an exception would not appear to flow logically from the broad general proposition enunciated at page 375 of his speech that:
>
> > "... English law should now recognise that there is a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution."
>
> A large number of tax or ratepayers might be affected in such circumstances but substantial resources are available to the State and, as a matter of principle, it is perhaps difficult to see why the State should benefit from unjust enrichment particularly when the vast majority of tax and ratepayers are unlikely to be substantial businesses or corporations. At page 381 of his speech Lord Goff considered whether their Lordships should develop the law on the lines suggested by the Law Commission as a corollary to the newly developed right of recovery but went on to observe that:
>
> > "But, for my part, I cannot see why judicial development of the law should, in this respect, be placed on the same footing as legislative change. In this connection, it should not be forgotten that legislation which has an impact on previous transactions can be so drafted as to prevent unjust consequences flowing from it. That option is not, of course, open in the case of judicial decisions."
>
> In my opinion this passage suggests that it was the "settled law" defence about which Lord Goff was speaking at this stage of his speech and in my view neither his speech nor those delivered by any other of their Lordships required an exception to be made specifically for taxes, rates etc.
>
> Ultimately, it seems to me that the issues of social and economic policy which underpin the argument that it would be in the public interest to create an exception for overpayments of tax, rates etc are matters which should be properly considered by Parliament and, if appropriate, incorporated into legislation.

a

> 26. I note that, since the hearing of these actions, Park J has given judgment in [the instant case], in the course of which he rejected the argument that Lord Goff was saying in the passage upon which [counsel for the department] seeks to rely that restitution for money paid under a mistake of law was not available in respect of sums paid by way of taxes. I respectfully agree and adopt the reasoning of Park J.'

b

[117] Addressing the question whether the payments in question had been made under a mistake of law, Coghlin J said this (see para 38):

> 'Article 6 of the Rates (Northern Ireland) Order 1977 places the defendant under a duty to make rates for each year in accordance with the provisions of the order and art 18 of the same order places the occupier of the relevant
c hereditament under a duty to discharge the rates made. The relevant mistake of law in these cases, essentially a mixed question of law and fact, was whether the premises of the plaintiffs ought to have been distinguished as industrial by the Commissioner or District Valuer in accordance with art 43 and Sch 2 and 14. By its judgment dated 3 April 1998 the Lands
d Tribunal recognised that premises occupied for the purposes which the plaintiffs occupied their premises should be so distinguished. While both the plaintiffs in these actions appear to have raised the issue of whether their premises ought to be distinguished as industrial at an early stage after occupation relying both upon representations made on their own behalf and with the assistance of agents, it does not seem to me that either of them
e would have entertained any real reason to reject the interpretation of the law put forward on behalf of the defendant until senior counsel's opinion was furnished to the group of companies. Up until that time, I have reached the view, on the balance of probabilities, that the plaintiffs were making payments on the basis of a mistake of law bearing in mind that such a mistake
f may result from the failure to take advice, the omission to examine the available information, misunderstanding the information that has been obtained or failing to identify the relevant issues. However, it seems to me that once senior counsel's opinion had been obtained, despite the fact that it was far from enthusiastic, couching the prospects of success as not "great" and "an uphill struggle", the state of each plaintiff's mind must have moved
g from that of "mistake" to one of "doubt". It seems to me that after considering their solicitor's advice and taking the benefit of senior counsel's opinion, the agreement by this group of companies reached as a "commercial decision" not to take the risk of further legal proceedings falls within those cases identified by Lord Hope in which the payers were aware
h that there was an issue of law which was relevant, but doubtful, and in respect of which a decision was taken to make the payments appreciating the risk that the basis upon which they were made might be mistaken.'

Marcic

j [118] In *Marcic v Thames Water Utilities Ltd* [2004] 1 All ER 135, [2004] 2 AC 42 the claimant brought an action against the defendant, Thames Water Utilities Ltd a statutory sewerage undertaker under the Water Industry Act 1991, for damage to his property caused by escapes from Thames Water's surface water sewers (which Thames Water had inherited from its predecessor). Thames Water's conduct as a statutory sewerage undertaker was regulated by an elaborate

statutory scheme, which gave no direct right of action to persons injured by a contravention of the statutory scheme. The judge at first instance ([2001] 3 All ER 698, [2002] QB 929) held that Thames Water was not liable for the escapes at common law, since it had neither caused nor created the nuisance, but that its failure to take steps to abate the nuisance contravened art 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The Court of Appeal ([2002] EWCA Civ 64, [2002] 2 All ER 55, [2002] QB 929) upheld the judge's decision, and held in addition that Thames Water was liable at common law. The House of Lords allowed the defendant's appeal ([2004] 1 All ER 135, [2004] 2 AC 42). One of its grounds for doing so was that for the common law to provide a direct remedy to the claimant would be inconsistent with the statutory scheme and would thus run counter to the intention of Parliament.

[119] The relevance of *Marcic*'s case for present purposes lies in the analogy between the statutory scheme under consideration in that case and TMA, s 33.

[120] In paras [33]–[36] of his speech, Lord Nicholls of Birkenhead said:

> '[33] I must respectfully part company with the Court of Appeal. [*Goldman v Hargrave* [1966] 2 All ER 989, [1967] 1 AC 645 and *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 All ER 17, [1980] QB 485] exemplify the standard of conduct expected today of an occupier of land towards his neighbour. But Thames Water is no ordinary occupier of land. The public sewers under Old Church Lane are vested in Thames Water pursuant to the provisions of s 179 of the [Water Industry Act 1991], as a sewerage undertaker. Thames Water's obligations regarding these sewers cannot sensibly be considered without regard to the elaborate statutory scheme of which s 179 is only one part. The common law of nuisance should not impose on Thames Water obligations inconsistent with the statutory scheme. To do so would run counter to the intention of Parliament as expressed in the 1991 Act.
>
> [34] In my view the cause of action in nuisance asserted by Mr Marcic is inconsistent with the statutory scheme. Mr Marcic's claim is expressed in various ways but in practical terms it always comes down to this: Thames Water ought to build more sewers. This is the only way Thames Water can prevent sewer flooding of Mr Marcic's property. This is the only way because it is not suggested that Thames Water failed to operate its existing sewage system properly by not cleaning or maintaining it. Nor can Thames Water control the volume of water entering the sewers under Old Church Lane. Every new house built has an absolute right to connect. Thames Water is obliged to accept these connections: see s 106 of the 1991 Act. A sewerage undertaker is unable to prevent connections being made to the existing system, and the ingress of water through these connections, even if this risks overloading the existing sewers. But, so Mr Marcic's claim runs, although Thames Water was operating its existing system properly, and although Thames Water had no control over the volume of water entering the system, it was within Thames Water's power to build more sewers, as the company now has done, to cope with the increased volume of water entering the system. Mr Marcic, it is said, has a cause of action at law in respect of Thames Water's failure to construct more sewers before it eventually did in June 2003.

[35] The difficulty I have with this line of argument is that it ignores the statutory limitations on the enforcement of sewerage undertakers' drainage obligations. Since sewerage undertakers have no control over the volume of water entering their sewerage systems it would be surprising if Parliament intended that whenever sewer flooding occurs, every householder whose property has been affected can sue the appointed sewerage undertaker for an order that the company build more sewers or pay damages. On the contrary, it is abundantly clear that one important purpose of the enforcement scheme in the 1991 Act is that individual householders should not be able to launch proceedings in respect of failure to build sufficient sewers. When flooding occurs the first enforcement step under the statute is that the Director, as the regulator of the industry, will consider whether to make an enforcement order. He will look at the position of an individual householder but in the context of the wider considerations spelled out in the statute. Individual householders may bring proceedings in respect of inadequate drainage only when the undertaker has failed to comply with an enforcement order made by the Secretary of State or the [Director General of Water Services]. The existence of a parallel common law right, whereby individual householders who suffer sewer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme. It would effectively supplant the regulatory role the Director was intended to discharge when questions of sewer flooding arise.

[36] For this reason I consider there is no room in this case for a common law cause of action in nuisance as submitted by Mr Marcic and held by the Court of Appeal. On this point I agree with the decision of [the judge at first instance].'

[121] Lord Hoffmann reached the same conclusion as Lord Nicholls. In para [70] of his speech, Lord Hoffmann said:

'The 1991 Act makes it even clear than the earlier legislation that Parliament did not intend the fairness of priorities to be decided by a judge. It intended the decision to rest with the [Director General of Water Services], subject only to judicial review. It would subvert the scheme of the 1991 Act if the courts were to impose upon the sewerage undertakers, on a case-by-case basis, a system of priorities which is different from that which the Director considers appropriate.'

[122] The remainder of their Lordships (Lord Steyn, Lord Hope and Lord Scott of Foscote) agreed with Lord Nicholls and Lord Hoffmann.

PART VIII: AUTHORITIES IN OTHER JURISDICTIONS

[123] In the course of his submissions, Mr Rabinowitz took us to *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) SA 202 (referred to by Lord Goff in *Kleinwort Benson* [1998] 4 All ER 513 at 531, [1999] 2 AC 349 at 374), *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 (referred to by Lord Goff in *Woolwich* [1992] 3 All ER 737 at 761–763, [1993] AC 70 at 175–176) and in *Kleinwort Benson* [1998] 4 All ER 513 at 531, [1999] 2 AC 349 at 373), and *Comr of State Revenue v Royal Insurance Australia Ltd* (1994) 126 ALR 1 (referred to by Lord Goff in *Kleinwort Benson*[1998] 4 All ER 513 at 532, [1999] 2 AC 349 at 375), pointing out that in each of these cases the mistake of law related to payments of tax. I refer to them briefly.

Willis Faber

[124] In the *Willis Faber* case (which was decided in 1991, that is to say before the House of Lords decision in *Woolwich*) the claimant insurance broker mistakenly made payments of tax on premiums which fell outside the relevant statutory taxing provision. In the course of his judgment (with which other members of the court agreed), Hefer JA said ((1992) (4) SA 202 at 220):

> 'What is immediately apparent is that there is no logic in the distinction between mistakes of fact and mistakes of law in the context of the *condictio indebiti*. This *condictio* has since Roman times always been regarded as a remedy *ex aequo et bono* to prevent one person being unjustifiably enriched at the expense of another. ... Bearing in mind that the remedy lies in respect of the payment of an *indebitum* (ie a payment, without any underlying civil or natural obligation), it is clear that, where such a payment is made in error, it matters not whether the error is one of fact or of law: in either case it remains the payment of an *indebitum* and, if not repaid, the receiver remains enriched. The nature of the error thus has no bearing either on the *indebitum* or on the enrichment.'

[125] Later in his judgment, Hefer JA said (at 224):

> 'Accordingly, in my judgment, our law is to be adapted in such a manner as to allow no distinction to be drawn in the application of the *condictio indebiti* between mistake in law (*error juris*) and mistake of fact (*error facti*). It follows that an *indebitum* paid as a result of a mistake of law may be recovered provided that the mistake is found to be excusable in the circumstances of the particular case.'

Air Canada

[126] Since Lord Goff refers to this case at some length in the *Woolwich* case, it suffices to note that, as Lord Goff observed ([1992] 3 All ER 737 at 762, [1993] AC 70 at 175), four of the seven judges thought it necessary to consider whether the taxes paid in that case were recoverable at common law. Three of the four concluded that the distinction between mistake of fact and mistake of law should play no part in the law of restitution. The fourth, Wilson J, did not find it necessary to consider that question. She concluded that the mistake of law rule 'can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the Revenue' (to quote Lord Goff in the *Woolwich* case [1992] 3 All ER 737 at 763, [1993] AC 70 at 176).

Royal Insurance

[127] In *Comr of State Revenue v Royal Insurance Australia Ltd* (1994) 126 ALR 1, which was decided after the *Woolwich* case but before the *Kleinwort Benson* case, the claimant insurance company made overpayments of stamp duty on premiums in ignorance of statutory amendments which exempted certain premiums from duty. The claimant brought an action for the recovery of the overpayments. The High Court of Australia held that the overpayments were recoverable under the general law of restitution. The leading judgment was given by Mason CJ. In the course of it, he said (at 9–10):

'We begin with the proposition, accepted in *David Securities*, that mistake of law is no bar to recovery, and in this case there is no question but that Royal [ie the claimant insurance company] made the relevant payments in the mistaken belief that in law it was bound to do so. ... In *David Securities* it was accepted that:

> "the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment."

And, prima facie, that is all that is required where, as here, the recipient has no legal entitlement to receive or retain the moneys. The recipient has been unjustly enriched. ...

The belated recognition in *David Securities* that moneys paid away as a result of a causative mistake of law are recoverable enables us to discard some of the complications associated with the old law governing the recovery of moneys paid as and for taxes which were not due and payable because causative mistake of law was not thought to be a sufficient basis of recovery. Recovery was permitted only in cases in which money was exacted under an unlawful demand by a public authority where the payment was made under a mistake of fact or under compulsion of some kind. The relevant principles have been examined ..., very recently, by the House of Lords in [*Woolwich*]. In *Woolwich*, the House of Lords, though unwilling to acknowledge that causative mistake of law is a basis for recovery, reformulated the principles so as to recognise a prima facie right of recovery based solely on payment of money pursuant to an ultra vires demand by a public authority. With that development in the law of restitution in England we are not presently concerned because, as I have explained, Royal made the relevant payments as a result of a causative mistake of law. In conformity with *David Securities*, payment in these circumstances opens the gateway to recovery where the payment results in the enrichment of the defendant at the expense of the plaintiff.'

PART IX: THE JUDGE'S JUDGMENT

[128] In para [15] of his judgment ([2003] 4 All ER 645), the judge observed (plainly correctly) that it is clear from the decision of the House of Lords in *Kleinwort Benson* that English law recognises a claim in restitution to recover money paid under a mistake of law. In para [17] of his judgment, he turned to the question whether such a claim is available where the money was paid to the Revenue in discharge of what was mistakenly thought to be a liability for taxes, saying:

> 'In principle it is hard to see why that should make any difference, but the question must be considered with some care because of three paragraphs in Lord Goff's speech ...'

[129] The judge then quoted the second, third and fourth paragraphs in the passage from Lord Goff's speech which I have quoted in para [93], above. The judge continued (at [18]):

'Is Lord Goff saying in those paragraphs that the cause of action for restitution of money paid under a mistake of law, the existence of which he, Lord Hoffmann and Lord Hope are affirming, does not apply to money mistakenly paid in taxes? In my judgment the answer is that he is not. In support of my view I make the following points. (i) There is certainly no principle that, for public policy reasons or for other reasons, there can never be restitutionary claims for recovery of taxes wrongly paid. See *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70, recognising the existence of a restitutionary claim in respect of tax paid under protest in response to what turned out to have been an unlawful statutory demand. (ii) If Lord Goff intended to say that, although money paid under a mistake of law was generally recoverable, money paid in taxes under a mistake of tax law was not, he would not have said it at the point in his speech where the three paragraphs which I have quoted appear. The general structure of the speech was to begin with an analysis of whether a cause of action for restitution of payments made under a mistake of law existed at all, and then, having concluded that it did, to go on to consider whether there were any defences to such a cause of action which might apply in particular cases. If His Lordship wished to say that a cause of action for payments of taxes made under a mistake of law did not exist he would surely have dealt with the point in the first part of his speech. However, the paragraphs which I have quoted appear in the second part of the speech, and in particular in a section where Lord Goff is considering whether the House of Lords should introduce a "settled law defence" along the lines of a proposal which had been made by the Law Commission. The Commission had considered that legislation would be necessary to create a settled law defence, and in a draft Bill had included a provision expressed as follows (Law Com no 227 p 196 (cl 3(1))):

> "An act done in accordance with a settled view of the law shall not be regarded as founding a mistake claim by reason only that a subsequent decision of a court or tribunal departs from that view."

(iii) In the context I do not believe that Lord Goff was saying that there could never be a restitutionary claim for tax paid by mistake. Rather he was observing that, although there could be such a claim, the courts might at some future time have to consider whether there was also a settled law defence. In the *Kleinwort Benson* case itself he went on to decide that (at common law, and leaving out of account possible future legislative changes) there was no such defence where the mistaken payments had been made under private law. He did not wish to be understood as deciding the same thing where the payments were tax payments. However, he was not deciding that there was a settled law defence in the case of tax payments. He was leaving the matter open. (iv) In the present case the submission put to me by Mr Glick QC on behalf of the Revenue was that a cause of action for the restitution of tax payments made under a mistake of law did not exist at all. He expressly said that, if I considered that the cause of action did exist, he did not invite me to decide at High Court level that a settled law defence might be available. He reserved the right to advance such an argument in a higher court, and I gave permission for an amendment to the Revenue's defence which would lay the basis for such an argument if the Revenue wish

a to advance it hereafter. (v) In the earlier part of Lord Goff's speech, where he discussed whether there should be a cause of action in restitution for money paid under a mistake of law, he reviewed a number of authorities in other jurisdictions which had held that such a cause of action did exist. Among them was the South African case of *Willis Faber Enthoven (Pty) v Receiver of Revenue* (1992) (4) SA 202. That was a tax case in which a b restitutionary claim for the recovery of tax paid under a mistake of law succeeded. The impression which I glean from the speech is that Lord Goff approved of the *Willis Faber* decision and saw no objection to a similar result forming part of United Kingdom law. (vi) In none of the other speeches in the House of Lords, either of the majority or of the minority, is there any suggestion that there could be a difference between payments of tax made c under a mistake of law and payments of different kinds made under a mistake of law.'

[130] In para [19] of his judgment, the judge referred to the judgment of Brooke LJ in *Eagerpath Ltd v Edwards (Inspector of Taxes)* [2001] STC 26, and to Brooke LJ's apparent assumption that a taxpayer who has made an overpayment d of tax under a mistake of law has a claim at common law based on his mistake. The judge pointed out that Brooke LJ's observations in this respect were obiter, and he doubted whether, in making those observations, Brooke LJ had considered the passages from Lord Goff's speech in *Kleinwort Benson* which the judge had quoted earlier. The judge continued:

e 'In the circumstances I do not attach much weight to his observations, but they are at least a tentative opinion of a Court of Appeal judge that tax payments made by mistake can be recovered.'

[131] It is of course common ground that the *Woolwich* case establishes that f there is a cause of action for the recovery of tax paid under an unlawful demand, whether or not the payment was made under a mistake of law (for in the *Woolwich* case itself there was no such mistake); but it is plain that the judge is here referring to a cause of action for the recovery of overpaid tax *on the ground that* the payment was made under a mistake of law.

[132] In paras [20]–[32] of his judgment the judge addressed the question g whether DMG made its payments of ACT under a mistake of law: a question to which, as he made clear in para [20], his answer was, Yes. However, he went on to say that the mistake in the instant case could not be described in terms as simple as those which Lord Goff had used to describe the mistake in *Kleinwort Benson*. The judge concluded that there were two reasons for this. He explained h the first of these two reasons in paras [21] and [22] of his judgment, as follows:

'[21] The first reason is this. The relevant United Kingdom tax provisions did not take the simple form of providing that, if a subsidiary paid a dividend to another company which was in the same group, it did not have to pay ACT. They provided: (1) that if the companies were in a group relationship, j they could make a group income election; (2) that if there was a group income election in force at the time of payment of a dividend, ACT was not payable (unless the companies specifically gave notice to the contrary as regards a particular dividend); (3) that a group income election did not take effect for three months or, if earlier, until the inspector notified the companies that he accepted it; and (4) that an election would be of no effect

if, in those three months, the inspector notified the companies concerned that he was not satisfied that it was validly made. See generally ICTA, ss 247(2), (3), 248(2). On the last point, if the inspector gave notice that he was not satisfied that an election was validly made the companies could appeal, but unless and until the appeal was determined in the companies' favour, there was no group income election in force. It followed that as a matter of law ACT was properly payable in respect of dividends paid in the meantime, and even a successful appeal against the refusal of a group income election would not change that position. The dividends paid while the appeal was pending continued to give rise to ACT liabilities, and the success of the appeal would only be relevant to future dividends paid after the appeal decision. See as to this observations of the CJEC in para 104 of its judgment in [*Metallgesellschaft*].

[22] The point which emerges from the foregoing is that, on a close analysis, the mistake of law which DMG made was not that it paid ACT which was not payable: the ACT was as a matter of law payable when DMG paid it, and the decision of the CJEC in [*Metallgesellschaft*] does not mean that it was not payable. Rather the mistake of law which DMG made was that it did not realise that it and DBI could have made group income elections with DBAG, which would have had the effect of preventing the ACT from being payable.'

[133] The judge then turned (at [23]) to the second of his two reasons. He began by noting Mr Glick's reliance, so far as the 1996 payment is concerned, on the fact that the payment was made after the commencement of the *Metallgesellschaft* litigation (which was commenced in April 1995) and after DMG, through its head of taxation, Mr Thomason, had become aware of the *Metallgesellschaft* litigation (which the judge found to have occurred by, at the latest, early July 1995). The judge went on to note that the position in relation to the 1993 payment and the 1995 payment was more complicated because both those payments were made before the commencement of the *Metallgesellschaft* litigation. He noted Mr Glick's argument in relation to the 1993 payment and the 1995 payment that even if DMG was suffering from a mistake when it made these payments, it discovered its mistake by July 1995 when Mr Thomason became aware of the argument which the taxpayers in *Metallgesellschaft Ltd v IRC* were putting forward.

[134] However, in para [24] of his judgment the judge concluded that all three payments (including, that is to say, the 1996 payment) were made under a mistake of law. As to the 1993 payment and the 1995 payment, the judge said:

'[25] At the times of the first and second dividends and of the two ACT payments to which they gave rise DMG knew nothing about the argument that, by virtue of EC law, it and DBI were entitled to make group income elections with DBAG despite the express provision in ICTA, s 247 that they were not. Because of the CJEC decision in [*Metallgesellschaft*] DMG knows now that the true state of the law then was that the companies were entitled to make group income elections; the Revenue knows that now as well; indeed we all do. But we did not know that then. If the true state of the law had been known at the time the companies would have made elections and DMG's dividends would have been paid under them as group income, not

attracting a liability on DMG's part to pay ACT. At this stage in the analysis it must be assumed that, if the true state of the law had been understood, both DMG and the Revenue would have understood it. In other words we know now that DMG, DBI and DBAG were mistaken in thinking that DMG and DBI could not make group income elections with DBAG; if they had not been mistaken in that respect they would have made elections; if they had made elections all of the DMG dividends which in fact attracted ACT would not have attracted ACT. Therefore the ACT which DMG in fact paid was paid under a mistake of law: if the mistake had not existed the ACT would not have been paid. It is, however, important to appreciate that the mistake was not directly a mistake about whether there was a liability to pay ACT. It was directly a mistake about whether group income elections could be made. The liabilities to pay ACT arose as secondary consequences of that primary mistake.'

[135] The judge then addressed the significance of the fact that by mid-July 1995 DMG knew of the *Metallgesellschaft* litigation. He began by pointing out that in relation to the 1996 payment the question was whether that payment was made under a mistake of law; and that in relation to the 1993 payment and the 1995 payment the question was whether, if (as in his view was the case) those payments were made under a mistake of law, DMG discovered its mistake in July 1995.

[136] In para [27] of his judgment, the judge referred to the evidence of Mr Thomason, quoting a passage from Mr Thomason's witness statement where he said:

'At all times prior to the determination of the European Court in [*Metallgesellschaft*], I believed that the United Kingdom statute denying the ability to make a group income election was the law and I was bound to act in accordance with this law ... It did not occur to me that I could ignore the law as it stood for the simple reason that the law is the law. Just because another taxpayer challenged the law that did not mean that I could or should ignore it.'

[137] The judge continued as follows:

'Mr Thomason was cross-examined, but I do not believe that the foregoing passage was challenged or affected by his answers on other points. He added the general point (obvious but plainly relevant) that it was not clear in 1995 what would be the outcome of [*Metallgesellschaft*] ... He also said that there were more arguments being advanced by [the claimants in *Metallgesellschaft*] in 1995 than the one which eventually succeeded in the CJEC. For example, relief was being claimed by [Metallgesellschaft AG], the German parent company, as well as by the United Kingdom subsidiary which had paid the dividends and the associated ACT. In addition arguments were being advanced in reliance, not on the EC Treaty, but on the non-discrimination article in the double taxation agreement between the United Kingdom and Germany.'

[138] In paras [28]–[32] of his judgment, the judge set out his own analysis of the position, as follows:

'[28] I now proceed with my own analysis of the position. It is obvious that, when DMG learned of the argument which [Metallgesellschaft] was advancing, it had come to know something—to discover something—which it had not known before. That is true, but DMG did not come to know, or to discover, that it and DBI could make group income elections with DBAG after all. All that it discovered was that another company was arguing that it could make a group income election with its German parent company in comparable circumstances, and that the Revenue were disputing the argument. I examine the position as matters actually stood before DMG paid the dividend which it was planning to pay and did pay in July 1995. If at that time DMG and DBI had submitted group income elections with DBAG, it is in my opinion certain that the inspector would have rejected the elections within the three month period which was available to him under s 248(2). Short of DMG abandoning the intention to pay dividends altogether (which I assume would have been unacceptable to the group as a whole) DMG would have had to pay the ACT. Further, such ACT would have been correctly paid even if DMG had appealed against the rejection of the elections and a later decision (like the actual decision in [*Metallgesellschaft*]) showed that the inspector ought to have accepted them. (See as to this paras [21] and [22] above.)

[29] Concentrating for the moment on the first and second ACT payments (the payments associated with the dividends which DMG paid in July 1993 and July 1994), I repeat that the mistake which DMG made at those times was that it did not realise that it and DBI could have made valid group income elections with DBAG. In 1995, when DMG learned of the case which [Metallgesellschaft] had begun against the United Kingdom Revenue, it did not discover that it (DMG) and DBI could have made group income elections with DBAG after all. All that it discovered was that there was a possible argument that they could have done that. So it did discover something, but not something which made any difference to the matters which are critical in this case. Suppose that back in 1993, when DMG was planning to pay the first of the dividends, it had already known what it actually discovered in 1995: that there was an argument that group income elections could be made with parent companies in member states other than the United Kingdom, but that the Revenue did not agree with the argument. Would DMG, DBI and DBAG have submitted group income elections then? I do not think that they would. Still less do I think that, if they had submitted elections then, DMG would not have been liable to pay ACT when it paid the dividends. I have no doubt that the Revenue would have rejected the elections, and that DMG would have been liable to pay the ACT and would have paid it.

[30] Accordingly, my conclusions in relation to the first two ACT payments are (1) that DMG did pay them under a mistake of law; (2) that, unless a limitation defence applies, DMG is entitled to claim restitution on the basis of a mistake of law; (3) that DMG did not discover its mistake in 1995 when it learned about the argument which [Metallgesellschaft] was advancing; (4) that therefore the limitation period applicable to DMG's mistake of law claim did not begin to run in or about July 1995; and (5) that no limitation defence applies. In my opinion DMG did not discover its mistake until the decision of the CJEC in [*Metallgesellschaft*] was released on 8 March 2001. DMG had already commenced its action claiming relief

before then: it did so shortly after the Advocate General's opinion was delivered. That opinion was in favour of the claimants, and thus it foreshadowed the later decision of the CJEC itself. It might be arguable that DMG discovered its mistake at the time of the Advocate General's decision. I would not take that view myself: it was not inevitable that the CJEC would take the same view as the Advocate General. But the point does not matter, because, even if the limitation period started to run at the time of the Advocate General's opinion, DMG commenced its action only a month and a day later (12 September 2000 and 13 October 2000).

[31] As regards the third ACT payment—the one made on 14 January 1996—DMG knew about the [Metallgesellschaft] argument when it paid the ACT, and it had also known about the argument when it and DBI made no attempt to make group income elections before it paid the dividends on 17 July 1995. Notwithstanding that, I accept that DMG paid the ACT under a mistake of law, and is in principle entitled to restitution for the timing disadvantage which it thereby suffered. The limitation period would only start to run against DMG on the release of the CJEC decision, by which time it had already commenced its claim for relief.

[32] The result is that in my judgment DMG's claims succeed and that none of them is statute barred. I will, however, briefly indicate what I believe the position would have been if I am wrong and if, once DMG knew of the [Metallgesellschaft] argument in 1995, it was no longer suffering from a relevant mistake.'

[139] In paras [33]–[40] of his judgment, the judge addressed the question whether, on the assumption that the 1993 payment, the 1995 payment and the 1996 payment were made under a mistake of law, DMG was (contrary to his view) no longer mistaken once it learned of the argument being advanced by the taxpayers in *Metallgesellschaft*.

[140] As to the 1993 payment and the 1995 payment, the judge assumed that in relation to those payments the limitation period began to run on 1 July 1995, with the consequence that claims in respect of those payments would be statute-barred unless brought before 1 July 2001. He noted that the claim form was issued on 13 October 2000 (ie within the limitation period, so computed), but he noted also the issue as to whether that was the relevant date for computing the limitation period, or whether the relevant dates for this purpose were the dates on which the schedule to the particulars of claim was amended to include details of the payments in question (ie 16 August 2001 in relation to the 1993 payment and 19 August 2002 in relation to the 1995 payment). He defined this issue in para [34] of his judgment, as follows:

'The question is whether the claim form and the particulars of claim as they were originally expressed always claimed relief in respect of the ACT payments made in October 1993 and February 1995, or whether claims in respect of those particular ACT payments were new claims added by amendments made on 16 August 2001 (as respects [the 1993 payment]) and on 19 August 2002 (as respects [the 1995 payment]). If they were new claims added to the particulars of claim by the amendments, and if (contrary to my view) the limitation period had started running on or about 1 July 1995, the claims would be time barred by the 1980 Act. In my opinion, however, the

original particulars of claim, on their proper interpretation, already claimed relief in respect of [the 1993 payment] and [the 1995 payment].' a

[141] The judge addressed this issue as follows:

'[35] This is a fine point on the small print wording of the particulars of claim, and I will not go into it at length. The critical point is that the particulars claimed relief in respect of all payments of ACT made by b reference to "the Dividends". "The Dividends" was a defined term: it meant the dividends which DMG had paid from time to time to DBI and DBAG, thus (as it seems to me) covering all dividends, including those which had led to [the 1993 payment and the 1995 payment]. The original particulars of claim did say that the payments of ACT "include but are not limited to" c certain payments set out in a schedule. The payments so set out did not include [the 1993 payment or the 1995 payment]: those payments were only added to the schedule by the amendments made more than six years after 1 July 1995. However, in my view the original particulars of claim claimed relief in respect of all payments of ACT which had been made by DMG in respect of all dividends paid by it to DBI and DBAG. The claim was not d limited to the payments specified in the schedule.

[36] In this respect the original particulars of claim were different from those which I considered in the recent case of *Hoechst UK Ltd v IRC* [2003] EWHC 1002 (Ch), [2004] STC 1486. The particulars of claim in that case (as I interpreted them) only claimed relief in respect of the specific ACT e payments which were identified in a schedule, so that when the schedule was amended to add further payments the amendment had the effect of adding new claims in respect of additional causes of action. In the present case, in contrast, I consider that the amendments did not add new claims, but rather gave further details of claims which had already been made within the causes of action which had already been pleaded. Therefore, even if, contrary to my f view, the six years limitation period started to run in July 1995 as respects [the 1993 payment and the 1995 payment], I still consider that DMG's claims for relief in respect of those two payments were brought within the period and are not statute barred.'

[142] In paras [37] and [38] of his judgment the judge reached the same g conclusion in relation to the 1996 payment.

[143] The judge summarised his conclusions in paras [41] and [42] of his judgment, as follows:

'[41] In the result I conclude that DMG's claims, in so far as they are h formulated as claims for restitution in respect of money paid under a mistake of law, succeed in principle, and that they are not time-barred by the 1980 Act. I wish only to add that this is not a result which I reach with much enthusiasm. When Parliament first enacted the predecessor of s 32(1)(c) of the 1980 Act (postponing the running of the limitation period in claims based on mistake until the mistake is discovered), it did not have in mind claims for j recovery of money based on a mistake of law, particularly a mistake which was shared by almost everyone else at the time. This was one consideration which influenced the dissenting minority in *Kleinwort Benson* ... The three Law Lords in the majority clearly felt that the limitation consequences of their decision would be unacceptable in the long term and would have to be

changed ... The Law Commission considered the matter in its major report on Limitation of Actions ... However, no legislation consequent upon that report has yet been enacted.

[42] In the circumstances I believe that I am bound by the decision of the majority in the House of Lords in *Kleinwort Benson* to hold that a cause of action for recovery of money paid under a mistake of law does exist, and that where such an action is commenced s 32(1)(c) of the 1980 Act applies with the effect that the limitation period does not begin to run until the mistake is discovered. For the detailed reasons which I have given in this judgment, I consider that DMG did make the three payments of ACT under a mistake of law; that DMG is therefore entitled to restitution; that it makes no difference that the payments were tax payments; and that DMG's claims for restitution are not time-barred by the 1980 Act. For those reasons I will give judgment in favour of DMG.'

PART X: THE APPELLANTS' GROUNDS OF APPEAL

[144] By their grounds of appeal the appellants contend: (1) that the judge was wrong to conclude that English law recognises a cause of action for mistake of law in relation to an overpayment of tax (the cause of action issue); (2) that the judge was wrong to conclude that by virtue of s 32(1)(c) time did not begin to run in relation to any of the three payments in question until the ECJ delivered judgment in *Metallgesellschaft* (the s 32(1)(c) issues); (3) that in any event the appellants have a 'settled law defence' (the 'settled law defence' issue); and (4) that the judge was wrong in failing to conclude that the claims in relation to the payments in question were not brought until the schedule to the particulars of claim was amended to include details of such payments (the pleading issue).

[145] In addition, as noted earlier (see para [18] above), the appellants also contend that even if DMG would otherwise have a cause of action for mistake of law, the nature of the mistake which it made is not such as is capable of founding such a cause of action (the mistake of law issue).

PART XI: THE ARGUMENTS ON THIS APPEAL

A. The cause of action issue

The argument for the appellants

[146] Mr Glick relies heavily on the passage in Lord Goff's speech in *Kleinwort Benson* [1998] 4 All ER 513 at 537–540, [1999] 2 AC 349 at 381–382 (quoted in [93], above) in support of the submission that the principle established in that case does not extend to overpayments of tax. He submits that in that passage Lord Goff is recognising a clear distinction between overpayments of tax made under a mistake of law and other payments so made. He lays particular stress on Lord Goff's reference to *'separate and distinct regimes'*, and on his description of the first such regime as comprising payments made pursuant to an unlawful demand—which are recoverable as of right under the principle established in *Woolwich*—*'and otherwise are the subject of statutory regimes regulating recovery'*. He submits that this passage in Lord Goff's speech makes clear that there is no place for a restitutionary claim at common law in respect of an overpayment of tax simply because the overpayment was made by mistake, and that a restitutionary remedy for such an overpayment is available only on the *Woolwich* principle (in

cases where the mistaken payment was made pursuant to an unlawful demand) or under the terms of the relevant statutory regime. a

[147] Mr Glick submits that the reason for the distinction drawn by Lord Goff in the passage in question is that Parliament has enacted specific provisions dealing with the recovery of tax which has been overpaid by reason of a mistake. In relation to corporation tax, those provisions are to be found in TMA, s 33. Mr Glick points out that the remedy available under TMA, s 33 differs markedly b from any remedy at common law for payment made under a mistake. First, there is the requirement (in TMA, s 33(1)) that the mistake is made in a return which results in an excessive assessment. Secondly, as already noted, there is the six-year time limit imposed by that subsection. Thirdly, no relief is given under TMA, s 33 where the return was made on the basis of, and in accordance with, the practice generally prevailing at the time it was made (see the proviso to TMA, c s 33(2)). Fourthly, the Board has power (under TMA, s 33(3)) to consider whether the granting of relief would result in the exclusion from charge to tax of any part of the claimant's profits. In addressing this question, the Board may take into consideration the claimant's liability to tax and any assessments made on him in respect of chargeable periods other than that to which the claim relates; whereas d no such flexibility would be imported into any corresponding common law remedy.

[148] Mr Glick submits that in recognising that repayments of tax are excluded from the common law remedy for mistake, Lord Goff was merely founding on the common law principle, applied recently by the House of Lords in *Marcic* (see [118]–[122] above), that a common law remedy will be excluded where e Parliament has enacted a statutory scheme which is inconsistent with that remedy. The rationale of that principle, he submits, is that the existence of a limited statutory remedy impliedly negatives any wider remedy at common law. He submits that a common law right to recover taxes overpaid under a mistake of law would be inconsistent with the statutory scheme in TMA, s 33. He points f out (relying on Lord Slynn's speech in *Woolwich*, quoted in [70], above) that TMA, s 33 cannot operate to exclude a common law remedy where the payment in question is made pursuant to an unlawful demand.

[149] Mr Glick accordingly submits that the *Kleinwort Benson* principle does not extend to claims in relation to tax which is overpaid, or (as in the instant case) paid g prematurely. He submits that this conclusion may be reached either by distinguishing between payments of tax and other payments, or by treating a *Kleinwort Benson* claim as being excluded by TMA, s 33.

[150] He further submits that in *Eagerpath* Brooke LJ was in error in assuming that a cause of action for mistake of law can exist in relation to an overpayment h of tax in circumstances where TMA, s 33 does not apply; and that in making that erroneous assumption Brooke LJ failed to recognise that, far from being merely a historical curiosity, TMA, s 33 represents the latest formulation of a provision which has been on the statute book, in broadly the same form, since 1923.

[151] Mr Glick also referred us to s 320 of the Finance Act 2004, which provides protection for tax revenues following a High Court judgment which is being j appealed, and which (he tells us) was enacted as a direct consequence of Park J's decision in the instant case. In summary, the effect of the section is to disapply s 32(1)(c) in relation to actions brought after 8 September 2003, and to prevent claims being added by amendment to existing claims on or after 20 November 2003.

The argument for DMG

[152] Mr Rabinowitz supports the judge's reasoning and conclusions on this issue.

[153] As to the passage in Lord Goff's speech in *Kleinwort Benson* on which Mr Glick principally relies, Mr Rabinowitz acknowledges that restitutionary claims in relation to overpayments of tax may call for separate treatment when considering the defences which may be available, but he submits that when the speech is read as a whole it is plain that Lord Goff is not intending, by his reference to 'separate and distinct regimes', to limit the availability of a cause of action for mistake of law to cases involving private transactions. He submits that, had Lord Goff intended to import such a fundamental qualification on the extent of the abrogation of the mistake of law rule, it is inconceivable that he would not have said so in the clearest terms.

[154] In support of the above submissions Mr Rabinowitz points out, as noted earlier, that three of the decisions in other jurisdictions to which Lord Goff makes special reference in *Woolwich* and/or in *Kleinwort Benson*—viz *Willis Faber*, *Air Canada* and *Royal Insurance*—were cases of mistake of law involving overpayments of tax. He submits that this is the clearest indication that in referring to 'separate and distinct regimes' Lord Goff was not intending to suggest that no cause of action for mistake of law could exist in relation to overpayments of tax: he was merely considering the circumstances in which a 'settled law defence' might be available, and expressing the view that in that context overpayments of tax could be regarded as being on a different footing from payments under private transactions at least to the extent that there may be a stronger case for the recognition of a 'settled law defence' where an overpayment of tax is involved.

[155] Mr Rabinowitz makes the further point that Lord Hope, in *Kleinwort Benson*, also refers to *Air Canada* (among other authorities) when discussing the possible existence of a 'settled law defence'.

[156] Turning to the consequences which would follow were the appellants' argument on the cause of action issue to be held to be correct, Mr Rabinowitz submits that a claimant who had unjustly enriched the Revenue by making an overpayment of tax under a mistake of law in circumstances where the demand was not unlawful would in that event be in a worse position than a claimant who had unjustly enriched the other party to a private transaction. The latter would be entitled to a restitutionary remedy under the principle in *Kleinwort Benson* whereas the former would not. Mr Rabinowitz submits that Lord Goff cannot have intended such an unjust result.

[157] As to TMA, s 33, Mr Rabinowitz points out that, far from putting in place an exhaustive regime, that section provides a remedy for overpayment of tax made by mistake only in the most limited circumstances. He asks, rhetorically: What is the position of a claimant who has made such an overpayment, but who cannot invoke the *Woolwich* principle because the demand was not unlawful, and who cannot (for whatever reason) have recourse to TMA, s 33? He submits that an interpretation of the *Kleinwort Benson* principle which left such a claimant without any restitutionary remedy would leave a huge gap in the law, and that Brooke LJ in *Eagerpath* was right to assume that such a claimant would be entitled to such a remedy at common law.

[158] Mr Rabinowitz also relies on the reasoning and conclusion of Coghlin J in *Mallusk* (see [112]–[117], above).

[159] Mr Rabinowitz submits that the (admitted) fact that in the instant case DMG has a good cause of action based on the *Woolwich* principle is nothing to the point. He submits that there is nothing strange or surprising in the existence of concurrent causes of action founded on the precisely same facts.

[160] Finally, Mr Rabinowitz invites us to conclude that the merits of the case are entirely with DMG; and that it would be unjust for the Revenue to retain payments of ACT made under a mistake.

B. The mistake of law issue

The argument for the appellants

[161] As noted earlier, Mr Glick supports the judge's conclusion (in paras [22] and [25] of his judgment, quoted in [132] and [134], above) that the ACT in question was legally due and payable when it was paid, and that DMG's mistake was 'a mistake about whether group income elections could be made' (see [25] of his judgment).

[162] Mr Glick submits that a mistake of that nature cannot in any event found a restitutionary claim at common law, since the mistake was not *as to the payer's liability to make the payment*; rather, the mistake was in not taking action which would have resulted in there being no liability on the payer to pay. He submits that if it were otherwise, a taxpayer who had received inadequate tax advice and as a result had been deprived of an opportunity of saving tax or of mitigating his tax liability could in effect reopen an issue as to his tax liability at any time in the future, regardless of any time limit which might be incorporated into the relevant statutory regime (eg the six-year time limit imposed by TMA, s 33(1)).

[163] In support of his submissions on the mistake of law issue, Mr Glick referred us to para 47 of Mr Thomason's witness statement, which the judge quotes in para [27] of his judgment (see [136], above).

[164] Mr Glick also referred us to passages in the cross-examination of Mr Thomason where he indicated that his understanding from July 1995 onwards was that the ECJ's decision in *Metallgesellschaft* would regulate the position for the future, but that it would not affect the fact that the ACT in question was legally due and payable at the time it was paid.

The argument for DMG

[165] Mr Rabinowitz characterises DMG's mistake of law as being simply its mistaken belief that the ACT in question was legally due and payable when demanded. He submits that in *Metallgesellschaft* the ECJ decided that the statutory regime in question contravened Community law; that demands made under that regime were consequently unlawful; and that a taxpayer faced with such a demand is entitled to refuse to pay. He submits that a mistake by a claimant as to liability to pay falls fairly and squarely within the *Kleinwort Benson* principle.

[166] Mr Rabinowitz accordingly submits that, in relation to each of the three payments in question, DMG's mistake was of such a nature as to be capable of founding a cause of action for mistake of law and of engaging s 32(1)(c).

C. The s 32(1)(c) issues

The argument for the appellants

[167] On the assumption (contrary to his earlier submission) that the mistake made by DMG in paying the ACT in question was of such a nature as is capable of founding a cause of action for mistake of law, Mr Glick submits (as he submitted to the judge) that the mistake was discovered by DMG at the latest by July 1995. By that time, as is common ground, DMG knew (a) that the claimants in *Metallgesellschaft* were claiming compensation on the basis that the statutory regime governing group income elections was contrary to Community law and (b) the arguments which the claimants were deploying in support of that claim.

[168] In support of the above submission, Mr Glick took us once again to the transcript of Mr Thomason's cross-examination. In cross-examination, Mr Thomason gave evidence that in early July 1995 Herr Langel (the global head of tax at Deutsche Bank, DMG's parent company) came to London for the specific purpose of discussing with Mr Thomason potential German tax issues arising from the closer integration of Deutsche Bank and DMG, with particular reference to the making of protective group income elections pending the ECJ decision in *Metallgesellschaft*. Mr Thomason's evidence was that his understanding at that time was that the challenge brought by the claimants in *Metallgesellschaft* had merit, but that he was uncertain whether the challenge would succeed. He said he believed he had recommended to Herr Langel that protective elections should be made, but further dividends were paid before any answer was received. Asked by Mr Glick whether the fact that he had considered a protective group income election indicated that, in the light of *Metallgesellschaft*, there was a doubt in his mind whether a group income election might be available as between a United Kingdom subsidiary and a parent resident in another member state, Mr Thomason said this:

> 'Yes, I could see the question was there. I think in a way I saw it as something that was more likely to be resolved in the future and cause us to put a group income election into place or change our behaviour at a future time.'

[169] However, Mr Thomason went on to acknowledge that in practice it had been decided to go ahead with payment of dividends in July 1995, before the doubt could be resolved. Later in his cross-examination, he agreed with Mr Glick that when it came to paying dividends in 1998 or 1999 a decision was taken by DMG that it would not try to make a group income election before hand, but would await the outcome of the *Metallgesellschaft* litigation.

[170] As to the 1993 payment and the 1995 payment, Mr Glick submits that it does not require an authoritative judgment of a court in order for a party who made the payment to have discovered his mistake and for the limitation period to start to run: it is enough that the party who made the payment understood that the relevant legislative regime was the subject of serious legal challenge.

[171] As to the 1996 payment, Mr Glick relies on the dicta of Lord Hope in *Kleinwort Benson* (quoted in [97] and [100], above) that a person who pays when in doubt takes the risk that he may be wrong, and that a payment made in the knowledge that there was a ground to contest liability will be irrecoverable.

[172] Mr Glick submits that the mischief at which s 32 of the 1980 Act is directed is that of a person making a payment in ignorance of the fact that he was

not obliged to pay. A party who makes a payment when he is aware that there is no obligation to pay should not (he submits) be allowed to rely on the provisions of s 32(1)(c). a

The argument for DMG

[173] On this issue Mr Rabinowitz once again supports the reasoning and conclusion of the judge. b

[174] Basing himself on the evidence of Mr Thomason, Mr Rabinowitz submits that at all times prior to the ECJ's decision in *Metallgesellschaft*, DMG understood that the law was as stated in the statutory provisions (a view which, he points out, the Revenue at that time demonstrably shared). He submits that where, as in the instant case, provisions of primary United Kingdom legislation are held by the ECJ to be unlawful, and where the United Kingdom has continued to assert the validity of those provisions down to judgment, the earliest a mistake as to the validity of those decisions can be discovered is when the ECJ gives its decision. c

[175] Turning to the 1996 payment, and to Mr Glick's reliance on the dicta of Lord Hope in *Kleinwort Benson*, Mr Rabinowitz submits that the fundamental issue is whether it would be just for the Revenue to retain money paid to it under a mistaken belief that there was a liability to pay. He submits that it would plainly be unjust for it to do so; and that mere knowledge that the statutory provisions in question are under challenge is not to be equated with a state of doubt as to the validity of those provisions. d e

[176] Mr Rabinowitz submits that, looked at in the round, the proposition that the 1996 payment was made under a mistake of law accords with common sense. He points out that DMG was faced with the provisions of primary legislation; that any attempt to make a group income election would have been rejected by the Revenue who, until the ECJ's decision in *Metallgesellschaft*, continued vigorously to assert the validity of the statutory provisions; that even if DMG had made an election and appealed its refusal, it would still have been obliged under the express terms of the legislation to pay ACT on any dividends paid in the meantime and this would have remained the case even if it had succeeded in its appeal; and that a refusal to pay the ACT would have exposed DMG to penalties. He also reminds us that DMG was not a party to the *Metallgesellschaft* litigation. f g

D. The 'settled law defence' issue

The argument for the appellants

[177] Mr Glick makes his submissions on this issue on the assumption that his earlier submissions are rejected. h

[178] He submits that, prior to the commencement of the *Metallgesellschaft* litigation, there was a settled understanding that, in accordance with ICTA, a group income election could only be made where both the paying and the receiving parties were resident in the United Kingdom; and that as a consequence of that understanding the prevailing practice was that such an election would not be made where the paying company was resident in the United Kingdom but the receiving company was resident in another member state. He submits that the appellants are entitled to rely on the existence of that settled understanding and prevailing practice as a defence to DMG's claims based on mistake. j

[179] Mr Glick stresses that such a defence would leave open claims for restitution based on an overpayment of tax pursuant to an unlawful demand (ie *Woolwich* claims); that it would prevent an unsatisfactory situation arising in which parties would be able to reopen transactions for scrutiny many years after the transactions had been completed (in this connection he points out that, within the claims currently covered by the group litigation order, there are claims in respect of payments of ACT going back to the 1970s); and that such a defence would satisfy the requirement of Community law that there should be an effective remedy available to a claimant who has made an overpayment of tax, albeit not a remedy which extends back for an indefinite period into the past.

[180] In support of his submissions on this issue Mr Glick relies on the observations of Lord Goff as to the availability of a 'settled law defence' in the passage from his speech in *Kleinwort Benson* quoted in [93], above.

The argument for DMG

[181] Mr Rabinowitz submits that English law does not recognise a 'settled law defence' to a claim for restitution in respect of a payment made under a mistake of law. He points out that the existence of such a defence was expressly rejected by the House of Lords in *Kleinwort Benson* itself. He submits, moreover, that there is no suggestion in the speeches of any of their Lordships in that case that there is any currently recognised exception in the common law to English law's rejection of such a defence where the restitution claim involves an overpayment of tax.

[182] He submits that in his speech in *Kleinwort Benson* Lord Goff was doing no more than indicating that consideration might in the future need to be given to the creation of a limited defence on grounds of public policy in cases such as he there described. He submits that had Lord Goff intended to identify an existing, recognised, 'settled law defence' (a) he would have done so expressly, and (b) the remainder of their Lordships would themselves have addressed the point. He further submits that there is no more reason why the formulation and introduction of a defence founded on public policy in order to prevent or limit claims against the Revenue should be justified in the context of a restitutionary claim based on the *Kleinwort Benson* principle than in the context of a restitutionary claim based on the *Woolwich* principle.

[183] In any event, submits Mr Rabinowitz (relying on the speech of Lord Hoffmann in *Kleinwort Benson*: see [96], above), whether or not to introduce a 'settled law defence' is a matter for Parliament, and not for the courts (in this connection he reminds us that by s 320 of the Finance Act 2004 Parliament has recently modified the operation of s 32(1)(c)).

E. The pleading issue

Preliminary

[184] As explained earlier, the resolution of the pleading issue turns on whether, in amending the schedule to the particulars of claim to include details of the payments in question, DMG added new causes of action to those originally pleaded. If that was the effect of the amendments, then, unless it can be said that the new claims were based on the same or substantially the same facts, for limitation purposes DMG's claims in respect of the payments in question were not brought until the amendments were made.

The argument for the appellants

[185] Mr Glick submits that in order to determine whether a new cause of action has been added by amendment it is necessary to compare the statement of case as it stood immediately before the amendments were made with the statement of case as amended; and that a new cause of action will have been added by amendment if the amendment adds previously unpleaded facts which (if established) give rise to a new cause of action (as opposed to facts which are no more than an elaboration of a cause of action previously pleaded).

[186] Turning to the amendments made in the instant case, Mr Glick submits that separate causes of action arise in relation to each of the three payments in question, in that in relation to each payment DMG must establish:

- that a particular dividend was paid on a particular date to a parent resident in another member state;
- that the dividend was paid otherwise than pursuant to a group income election;
- that in the next period of assessment ACT was paid in respect of the earlier dividend; and
- that in consequence it suffered a timing disadvantage.

[187] Mr Glick submits that it follows that each payment of ACT gives rise to a new cause of action which is pleaded only when the particular payment is specified in the statement of case; and that it cannot be said that the cause of action in relation to a particular payment arises out of the same or substantially the same facts as the causes of action pleaded in relation to other payments.

[188] The consequence of the above, Mr Glick submits, is that for limitation purposes DMG's claims in relation to the three payments in question were not brought until the schedule to the particulars of claim was amended to include details of them (that is to say 16 August 2001 in relation to the 1993 payment and 19 August 2002 in relation to the 1995 payment and the 1996 payment).

The argument for DMG

[189] Mr Rabinowitz submits that the judge was right to conclude that the amendments in question merely particularised a cause of action or causes of action which were already pleaded. He stresses that, as the judge pointed out (in para [35] of his judgment, quoted in [141], above), the particulars of claim expressly states that the payments of ACT in respect of which restitution is sought 'include, but are not limited to' the payments listed in the (unamended) schedule.

[190] Mr Rabinowitz submits that a cause of action is pleaded when its essential elements are pleaded; and that in the case of a payment under a mistake of law those essential elements are:

- that there was a payment;
- that the payment was made under a mistake of law; and
- that the mistake caused the payment.

[191] He submits that in order to plead a cause of action in relation to a particular payment it is not necessary to plead the matters leading to the making

of the payment; nor (if it be suggested) is it necessary to plead precise particulars as to quantum.

PART XII: CONCLUSIONS

A. The cause of action issue

[192] The key to the resolution of the cause of action issue lies, in my judgment, in the inter-relationship between *Woolwich* and *Kleinwort Benson*. Lord Goff's celebrated speeches in those two cases are universally acknowledged as representing contributions of the highest significance to the development of the law of restitution; and it is clear from his comprehensive treatment of the subject matter that he cannot have intended to leave over for future consideration an issue as important as the cause of action issue. Hence the need to examine Lord Goff's speeches, in particular, in some detail.

[193] I begin with *Woolwich*. As already noted, *Woolwich* was not a case of mistake of law. As Lord Goff says in *Woolwich* ([1992] 3 All ER 737 at 759, [1993] AC 70 at 171):

> 'The taxpayer is convinced that the demand is unlawful, and has to decide what to do ... [I]t decides to pay first, asserting that it will challenge the lawfulness of the demand in litigation.'

[194] Thus an abrogation or relaxation of what (in *Kleinwort Benson*) he called 'the mistake of law rule' would not have met what he described (in *Woolwich* [1992] 3 All ER 737 at 759, [1993] AC 70 at 171) as the plain justice of the building society's case (see also his reference to 'the simple call of justice' ([1992] 3 All ER 737 at 759, [1993] AC 70 at 172)). Hence his attraction to the approach of Wilson J in her dissenting judgment in *Air Canada*. Wilson J (it will be recalled) had not found it necessary to consider whether the mistake of law rule should be abrogated, taking the view that money paid under unconstitutional legislation was generally recoverable. Lord Goff said this about Wilson J's approach:

> '... I agree with her that, if there is to be a right to recovery in respect of taxes exacted unlawfully by the Revenue, it is irrelevant to consider whether the old rule barring recovery of money paid under mistake of law should be abolished, *for that rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the Revenue.*' (My emphasis.) (See [1992] 3 All ER 737 at 763, [1993] AC 70 at 176.)

[195] It seems to me that the above passage, notwithstanding that it is strictly obiter, is of direct significance in the context of the cause of action issue. Lord Goff is plainly referring to cases (of which *Air Canada* was one) in which there is an unlawful demand *and* a mistake of law by the taxpayer; indeed, if it were otherwise his reference to the mistake of law rule would not be explicable. His conclusion (as I read it) is that in such cases the mistake of law rule has no application since the taxpayer's cause of action is founded not on his mistake but on the unlawful nature of the demand (in effect, on the Revenue's mistake): in

other words, that the *Woolwich* cause of action effectively subsumes any cause of action which might otherwise exist for mistake of law.

[196] Also of direct significance in the context of the cause of action issue is the importance which Lord Goff places on the fact that an ultra vires demand by definition falls outside the various statutory regimes regulating the recovery of overpaid tax, with the consequence that it is for the common law to provide a restitutionary remedy in such cases. As he put it in *Woolwich* ([1992] 3 All ER 737 at 757, [1993] AC 70 at 169), when referring to TMA, s 33:

> 'This is a case where there is no lawful basis whatever for any demand of tax to be made by the Revenue. In such circumstances, the demand is ultra vires and is therefore a nullity. It follows that in a case such as the present there can be no valid assessment ... Just as the appeal procedure presupposes a lawful assessment, so does s 33(1) of the [TMA], which is concerned with a lawful assessment which is excessive by reason of some error or mistake in a return.'

[197] In consequence, as he says:

> '[the building society] is not enabled or required to seek its remedy through the statutory framework, but must fall back on the common law. It also follows that the common law principles, whatever they may be, are applicable to a case such as the present, unconstrained by the provisions of any statute.' (See [1992] 3 All ER 737 at 757, [1993] AC 70 at 169–170.)

[198] Lord Goff comes back to this point ([1992] 3 All ER 737 at 758, [1993] AC 70 at 170), where he describes the point of principle as being one: 'on which statute law has no direct impact.'

[199] The importance which Lord Goff attached to the existence of the statutory regimes is also apparent from his observation in *Woolwich* [1992] 3 All ER 737 at 763, [1993] AC 70 at 176 that—

> 'the immediate practical impact of the recognition of the [*Woolwich*] principle will be limited, for (unlike the present case [ie a case involving an unlawful demand for tax]) most cases will continue for the time being to be regulated by the various statutory regimes now in force.'

[200] Thus the *Woolwich* cause of action is complementary to the various statutory regimes for the recovery of overpaid tax, in that in cases where the demand is lawful recovery of overpaid tax will be regulated by the statutory regimes; and in cases where the demand is unlawful (with the consequence that the statutory regimes do not apply) the common law supplies a restitutionary remedy.

[201] I can turn now to Lord Goff's speech in *Kleinwort Benson* [1998] 4 All ER 513, [1999] 2 AC 349.

[202] Lord Goff's first reference to *Woolwich* in his speech in *Kleinwort Benson* is to be found ([1998] 4 All ER 513 at 532, [1999] 2 AC 349 at 375) (in the passage quoted in [89], above), where he describes *Woolwich* as going further than simply dispensing with the requirement that the money should have been paid under a

mistake, in that it allows recovery even if the taxpayer pays in the belief that the money is not due. This, again, is entirely consistent with his observations in *Woolwich* with regard to *Air Canada*, referred to above.

[203] Lord Goff's next reference to *Woolwich* is to be found at [1998] 4 All ER 513, [1999] 2 AC 349 at 381, where he notes that in *Woolwich* it was held that at common law taxes exacted ultra vires were recoverable 'as of right, without the need to invoke a mistake of law by the payer'. He makes this reference to *Woolwich* in the context of the distinction which he draws at that point in his speech—

> 'between, on the one hand, payments of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions.' (See [1998] 4 All ER 513 at 536–537, [1999] 2 AC 349 at 381.)

[204] He goes on ([1998] 4 All ER 513 at 538, [1999] 2 AC 349 at 382) to elaborate this distinction by referring (in the passage particularly relied upon by Mr Glick) to the two 'separate and distinct regimes in respect of the repayment of money paid under a mistake of law'. For convenience, I set out the relevant passage once again:

> 'in our law of restitution, we now find two separate and distinct regimes in respect of the repayment of money paid under a mistake of law. These are (1) cases concerned with the repayment of taxes and other similar charges which, when exacted ultra vires, are recoverable as of right at common law on the principle in the *Woolwich* case, and otherwise are the subject of statutory regimes regulating recovery; and (2) other cases, which may broadly be described as concerned with repayment of money paid under private transactions, and which are governed by the common law.'

[205] The first of the two regimes which Lord Goff there identifies is a comprehensive and complete regime in relation to overpayments of tax made under a mistake of law. It is not limited to cases where the payment of tax is made pursuant to an unlawful demand (ie it is not limited to *Woolwich* cases); it includes payments of tax the recovery of which is regulated by statute, to which the *Woolwich* principle has no application. Similarly, the second regime is a comprehensive and complete regime in relation to all payments made under a mistake of law *other* than payments of tax.

[206] Further, it is to be noted that in referring to *both* regimes as relating to 'the repayment of money paid under a mistake of law', Lord Goff is effectively excluding from the first regime cases (like *Woolwich* itself) where the payment is not made under a mistake of law. This is not in any way surprising, since *Kleinwort Benson* was concerned with the mistake of law rule, and in the passage in question Lord Goff was discussing the possible ramifications of the abrogation of that rule. By the same token, however, cases involving a payment to the Revenue made pursuant to an unlawful demand *and* under a mistake of law *are* plainly included in the first regime as being payments the recovery of which is governed by the *Woolwich* principle. To my mind this confirms that Lord Goff was not contemplating that the claimant in such a case (ie a taxpayer entitled to a restitutionary remedy 'as of right' on the *Woolwich* principle) might be in a

position to found an alternative cause of action for the same remedy, based on a mistake of law.

[207] This interpretation is, to my mind, further reinforced when one considers the second category of cases which Lord Goff includes in the first of his two regimes, viz cases where a payment is made to the Revenue which engages the relevant statutory regime regulating recovery for mistake of law (ie cases where the demand is lawful and the *Woolwich* principle accordingly does not apply). If the common law were to recognise a cause of action for mistake of law in such cases, the result would be two separate and potentially conflicting regimes regulating recovery: the common law regime and the statutory regime. Indeed, the result in the case of ACT would be to produce a direct conflict between TMA, s 33(1) (with its six year time limit on claims) and the more flexible provisions of s 32(1)(c) of the 1980 Act. I cannot think that Lord Goff could have contemplated such an unsatisfactory result. The alternative would be to recognise a cause of action for mistake of law in relation to payments to the Revenue only in cases where the payment is made pursuant to an unlawful demand (ie only in *Woolwich* cases). However, that would (to my mind) produce a no less unsatisfactory result in that the limitation consequences of the mistake of law would differ, depending on whether or not the demand was lawful. I can see no basis in principle for distinguishing for limitation purposes between mistake of law cases where the payment to the Revenue is made pursuant to a lawful demand and mistake of law cases where the payment to the Revenue is made pursuant to an unlawful demand. Such a distinction would in my judgment be purely fortuitous. Once again, therefore, I cannot think that Lord Goff could have intended such a result.

[208] In my judgment, therefore, on a true analysis of Lord Goff's speeches in *Woolwich* and *Kleinwort Benson*, a claimant who makes a payment to the Revenue under a mistake of law is not entitled to a restitutionary remedy in respect of that payment *otherwise than* under the *Woolwich* principle (where the demand is unlawful) or under the relevant statutory regime (where the demand is lawful).

[209] In reaching the opposite conclusion, the judge made six points (in para [18] of his judgment, quoted in [129], above). First, he said (referring to *Woolwich*) that '[t]here is certainly no principle that, for public policy reasons or for other reasons, there can *never* be restitutionary claims for recovery of taxes wrongly paid [emphasis added]'. That is undoubtedly correct, as *Woolwich* itself establishes. However, the mere fact that the common law recognises an entitlement to a restitutionary remedy in respect of a payment to the Revenue on the ground that the payment was made pursuant to an unlawful demand (the *Woolwich* principle) throws no light on the further question whether the common law also recognises such an entitlement on the ground that the payment was made under a mistake of law.

[210] The judge's second point is that had Lord Goff intended to say that there was no general common law right of recovery in respect of payments to the Revenue, one would not have expected to find such a statement in the section of his speech in *Kleinwort Benson* in which he was discussing possible defences to a claim at common law for a remedy for mistake of law, and in particular the possible recognition of a 'settled law defence'. In my judgment, however, it is natural that Lord Goff should have referred to the two 'separate and distinct regimes' when considering whether the common law should recognise a 'settled

law defence' in relation to the second of the two regimes (ie recovery of payments made under a mistake of law *in private transactions*), which was the relevant regime in *Kleinwort Benson* itself.. As I read the passage in question, Lord Goff is merely making the point that a 'settled law defence' would fit more easily into the first regime than into the second. This is, I think, apparent from what follows. Thus ([1998] 4 All ER 513 at 538, [1999] 2 AC 349 at 382), he observes that—

> *'in cases concerned with overpaid taxes*, a case can be made in favour of a principle that payments made in accordance with a prevailing practice, or indeed under a settled understanding of the law, should be irrecoverable.' (My emphasis.)

[211] He continues:

> 'If such a situation should arise with regard to overpayment of tax, it is possible that a large number of taxpayers may be affected; there is an element of public interest which may militate against repayment of tax paid in such circumstances; and, since ex hypothesi all citizens will have been treated alike, exclusion of recovery on public policy grounds may be more readily justifiable.'

[212] He then returns to the case before him, saying ([1998] 4 All ER 513 at 538, [1999] 2 AC 349 at 382): 'In the present case, however, we are concerned with payments made under private transactions [ie the second of the two regimes].'

[213] He goes on to observe that, in contrast to defences such as change of position or settlement of an honest claim, the proposed 'settled law defence' is not a defence which is directed at protecting the stability of closed transactions (ie transactions within the second regime); rather, it is—'based on the theory that a payment made on that basis is not made under a mistake at all.'

[214] He accordingly concludes ([1998] 4 All ER 513 at 539, [1999] 2 AC 349 at 382): 'Once that reasoning is seen not to be correct, the basis for the proposed defence is, *at least in cases such as the present*, undermined.' (My emphasis.)

[215] I would therefore respectfully regard the judge's second point as a false one. *Kleinwort Benson* was a case within the second of Lord Goff's two regimes. The issue as to the possible recognition of a 'settled law defence' arose in that context. In considering the suitability of such a defence in such cases, Lord Goff distinguished between the two regimes and concluded that whilst there were public policy arguments for the recognition of a 'settled law defence' in cases within the first regime, those reasons did not hold good in relation to cases within the second regime. On that basis, he rejected the possibility of a 'settled law defence' in *Kleinwort Benson* itself.

[216] As his third point, the judge said that he did not believe that Lord Goff was saying that there could never be a restitutionary claim for tax paid by mistake: rather, he was observing that, although there could be such a claim, the courts might at some future time have to consider whether there was also a 'settled law defence'. However, as noted earlier, Lord Goff's first regime relates exclusively to recovery of tax paid by mistake. In respect of such payments he

points out that recovery is available either under the *Woolwich* principle (where the demand was unlawful) or, if applicable, under the relevant statutory regime (where the demand was lawful).

[217] As his fourth point, the judge merely recorded Mr Glick's submission on the cause of action issue, and his reservation of the 'settled law defence' issue for a decision by a higher court.

[218] As his fifth point, the judge cited Lord Goff's reference in *Kleinwort Benson* [1998] 4 All ER 513 at 531, [1999] 2 AC 349 at 374 to *Willis Faber* (see [124] and [125], above). The judge continued (at [18]):

> 'The impression which I glean from [Lord Goff's speech in *Kleinwort Benson*] is that Lord Goff approved of the *Willis Faber* decision and saw no objection to a similar result forming part of United Kingdom law.'

[219] On the face of it, this appears to be a point of some force; indeed, as noted earlier, Mr Rabinowitz stresses that not only *Willis Faber* but also *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 (see [126], above) and *Comr of State Revenue v Royal Insurance Australia Ltd* (1994) 126 ALR 1 (see [127] above) were cases involving overpayments of tax. However, on analysis Lord Goff's references to these cases do not seem to me to justify the reliance which Mr Rabinowitz seeks to place upon them.

[220] I turn first to *Willis Faber*. Lord Goff referred to *Willis Faber* merely as an example of a decision in a civil law jurisdiction in which the mistake of law rule was rejected. It mattered not for the purpose of that reference that *Willis Faber* involved an overpayment of tax.

[221] Next, *Air Canada*. Lord Goff's reference to *Air Canada* in *Kleinwort Benson* ([1998] 4 All ER 513 at 531, [1999] 2 AC 349 at 373) was made in the general context of the abrogation of the mistake of law rule in common law jurisdictions and in the particular context of the concession by the respondent local authorities in *Kleinwort Benson* that the mistake of law rule required some modification. In the light of that concession, Lord Goff considered it unnecessary to consider in detail the criticism of the mistake of law rule made by Dickson J in *Hydro Electric* (a criticism which Lord Goff in *Woolwich* [1992] 3 All ER 737 at 761, [1993] AC 70 at 174 described as a 'devastating analysis'), which was later adopted by La Forest J in *Air Canada*. Reading Lord Goff's reference to *Air Canada* in context, it does not seem to me that it supports DMG's case.

[222] Lastly on this point, I turn to *Royal Insurance*. As I read the relevant passage in Lord Goff's speech in *Kleinwort Benson*, the only purpose of his brief reference to *Royal Insurance* was to point out that Mason CJ's criticism of the decision in *Woolwich* (he had said that the House of Lords was 'unwilling to acknowledge that causative mistake of law is a basis of recovery') was misplaced, since no question of mistake of law arose in *Woolwich*. Again, it does not seem to me that this reference provides support for Mr Rabinowitz's argument on the cause of action issue.

[223] The judge's sixth point was that none of the other speeches in *Kleinwort Benson* contains any suggestion that, in the context of mistake of law, there might be a difference between payments of tax and payments under private transactions. That is undoubtedly true, so far as it goes. However, it must be borne in mind that *Kleinwort Benson* was a case within the second of Lord Goff's

two regimes. In the circumstances, the fact that none of the rest of their Lordships referred to the first of Lord Goff's regimes seems to me to be of no significance for present purposes.

[224] The judge went on (in para [19] of his judgment) to refer to the judgment of Brooke LJ in *Eagerpath Ltd v Edwards (Inspector of Taxes)* [2001] STC 26 (see [110], above). The judge did not attach much weight to Brooke LJ's observations (which were obiter) as to the existence of a cause of action for mistake of law in relation to a payment to the Revenue, and in my judgment he was right not to do so since the point had not been raised in argument in that case.

[225] Nor do I derive any direct assistance on the cause of action issue from the decision of this court in *British Steel plc v Customs and Excise Comrs* [1997] 2 All ER 366 (see [71]–[77], above). The case concerned an unlawful demand, and no question of a separate cause of action for mistake of law arose. The issues were, firstly, whether the demand was unlawful: and secondly whether, if it was, the relevant statutory provision negatived the existence of a common law right on the *Woolwich* principle.

[226] In *Mallusk Cold Storage Ltd v Dept of Finance and Personnel* [2003] NIQB 58, Coghlin J relied on Lord Goff's reference in *Kleinwort Benson* [1998] 4 All ER 513 at 533, [1999] 2 AC 349 at 375 to a 'general right to recover money paid under a mistake, whether of fact or law' as indicating that Lord Goff was recognising a cause of action for mistake of law in cases involving payments to the Revenue. However, it is to be noted that the reference follows Lord Goff's description of *Woolwich* as a case in which English law dispensed with the requirement that the payment should have been made under a mistake.

[227] I accordingly conclude, for the reasons given above, and in respectful disagreement with the judge and with Coghlin J in *Mallusk*, that the appellants succeed on the cause of action issue.

[228] In the light of this conclusion, the mistake of law issue, the s 32(1)(c) issues and the 'settled law defence' issue do not arise. However, for the sake of completeness I address them briefly.

B. The mistake of law issue

[229] In para [22] of his judgment, the judge concluded that—'the ACT was as a matter of law payable when DMG paid it, and the decision of the CJEC in [*Metallgesellschaft*] does not mean that it was not payable.'

[230] It followed that DMG's belief that the ACT was due was not a mistaken belief. However, the judge went on (in para [25] of his judgment) to conclude that DMG nevertheless made the payments under a mistake of law in that:

> '[i]f the true state of the law had been known at the time the companies would have made elections and DMG's dividends would have been paid under them as group income ... It was directly a mistake about whether group income elections could be made. The liabilities to pay ACT arose as secondary consequences of that primary mistake.'

[231] With respect to the judge, I cannot agree with that analysis. In para 76 of its judgment (quoted in [44], above) the ECJ held that the relevant statutory regime was contrary to art 52, and consequently unlawful under Community law. It follows that although *under the terms of that regime* ACT was due and

payable, 'the true state of the law' (to use the judge's expression) was that the regime gave rise to no obligation to pay. Thus the payments were made pursuant to an unlawful demand.

[232] As to DMG's state of mind in making the payments in question (that is to say, in practical terms the state of mind of Mr Thomason) it emerges clearly from Mr Thomason's evidence (in particular the passage from his witness statement quoted by the judge in para [27] of his judgment: see [136], above) that DMG believed that notwithstanding the pending *Metallgesellschaft* litigation the ACT remained due and payable. Thus, DMG's mistake lay not in its belief that a group income election was not available, but rather in its belief that the ACT was payable when, on the true state of the law, it was not. That was plainly a mistake of law.

[233] Moreover, I agree with Mr Rabinowitz that such a mistake falls fairly and squarely within the *Kleinwort Benson* principle. As Lord Goff says ([1998] 4 All ER 513 at 536, [1999] 2 AC 349 at 379):

> 'The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it. Plainly, therefore, he paid the money under a mistake of law, and accordingly, subject to any applicable defences, he is entitled to recover it.'

C. The s 32(1)(c) issues

[234] As to the discovery of the mistake, I respectfully agree with the judge's conclusion (in para [30] of his judgment, quoted in [138], above) that the mistake was not discovered until the ECJ delivered its judgment in *Metallgesellschaft*.

[235] As to Lord Hope's observations in *Kleinwort Benson* [1998] 4 All ER 513 at 561, [1999] 2 AC 349 at 410 (quoted in [100], above) that a state of doubt is different from that of mistake, and that a person who pays when in doubt takes the risk that he may be wrong, I accept Mr Rabinowitz's submission (see [175], above) that mere knowledge that the statutory provisions in question are under challenge is not to be equated with a state of doubt as to the validity of those provisions. In any event, as I have already pointed out, Mr Thomason's evidence was that he was in no doubt that the ACT was payable, whatever the decision in *Metallgesellschaft*.

[236] It follows that in my judgment, and in respectful agreement with the judge, all three payments in question were made under a mistake of law which was not discovered until the ECJ delivered its judgment in *Metallgesellschaft*.

D. The 'settled law defence' issue

[237] I can deal with this issue shortly. I accept Mr Rabinowitz's submission (see [183], above) that, as Lord Hoffmann concluded in *Kleinwort Benson*, the question whether or not the law should recognise a 'settled law defence' to a cause of action for mistake of law on the *Kleinwort Benson* principle is a question for Parliament. In any event, if and in so far as it is a question for the courts, in *Kleinwort Benson* itself Lord Goff declined to recognise such a defence.

E. The pleading issue

[238] For reasons explained in Part III of this judgment, this issue remains a live issue in relation to the 1995 payment and the 1996 payment notwithstanding my conclusion on the cause of action issue.

[239] I return, therefore, to the particulars of claim. As noted earlier, the only amendments are to the schedules to the particulars of claim: no amendments have been made to the body of the pleading.

[240] Paragraphs 1–3 of the particulars of claim describe DMG and the structure of the group of which it is a member. Paragraphs 4 and 5 plead the relevant statutory provisions. Paragraphs 6 and 7 plead that the statutory provisions were at all material times discriminatory, contrary to arts 6, 52 and 58 of the EC Treaty. Paragraph 7 pleads that the statutory provisions were accordingly at all material times unlawful.

[241] Paragraphs 9–12 of the particulars of claim plead as follows:

> '9. From time to time the claimant paid dividends to DBAG ("the DBAG Dividends"). Pursuant to the unlawful statutory provisions and to unlawful demands made by the first and/or second defendant and further and/or alternatively under a mistake of law as to the validity of the statutory provisions, the claimant paid to the first defendant ACT in respect of the DBAG dividends. Such amounts include, but are not limited to, payments of ACT made by the claimant as specified in the first schedule hereto.
>
> 10. Such payments were received by the first defendant and/or the second defendant to the use of the claimant.
>
> 11. From time to time the claimant paid dividends to DBI ("the DBI Dividends"), which in turn paid the DBI Dividends to DBAG. Pursuant to the statutory provisions, the claimant paid to the first defendant ACT in respect of the DBI Dividends. Such amounts include, but are not limited to, payments of ACT made by the claimant as specified in the second schedule hereto.
>
> 12. The DBAG Dividends and the DBI Dividends are hereinafter referred to together as "the Dividends".'

[242] Then, under the heading 'Restitution and Compensation', para 13 pleads as follows:

> 'By reason of the matters pleaded above, the claimant is entitled to and claims against the defendants and each of them restitution of, and further and/or alternatively compensation for the loss of use of, monies paid on account of ACT pursuant to unlawful demands by the first and/or second defendant and/or under a mistake of law and pursuant to the statutory provisions in respect of the DBAG Dividends. Compensation for loss of use of monies to be calculated from the dates of payment until set-off against mainstream corporation tax or other payment or utilisation.'

[243] Paragraphs 17–21 of the particulars of claim plead loss and damage. As noted earlier (see [10], above), the particulars of loss and damage pleaded under para 20 of the particulars of claim contains (in sub-para (B)) a claim for compensation for loss of use of the ACT during the period specified in para 13.

[244] On that basis, DMG claims restitution and compensation, in addition to damages for breach of duty.

[245] CPR 17.1 provides that once a statement of case has been served it may be amended only with the written consent of the parties or with the permission of the court. CPR 17.4 applies to amendments to a statement of case after the end of a relevant limitation period. CPR 17.4(2) provides as follows:

> 'The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.'

[246] The issue, therefore, is whether the amendments to the schedules to include particulars of the 1995 payment and the 1996 payment had the effect of adding new claims; for if that was their effect, then for limitation purposes the new claims were not brought until the amendments were made, and it would follow that in the light of my conclusion on the cause of action issue the 1995 payment and the 1996 payment (in addition to the 1993 payment) were statute-barred.

[247] In my judgment, however, on its true interpretation the particulars of claim plead claims in respect of *all* payments of ACT made by DMG under the statutory provisions in question, the function of the schedules being merely to supply particulars of the specific payments. This follows, in my judgment, from the statements in paras 9 and 11 that the claims 'include, but are not limited to' the payments specified in the schedules. It may well be that, when served with a pleading in that form, the appellants could have complained that it was embarrassing. In the event, however, no objection was taken at the time to the form of the pleading, just as no objection was taken to the fact that it includes a restitutionary claim which finds no mention in the claim form.

[248] I accordingly agree with the judge that the claims in respect of all three of the payments in question were brought when the claim form was issued (13 October 2000).

PART XIII: RESULT

[249] The result, given my conclusions on the cause of action issue and the pleading issue, is that the claim in relation to the 1993 payment is statute-barred, but that the claims in relation to the 1995 payment and the 1996 payment are not. I would accordingly allow the appeal in relation to the 1993 payment, but dismiss it in relation to the 1995 payment and the 1996 payment.

RIX LJ.

[250] On the cause of action issue, I agree with the judgments of Jonathan Parker and Buxton LJJ. On the pleading issue, on which my Lords have differed, I respectfully prefer the approach of Jonathan Parker LJ.

[251] I gratefully adopt my Lords' exposition of the facts and the authorities, which make it unnecessary for me to repeat that exercise.

THE PLEADING ISSUE

[252] I agree with Buxton LJ that in a claim for restitution each payment the return of which is claimed constitutes a separate cause of action, so that a claim which has been advanced within time in respect of one payment will not validate a claim in respect of other earlier payments where limitation has already run; nor will it validate an attempt to amend a claim form out of time in respect of further payments not so far pleaded. In this respect, Jonathan Parker LJ's approach to this issue is no different: see [246], above.

[253] However, the particular problem which has arisen is of a lower order of abstraction. It is in truth a narrow pleading point which has arisen on very special facts relating to the state of the pleadings in this case. The circumstances have been set out in Jonathan Parker LJ's judgment at [10] and [239]–[243], above. Like him (and the parties) I ignore the fact that restitution was never claimed in the claim form itself, but only in the particulars of claim. In form the claim form should have been amended, but perhaps because there is no critical difference between the date of the claim form on 13 October 2000 and the date of the particulars of claim on 9 February 2001 the absence of a claim for restitution from the claim form itself has passed without remark. As for the particulars of claim, the essential facts are that in their original form they claimed restitution, quite generally, of 'Dividends' which were defined as amounts which 'include, but are not limited to' the payments specified in the first and second schedules; and in their later amended form those schedules were expanded to refer to the disputed payments in 1995 and 1996. The question is whether the particularisation in the original schedules of only a limited number of a more general class expressly pleaded in the main body of the pleading means that the later extension of the amended schedules to other payments within the general class lies outside the jurisdiction allowed for amendments once the relevant limitation period has expired.

[254] Section 35 of the Limitation Act 1980 provides:

> '(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—... (b) in the case of any other new claim, on the same date as the original action ...
>
> (2) In this section a new claim means ... any claim involving either—(a) the addition or substitution of a new cause of action ...
>
> (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim. ...
>
> (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following—(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action ...'

[255] Pursuant to s 35, CPR 17.4(2) provides:

> 'The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.'

[256] Park J, describing the current issue as 'a fine point on the small print wording of the particulars of claim' expressed the view (see [2003] EWHC 1779 (Ch) at [34], [35], [38], [2003] 4 All ER 645 at [34], [35], [38]) that the original form of the particulars of claim ('include, but are not limited to') meant that relief was claimed in respect of all dividend payments not limited to the payments specified in the original schedules. The amendments therefore 'did not plead a new cause of action, but rather gave further factual details of a cause or causes of action which had already been pleaded' (see [38]). Jonathan Parker LJ is of the same view (see [248], above), and so am I. On this basis, there is no need to ask whether the claims for relief in respect of the additional scheduled payments are 'new claims', nor whether, if they were, they would arise out of the same facts or substantially the same facts as already pleaded.

[257] Buxton LJ differs in his view, apparently on the basis that the particulars of claim (together with the original schedules) had not adequately or sufficiently pleaded the additional payments. That, however, must in my judgment ultimately be a matter of degree. I would be reluctant to hold that a claim form which sufficiently identified the cause or causes of action sued upon would fail in its purpose because of some lack of particularity. In the present case, the payments in question were identified as dividends paid 'from time to time' pursuant to unlawful statutory provisions and demands. It was in the nature of the pleading that there could be no intention to include some such payments but not others. If there had been no schedules identifying specific payments, then no doubt the pleading would refer to all such dividend payments described. Such a pleading may have lacked proper particularisation of dates and amounts, but I would not describe it as lacking in all effect. In other circumstances the original schedules might have been interpreted as deliberately excluding any dividend payments not particularised in them, but such an intention could hardly be taken from the language 'include, but are not limited to'.

[258] Thus, in a case where an allegation in the statement of claim had not been pursued in further and better particulars, it was permissible as a matter of discretion by amendment of the particulars after the expiry of the limitation period to resuscitate the allegation without it being said that this amounted to a new cause of action: *Burton v MBC (Builders-Ashington) Ltd* (1995) 69 P&CR 496 (Court of Appeal). And in another case it was held that a statement of claim which originally disclosed no sustainable cause of action (thus a strong example) might in a proper case be amended with leave of the court despite the expiry of the limitation period so that a cause of action based on the same or substantially the same facts could be introduced: *Sion v Hampstead Health Authority* [1994] 5 Med LR 170 (Court of Appeal). In my judgment these examples support the view which Park J, Jonathan Parker LJ and I have taken on this issue.

[259] Finally, even if the amendments to the schedules to particularise additional payments did amount to the introduction of new causes of action, I

would regard it as a possible conclusion, particularly in the light of the original pleading ('include, but are not limited to'), that such further payments arise out of the same or substantially the same facts. That conclusion was not investigated in the judgment below, but it was a submission made on appeal. In my judgment, it is not necessary to reach this submission, but I would not wish it to be thought that it could not provide a feasible and legitimate answer to the problem raised by the issue under discussion.

[260] For my part, therefore, I would agree that whether one looks to the claim form itself or to the particulars of claim the claims in respect of the 1995 and 1996 payments were brought within time.

THE CAUSE OF ACTION ISSUE

[261] I agree with my Lords' cogent analysis in this respect. Where a tax payment has been exacted by an unlawful ultra vires demand, as in this case, the applicable cause of action is the *Woolwich* cause of action (see *Woolwich Equitable Building Society (No 2) v IRC* [1992] 3 All ER 737, [1993] AC 70), as of right as a matter of high constitutional principle, in which mistake of law, whether it occurs or not (and in *Woolwich* it did not occur), is irrelevant. Otherwise, mistake of law in the context of payment of taxes is only relevant to the extent that it has a possible role to play within the applicable statutory provisions. The rules of recovery in private law transactions, however, in as much as they are based on mistake of fact or law, are governed by different principles and fall under a 'separate and distinct' regime.

THE MISTAKE OF LAW AND S 32(1)(C) ISSUES

[262] Jonathan Parker LJ has dealt with these issues only briefly, for they do not arise and he therefore approached them on the hypothetical basis that he was wrong to say that the *Kleinwort Benson* regime (see *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349) was inapplicable. It followed that he had to apply the facts of this case in an inappropriate context. In this respect, I would prefer myself to underline the observations of Buxton LJ at [279]–[284], below. I find it very difficult to reconcile the judge's conclusion, that the respondents were still labouring under their mistake of law until the judgment of the Court of Justice had been delivered, with Lord Hope of Craighead's remarks in *Kleinwort Benson* [1998] 4 All ER 513 at 562, 564, [1999] 2 AC 349 at 410, 412: and see now *Brennan v Bolt Burden (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321.

CONCLUSION

[263] In sum, I agree with Jonathan Parker LJ that the appeal should be allowed in relation to the 1993 payment, where the respondents' claim was time barred, but dismissed in relation to the 1995 and 1996 payments, where their claims were not out of time.

BUXTON LJ.

[264] Because we are differing from the judge (see [2003] EWHC 1779 (Ch), [2003] STC 1017), and also because on the pleading issue I have the misfortune to take a view different from that of my Lords, I venture to add some words of my

own. In dealing with the substance of the appeal I address only the 'cause of action' issue, as identified by Jonathan Parker LJ in [26] A of his judgment.

LORD GOFF'S ANALYSIS IN *KLEINWORT*: INTRODUCTION

[265] I have warned myself against treating Lord Goff's speeches in *Woolwich Equitable Building Society (No 2) v IRC* [1992] 3 All ER 737, [1993] AC 70 (*Woolwich*) and in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349 (*Kleinwort*) as if they were statutes. At the same time, however, these speeches are no ordinary judgments. In both cases the leading authority in a particular area of the law set himself to explain developments in that law that were acknowledged to be of general significance and which, before those cases, had been feared to be beyond the reach of judicial as opposed to legislative intervention: in *Woolwich*, the recovery of money paid under an ultra vires demand; in *Kleinwort*, the recovery of money paid under a mistake of law. In both cases Lord Goff explained the departures from the position as it had been understood up to then by detailed and careful analysis, which is plainly intended to set out the whole of the relevant law in effectively canonical terms. And the speeches were seen as such by other members of the House of Lords: see, in *Kleinwort*, Lord Browne-Wilkinson [1998] 4 All ER 513 at 517, [1999] 2 AC 349 at 357 and Lord Hoffmann [1998] 4 All ER 513 at 552, [1999] 2 AC 349 at 398.

[266] It is therefore tempting to say that when, in the famous passage in *Kleinwort* [1998] 4 All ER 513 at 538, [1999] 2 AC 349 at 382, Lord Goff said that recovery of payments made under an ultra vires demand fell under a separate and distinct regime from payments made under private transactions involving a mistake of fact or law of the kind addressed in *Kleinwort*; he really did mean separate and distinct; and that that is the end of this case. But that simple approach would not do justice either to the judgment of the judge or to the arguments addressed to us. Nor would it dispell what appear to be lingering concerns that Lord Goff would not have intended the outcome of his observations that is asserted by the Revenue in this case. It is therefore necessary to address the matter in much more detail.

[267] I will proceed as follows. First, I address the development of the law that occurred in *Woolwich*, to demonstrate that that law was intended to form a complete code in relation to recovery of ultra vires payments by use of the common law rather than under statute. That does not of itself determine the issue before us, but it does serve to explain why Lord Goff spoke as he did in *Kleinwort*. Second, and following on from the analysis of *Woolwich*, I consider the context in which Lord Goff referred to the *Woolwich* rule in *Kleinwort*, to demonstrate that not only did Lord Goff think that *Woolwich* recovery was the only remedy for ultra vires payments; but also, on the other side of the coin, that such payments were amenable only to recovery under the *Woolwich* rule and not under the rubric of payments under a mistake. Third, I demonstrate that that conclusion is in any event strongly reinforced by the difficulty of fitting a case of ultra vires payments, such as the present, into the language of and rules applying to recovery on grounds of mistake. Fourth, I address certain other considerations that were relied on in the course of argument.

WOOLWICH: THE PROBLEM

[268] In paras [269]–[274] of this judgment unless otherwise stated page references are to the reports at [1992] 3 All ER 737 and [1993] AC 70.

[269] Lord Goff recognised that the law of restitution, as it stood in 1992, was limited in the relief that it gave to persons who had paid an ultra vires tax. Recovery was available when a payment was made under a mistake of fact, though not of law [1992] 3 All ER 737 at 753, [1993] AC 70 at 164. And payments were recoverable when made under 'compulsion'; but, at least in the then state of English law, that concept did not extend to the act of paying simply in order to obey what was thought to be the law [1992] 3 All ER 737 at 760, [1993] AC 70 at 173. It was necessary to rely on these particular and limited rights of recovery because English law did not recognise a general action for the recovery of money on the ground that it was not due, along the lines of the condictio indebiti that had been developed in other systems [1992] 3 All ER 737 at 759, [1993] AC 70 at 172.

WOOLWICH: THE SOLUTION

[270] Lord Goff went on from his observation that English law gave no *general* right of recovery to explain that what was being sought in *Woolwich* was in a sense a reversal of that position 'in a particular type of case' [1992] 3 All ER 737 at 759, [1993] AC 70 at 172. And the justification for that step was not any deduction from or development of the existing rules of restitution, but a combination of common justice; the constitutional principle that taxes should not be levied without Parliamentary approval; and the need to protect the citizen against the power of the state. He said ([1992] 3 All ER 737 at 759–760, [1993] AC at 172):

> 'Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right. ... it is one of the most fundamental principles of our law—enshrined in a famous constitutional document, the Bill of Rights (1688)—that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right. ... when the Revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state ...'

[271] This was therefore a new remedy, perhaps drawing upon, but certainly not directly applying, ordinary principles of restitution, and having as its basis and justification the particular nature of an ultra vires demand for tax. The distance between this remedy and restitution as understood in private law can be demonstrated by a number of the characteristics of recovery on the basis of an ultra vires demand that were identified in *Woolwich*: (i) Although stress is laid upon the coercive power of the state, that in itself does not satisfy the requirements for restitutionary recovery on the ground of compulsion: see [269] above, and Lord Goff ([1992] 3 All ER 737 at 760, [1993] AC 70 at 173). (ii) The point is not finally decided in *Woolwich*, but Lord Goff was strongly attracted to the argument that defences available to the recipient in a private law restitutionary claim should not be available to the Revenue when it has collected

tax under an ultra vires demand. That is demonstrated by the fact that Lord Goff found 'most attractive' the reasoning to that effect of Wilson J in her dissenting judgment in *Air Canada v British Columbia* (1989) 59 DLR (4th) 161: see [1992] 3 All ER 737 at 762–763, [1993] AC 70 at 175–176. (iii) Lord Goff recognised the force of arguments that, because of potential damage to public funds if the right created in *Woolwich* were not controlled, restrictions in terms for instance of strict rules of limitation might have to be imposed: see [1992] 3 All ER 737 at 761–764, [1993] AC 70 at 174–177. Lord Goff did not take that step as a matter of judicial decision, nor indeed could he have done, but it is clear that he saw the point as significant: see in particular [1992] 3 All ER 737 at 761, [1993] AC 70 at 174. Two comments may be made. First, no such rules are seen as necessary in the case of private law restitutionary claims. Second, and directly relevant to our concerns in the present case, the respondents' argument requires us to accept that although he expressed concern in *Woolwich* about, and urged review by the Law Commission of, a limitation period even as long as six years in the case of ultra vires demands, Lord Goff nonetheless looked with equanimity in *Kleinwort* upon the prospect of claims in respect of such demands that, in the present case, were not raised until nine or ten years after demand made.

[272] It is therefore difficult to escape the conclusion that in *Woolwich* the House of Lords recognised, or created, a right and a remedy that were specific to the particular circumstances of the demander and of the payer, and which stood outside the mainstream of restitution as understood in a private law context.

[273] It is also difficult to escape the conclusion that that remedy was seen by Lord Goff to be the sole remedy available in respect of a payment under an ultra vires demand. As already noted, before *Woolwich* the sole grounds of relief were thought to be based on mistake of fact or on compulsion: see [269] above. The strong tide of jurisprudence flowing in favour of recognising relief also in cases of mistake of law was already very apparent: see [1992] 3 All ER 737 at 753, [1993] AC 70 at 164. But Lord Goff did not see that as an appropriate route through which to found relief in cases of ultra vires payments: not merely because in some such cases, of which *Woolwich* itself was one, no mistake had been made by the payer, but more fundamentally because issues of mistake on the part of the payer were seen as simply irrelevant to claims based on unlawful action on the part of the Revenue. As Lord Goff said ([1992] 3 All ER 737 at 763, [1993] AC 70 at 176):

> 'if there is to be a right to recovery in respect of taxes exacted unlawfully by the Revenue, it is irrelevant to consider whether the old rule barring recovery of money paid under mistake of law should be abolished, for that rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the Revenue.'

Woolwich thus provides a complete code to address recovery of payments under ultra vires demands.

[274] Finally in analysing *Woolwich* I must acknowledge (I hope that it is not disrespectful to say, by way of a footnote) that in the last of his many major contributions to the law of restitution before his untimely death Professor Peter Birks suggested that, had the *Woolwich* problem been addressed after the 'swaps' cases, and in the light of their jurisprudence, it would have been clear that the case fell entirely

consistently within the same rules of restitution as were subsequently applied in those swap cases: see Birks *Unjust Enrichment* (2nd edn, 2005) p 134. I find it difficult to share that view, in the light of the actual exposition in *Woolwich* as set out above. And the commonality that Professor Birks sees between recovery of ultra vires payments and restitutionary recovery in other cases springs from the view that all of them rest on recovery on the single ground of 'absence of basis': see *Unjust Enrichment*, p 134. That argument was not adopted before us, and understandably so. That was because it is essential to the respondents' case, applying *Kleinwort*, to stress that recovery was achieved in that case on the basis of mistake: so as to attract the period of limitation envisaged by s 32(1)(c) rather than the six years to which restitutionary claims generally are restricted. That last aspect of *Kleinwort* was equally stressed in the case itself by Lord Hope of Craighead. Having referred ([1998] 4 All ER 513 at 567, [1999] 2 AC 349 at 415) to *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890 and *Guinness Mahon & Co Ltd v Kensington and Chelsea London BC* [1998] 2 All ER 272, [1999] QB 215 (cases that as Professor Birks emphasised (see *Unjust Enrichment*, p 110) were decided on absence or failure of basis) Lord Hope continued ([1998] 4 All ER 513 at 567, [1999] 2 AC 349 at 415) to point out that those cases did not assist because they had not been decided on the ground of mistake, which was the ground on which the bank had to rely in order to meet the local authorities' limitation defence.

THE CONTEXT OF LORD GOFF'S 'SEPARATE AND DISTINCT' OBSERVATION IN *KLEINWORT*

[275] In paras [276]–[278] of this judgment page references, unless otherwise stated, are to the reports at [1998] 4 All ER 513 and [1999] 2 AC 349.

[276] The respondents urged that we should look carefully at the point in Lord Goff's speech at which his observation was made, and at his reason for making it. The judge also thought that to be of importance: see ([2003] 4 All ER 645 at [18](ii)). I respectfully agree. From [1998] 4 All ER 513 at 537 and [1999] 2 AC 349 at 381 onwards Lord Goff was considering, in the context of his adoption of the declaratory theory of judicial decision, whether there should be recognised a defence of payment under a settled understanding of the law, as was recommended by the Law Commission in cl 3(1) of the draft Bill annexed to its report on *Restitution: mistakes of law and ultra vires public authority receipts and payments* (Law Com No 227) (1994): see [1998] 4 All ER 513 at 533–534, [1999] 2 AC 349 at 376–377. It was in order to address that issue that Lord Goff ([1998] 4 All ER 513 at 537–538, [1999] 2 AC 349 at 381) considered that it was—

> 'appropriate to draw a distinction between, on the one hand, payments of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions.'

[277] Lord Goff drew that distinction because he considered that the arguments in favour of a defence of payment under a settled understanding of the law applied differently in the two cases. '[I]n cases concerned with overpaid taxes, a case can be made' (see [1998] 4 All ER 513 at 538, [1999] 2 AC 349 at 382) for the existence of such a defence; for somewhat the same reasons as had led Lord Goff in *Woolwich* to contemplate strict time-limits for claims in ultra vires cases: see [271](iii), above. But no such case could be made in respect of payments under private transactions, where the element of public interest is lacking: see [1998] 4 All ER 513 at 538, [1999] 2 AC 349 at 382. It is therefore entirely clear that

Lord Goff regarded the contrast that he underlined between the two separate and distinct regimes as essential to the development of his argument. Not only the language used but also the structure of this part of the judgment demonstrates that Lord Goff's analysis of the two separate streams of relief was regarded by him as setting out the substantive law that pointed to a particular solution to the issue of the settled law defence.

[278] It follows that I am unable to accept the argument of the respondents that the crucial part of Lord Goff's judgment is in some way limited in its generality because it occurs during a discussion of the settled law defence. It occurred there precisely because Lord Goff needed to set out the general structure of the law before identifying the different effect of the arguments about the settled law defence as applied to one chapter of the law and to the other. It also follows that I am unable to adopt the view of the judge, in his para [18](ii), that if Lord Goff had intended to lay down a contrast between recoverability of money generally paid under a mistake of law and recoverability of money paid in taxes under a mistake of law, he would not have waited to do so until this stage in his speech. In the earlier parts of his speech Lord Goff was concerned to demonstrate, in considerable detail, the current throughout the world towards recognising mistake of law as a ground of restitutionary recovery. Lord Goff did not need at that stage to address the position with regard to ultra vires payments because, as indicated in [273], above, he thought that 'mistake' and recovery on the ground of ultra vires demand were two quite separate institutions. The latter ground of recovery only needed to come into the reckoning when Lord Goff explained how it was that arguments that potentially supported a defence of payment under settled law in the case of ultra vires demands could not apply in the case of payments made under a mistake, be it of fact or of law.

THE NATURE OF 'MISTAKE' IN AN ULTRA VIRES CASE

[279] Lord Goff having held that issues of mistake are irrelevant in ultra vires cases (see [273], above); and having done so in a speech that commanded the assent of the majority of their Lordships in *Woolwich*; it may appear supererogatory to seek to demonstrate why, with great respect, that view is plainly well-founded. I do so only because, as the argument developed in this appeal, it became increasingly apparent that the considerations that lead to recovery in a case of an ultra vires demand can only with the greatest difficulty be fitted into the rules governing recovery on grounds of mistake.

[280] First, as we have already seen (see [271](ii), above), the 'defences' available to a claim for restitution on grounds of mistake may well not be available in a *Woolwich* case. If, as the respondents argue in the present case, any claim in respect of an ultra vires demand where a 'mistake' can be said to have been made by the payer can also be pursued under the latter rubric, then that presumably attracts the whole of the law attaching to recovery on grounds of mistake, however difficult it may be to apply. That in turn severely undermines the principle strongly stated in *Woolwich* that recovery should be as of right, to the extent that Lord Goff expressed doubts as to whether even a defence that the plaintiff had passed on the tax or levy should be available: see *Woolwich* [1992] 3 All ER 737 at 764, [1993] AC 70 at 177–178. And the difficulty of applying the normal restitution defences to a right based simply on an ultra vires demand is cogently demonstrated by Professor Gareth Jones in *Goff and Jones: The Law of Restitution* (5th edn, 1998) p 676–677.

[281] Second, the 'mistake' on which recovery depends in a case like *Kleinwort* is a mistake as to the rights of the opposite party in a private law transaction. But it must be an actual mistake as to those rights, and not just uncertainty as to their existence; and it must be that mistake that causes the payment to be made. Those requirements are set out by Lord Hope in *Kleinwort*:

> '([1998] 4 All ER 513 at 560, [1999] 2 AC 349 at 408) it will not be enough for the payer to prove that he made a mistake. He must prove that he would not have made the payment had he known of his mistake at the time when it was made ... ([1998] 4 All ER 513 at 562, [1999] 2 AC 349 at 410) A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong ... ([1998] 4 All ER 513 at 564, [1999] 2 AC 349 at 412) A payment made in the knowledge that there was a ground to contest liability will be irrecoverable ...'

[282] Those considerations can only be applied very imperfectly to a citizen faced with an ultra vires demand. Take this very case. The judge, in his para [27], quoted the evidence as to the respondents' reasons for making the payments of their head of taxation, Mr Thomason:

> '[A]t all times prior to the determination of the European Court in the Metallgesellschaft case [see *Metallgesellschaft Ltd v IRC, Hoechst AG v IRC* Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620], I believed that the UK statute denying the ability to make a group income election was the law and I was bound to act in accordance with this law ... It did not occur to me that I could ignore the law as it stood for the simple reason that the law is the law. Just because another taxpayer challenged the law that did not mean that I could or should ignore it.'

The judge found that the respondents did not become aware that s 247 of the Income and Corporation Taxes Act 1988 was unenforceable in Community law until judgment had been delivered in the Court of Justice: and that any payments made before that date were indeed made under a relevant and operative mistake. That conclusion may be difficult to reconcile with at least the latter part of Lord Hope's analysis set out in para [281], above. The more general point, however, is that persons who pay in response to a demand by the Revenue are in a quite different position from persons who pay under a private transaction. The demand for tax is implicitly backed by the coercive powers of the state, as Lord Goff emphasised in *Woolwich* [1992] 3 All ER 737 at 759–760, [1993] AC 70 at 172, see [270], above. That consideration lay behind the view expressed by Mr Thomason. That consideration, allied to the public nature of the responsibility, caused Lord Goff to think in *Woolwich* [1992] 3 All ER 737 at 763, [1993] AC 70 at 176, see [273], above, that the taxpayer's opinion as to the content of the law was irrelevant.

[283] It is thus not possible sensibly to apply Lord Hope's analysis of the nature of the mistake that grounds recovery to a case of payment under an ultra vires demand. And to attempt to do so produces the very remarkable outcome asserted in the present case. Both the Woolwich Equitable Building Society and the present respondents paid under claims made by public authorities. In each case the cost of not paying, both in terms of litigation and in terms of public

exposure, would have been significant. Woolwich was certain, as it turned out correctly, that the demand was indeed ultra vires, but paid none the less. The present respondents were aware of the doubts raised by other persons, and indeed of pending litigation, but either formed no concluded view about the issue, or as Mr Thomason suggests paid because they thought, as it turned out incorrectly, that the law was the law. On the basis of these two states of mind, the respondents claim relief because of payment under a mistake, whilst Woolwich is restricted to a claim with a six year limitation period because, as Lord Goff pointed out in *Kleinwort*, it had made no mistake.

[284] I do not introduce this comparison to argue matters of fairness. Rather, the comparison demonstrates the ineptitude of seeking to address cases the vice of which turns on the making of an ultra vires demand by a public authority through machinery developed to deal with the quite different issues that arise when a citizen makes a private law payment under a mistake that is indeed his own mistake.

REVENUE CASES RELIED ON BY LORD GOFF IN *KLEINWORT*

[285] In the course of a comparative exercise demonstrating that the rule excluding recovery for mistakes of law had been abandoned in other jurisdictions Lord Goff referred to two cases that involved payments to the revenue: in South Africa *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) SA 202; and in Australia *Comr of State Revenue v Royal Insurance Australia Ltd* (1994) 126 ALR 1. Mr Rabinowitz argued strongly that that demonstrated that Lord Goff saw no distinction between revenue and non-revenue cases when dealing with the jurisdiction in mistake. The judge adopted a similar argument in respect of the reference to *Willis Faber*: see his para [18](v).

[286] The reference to *Comr of State Revenue* does not assist in this connexion. Lord Goff cited the case only to correct a dictum of Mason CJ about what had been decided in *Woolwich*: see [1998] 4 All ER 513 at 532, [1999] 2 AC 349 at 375. *Willis Faber* was not subjected to any detailed analysis by Lord Goff. In any such analysis I have little doubt that Lord Goff would have pointed out that the basis of recovery in Roman-Dutch law is the condictio indebiti: which, as Hefer JA put it, 'has since Roman times always been regarded as a remedy *ex aequo et bono* to prevent one person being unjustifiably enriched at the expense of another' (see (1992) (4) SA 202 at 220). That is the general remedy for recovery of money on the simple ground that it was not due that, as Lord Goff had explained in *Woolwich* [1992] 3 All ER 737 at 759, [1993] AC 70 at 172, English law had decided not to adopt: see [269] above. The condictio does not rest on the mistake, but rather on the effect of the mistake. So, as Hefer JA went on to point out, 'where such a payment is made in error, it matters not whether the error is one of fact or of law: in either case it remains the payment of an *indebitum* and, if not repaid, the receiver remains enriched' (see (1992) (4) SA 202 at 220). *Willis Faber* thus addresses a system of law with a basis different from that explained by Lord Goff in *Woolwich*. It is quite impossible to spell out of his passing reference to the case a conclusion that conflicts with the specific language used everywhere else in his speech.

THE REQUIREMENT OF EUROPEAN LAW

[287] The rules as to group income election are invalid because they infringe art 43 EC (ex art 52 of the Treaty establishing the European Community). The

national state is therefore obliged to provide a remedy, in the shape of restitution of charges, but according to the rules of the domestic legal system and subject to the procedural rules of that system: see *Metallgesellschaft* [2001] All ER (EC) 496 at 538, [2001] Ch 620 at 663 (para 85). The only restriction on the reach of those domestic rules is that they must not make the exercise of the Community right practically impossible or excessively difficult. The domestic rules that fall under this rubric include rules as to time-limits: see *Palmisani v Instituto Nazionale della Previdenza Social (INPS)* Case C-261/95 [1997] ECR I-4025. A remedy is provided for the wrongful acceleration of payment of tax in the present case under the *Woolwich* principle. It was not suggested, nor could it have been, that the limitation rules attaching to that principle made the exercise of the Community right practically impossible or excessively difficult. The remedy therefore conforms to this country's obligations in Community law.

ALTERNATIVE CAUSES OF ACTION?

[288] Mr Rabinowitz argued that, even if the *Woolwich* and *Kleinwort* remedies were separate and distinct, that created nothing more than alternative causes of action in respect of payment under an ultra vires demand, between which the claimant could choose as suited him: just as, for instance, the same facts might ground a claim either in nuisance or in negligence. That approach does not give weight either to the exclusive nature of the remedy created in *Woolwich* or to the difficulty of applying the rules as to mistake of law to a payment under an ultra vires demand. Nor does it respect the language that described the two remedies as separate *and distinct*.

[289] There is however a further reason why this argument is ill-founded. Where there are alternative causes of action in tort, they are nonetheless both based on the same damage or loss suffered by the claimant. As Lord Hobhouse of Woodborough said in *Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] 1 All ER 833 at 847, [2000] 2 AC 190 at 209, citing the headnote in the official report of *The Wagon Mound* (see *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] 1 All ER 404, [1961] AC 388), in the case of claims in tort it is not the act but the consequences on which tortious liability is founded. But restitutionary claims have a different structure, because they are indeed founded on an act, the act of payment. In *Woolwich* 'the subject who makes a payment in response to an unlawful demand of tax acquires forthwith a prima facie right in restitution to the repayment of the money': per Lord Goff ([1992] 3 All ER 737 at 759, [1993] AC 70 at 171). In *Kleinwort*, '[i]t is well established that the cause of action for the recovery of money paid under a mistake of fact accrues at the time of payment': per Lord Goff ([1998] 4 All ER 513 at 542, [1999] 2 AC 349 at 386), a passage considered further in para [293], below. Whether the payer has in consequence suffered loss does not enter into consideration when determining the *constitution* of the action. Loss, or rather lack thereof, is only relevant as a matter of *defence;* and quite possibly, in *Woolwich*, not even then: see [271](ii) and [280], above. In the absence in English law of a general right to recovery (see [270], above), the claims turn on the reason why in law that payment should be returned. But that reason is completely different in the case of *Woolwich* on the one hand and of *Kleinwort* on the other. In *Woolwich* it is payment under an unlawful demand. In *Kleinwort* it is payment by mistake of the type and for the reasons described by Lord Hope: see [281]–[283], above.

[290] This contrast is quite different from the comparison that is appropriate in a case where the claimant bases his claim on an allegation that the defendant has caused him loss, and has more than one ground upon which he can assert that the defendant's conduct in causing that loss was unlawful. The difficulty of fitting into the requirements for a *mistake* by the payer that are laid out in *Kleinwort* a case, such as *Woolwich*, where the right to repayment is based on the nature of the *demand*, only serves further to underline the ineptitude of seeking to apply the jurisprudence of mistake to the separate and distinct regime that controls ultra vires conduct by public authorities.

THE PROPER REMEDY FOR PAYMENT UNDER AN ULTRA VIRES DEMAND

[291] In *Woolwich* Lord Goff, with the concurrence of the majority of the House, crafted a carefully designed and limited remedy to address the specific problem of ultra vires demands. He recognised that it might be necessary to limit the ambit of recovery of right against public funds, for instance by the introduction of specific time-limits. He emphasised that the remedy turned on the nature of the demand, and not on any mistake by the payer. Quite apart from the language used in *Kleinwort*, it is wholly implausible that Lord Goff in that case envisaged that the same problem could be addressed by a remedy with much more extensive time-limits and formulated entirely in terms of mistake by the payer. It is not open to the claimants in this case to adopt the remedy in terms of mistake of law that was introduced for private law cases in *Kleinwort*.

THE PLEADING POINT

[292] This issue is described and addressed by Jonathan Parker LJ in [26]E and [238]–[248] of his judgment. I have respectfully to disagree with the conclusion that he reaches. I do so because I do not think that that conclusion, and the argument of the respondents that supports it, properly recognises the essential nature of a claim in restitution, and what has to be proved to establish such a claim, such as I have already ventured to refer to in [289]–[290], above.

[293] In *Kleinwort* [1998] 4 All ER 513 at 542, [1999] 2 AC 349 at 386 Lord Goff said:

> 'It is well established that the cause of action for the recovery of money paid under a mistake of fact accrues at the time of payment. As authority for this proposition it is usual to cite *Baker v Courage & Co* [1910] 1 KB 56, [1908–10] All ER Rep 65, a decision of Hamilton J (later Lord Sumner) which, so far as I am aware, has never been questioned.'

Baker v Courage & Co, which was a limitation case, was referred to in the same sense by Lord Hope ([1998] 4 All ER 513 at 562, [1999] 2 AC 349 at 409). Hamilton J's analysis extended to all cases of the action for money had and received: see [1910] 1 KB 56 at 65, [1908–10] All ER Rep 65 at 68. It is a claim of that nature that the respondents assert. That claim depends on, and is constituted by, the fact of the payment: see [289], above. It therefore follows, as Lord Goff went on to hold ([1998] 4 All ER 513 at 542, [1999] 2 AC 349 at 386), that where there is a series of payments 'the cause of action for the recovery of the money so paid will accrue, in respect of each payment, on the date when the payment was made'.

[294] And it follows from that that a claim in restitution is not sufficiently pleaded unless it asserts the payment on which it rests: because until it does that

it fails (in the classic words of Brett J in *Cooke v Gill* (1873) LR 8 CP 107 at 116, cited with approval by this court in *Paragon Finance plc v Thakerar & Co (a firm)*, *Paragon Finance plc v Thimbleby & Co (a firm)* [1999] 1 All ER 400 at 405) to plead every fact which is material to be proved to entitle the plaintiff to succeed. Indeed, the fact of the payment is not merely material to success, but the whole essence of the action.

[295] I of course take note of the fact that the claim in the present case is not for recovery of the actual sums paid, but for compensation for premature payment: see [269], above. But the case has been argued throughout as an orthodox exercise in restitution; and in any event the respondents cannot make good, and by their pleading accept that they cannot make good, any claim for compensation unless they first establish the fact and date of the payment. For the reasons already given, each such payment creates a new cause of action; and therefore the amendments seeking to assert further payments added new causes of action: causes of action that on the above principles were out of time if the amendment was made out of time.

[296] Mr Rabinowitz argued against that conclusion, and I understand my Lords to accept, that this case was no different from a claim in tort, where new factual allegations may be added without constituting a new cause of action. That of course depends on the nature of the new factual allegations: see the judgment in *Paragon Finance* [1999] 1 All ER 400 at 406. But, more fundamentally, the essence of a claim in tort is of tortious conduct causing loss. It may therefore be sufficient to plead the tortious conduct as the foundation of the action, causing unspecified loss, with subsequent particularisation of the loss merely filling out an already sufficiently pleaded claim. That indeed is the approach adopted in paras 9 and 11 of the particulars of claim in this case. But in a claim for restitution the essence of the claim is the fact of the payment, with the reasons for that payment serving to assert why that payment should be returned: see [289], above. Both elements in the cause of action must thus be pleaded, under the general principle of *Cooke v Gill*.

[297] I would therefore hold that amendments made to add to the claim payments made more than six years before the date of the amendment are statute-barred.

DISPOSAL

[298] The claimants are restricted to relief under the *Woolwich* principle and to the six-year limitation period that is agreed to apply to that relief. In my view, all of the payments in respect of which claims are made fell outside that limitation period: the 1993 payment because it was made more than six years before the date of the writ, and the 1995 and 1996 payments because they were added by amendment made more than six years after the date of the payment. I would have allowed the appeal in those terms. However, since my Lords are of a different mind in relation to the pleading point the appeal will be allowed only to the extent set out by Jonathan Parker LJ in para [249] of his judgment.

Appeal allowed in part.

Kate O'Hanlon Barrister.

Campbell v Hamlet

[2005] UKPC 19

PRIVY COUNCIL

LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE, BARONESS HALE OF RICHMOND, LORD BROWN OF EATON-UNDER-HEYWOOD AND SIR SWINTON THOMAS

3 MARCH, 25 APRIL 2005

Trinidad and Tobago – Legal profession – Attorney at Law – Professional misconduct – Disciplinary proceedings – Standard of proof.

The appellant was an attorney-at-law practising in Trinidad and Tobago. The respondent made a complaint of professional misconduct against him to the Attorneys at Law Disciplinary Committee. The essence of the complaint was that the respondent had paid the appellant a sum of money to purchase from him two parcels of land but the appellant had neither conveyed the land nor returned the purchase price. The committee heard the complaint during the course of 1988 but it did not produce its findings and order until October 1996. It then found the allegation substantiated and ordered the appellant to refund the respondent's money with interest from the date of the committee's order. The appellant's appeal to the Court of Appeal of Trinidad and Tobago was dismissed and he appealed to the Privy Council contending (i) that the committee should have applied the criminal standard of proof and had in fact applied either the civil standard of a mere balance of probabilities or a standard somewhere between that and the criminal standard; and (ii) that the eight-year delay in the delivery of the committee's judgment was manifestly unfair and had adversely affected the quality of the judgment.

Held – (1) The criminal standard of proof was to be applied in all disciplinary proceedings concerning the legal profession. In the instant case there was nothing in the committee's determination to suggest that it had applied a lower standard of proof (see [16], [21], [22], [24], below); *Re a Solicitor* [1992] 2 All ER 335 considered.

(2) The committee's delay in giving judgment had been highly reprehensible but it did not follow that the appellant had been prejudiced by the delay nor that it afforded him any sustainable ground of appeal. The delay had been to his benefit; the evidence against him had been overwhelming and the complaint had been likely therefore to be found proved but in the meantime he had been able to retain and make use of the disputed moneys. The committee's ability to decide the case had not been compromised by the delay; it had had full transcripts of all the evidence and it had been well able to provide a reasoned decision in reliance upon them. Accordingly, the appeal would be dismissed (see [27], [29], [32], [34], below); *Goose v Wilson Sandford & Co* [1998] TLR 85 considered.

Notes

For disciplinary jurisdiction overseas, see 44(1) *Halsbury's Laws* (4th edn reissue) para 425.

Cases referred to in judgment

Aaron v The Law Society [2003] EWHC 2271 (Admin), [2003] All ER (D) 205 (Oct).

B v Chief Constable of the Avon and Somerset Constabulary [2001] 1 All ER 562, [2001] 1 WLR 340, DC.

Bhandari v Advocates Committee [1956] 3 All ER 742, [1956] 1 WLR 1442, PC.

Boodhoo v A-G of Trinidad and Tobago [2004] UKPC 17, [2004] 5 LRC 483, [2004] 1 WLR 1689.

Goose v Wilson Sandford & Co [1998] TLR 85, CA.

Gough v Chief Constable of the Derbyshire Constabulary [2002] EWCA Civ 351, [2002] 2 All ER 985, [2002] QB 1213, [2002] 3 WLR 289.

R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC [2002] UKHL 39, [2002] 4 All ER 593, [2003] 1 AC 787, [2002] 3 WLR 1313.

Solicitor, Re a [1992] 2 All ER 335, [1993] QB 69, DC.

Appeal

Wilston Campbell, an attorney-at-law, appealed from the decision of the Court of Appeal of Trinidad and Tobago (Hamel-Smith, Jones and Nelson JJA) on 22 May 2000 dismissing his appeal from the Findings and Order of the Attorneys-at-Law Disciplinary Committee on 29 October 1996 that an allegation of professional misconduct brought against the appellant by Simon Alexander was substantiated and ordering payment of compensation. Mr Alexander was replaced as respondent to the appeal by his executrix Davida Hamlet. The facts are set out in the judgment of the Board.

Anand Beharrylal (instructed by *P S Levy & Co*) for the appellant.

The respondent did not appear.

The Board took time for consideration.

25 April 2005. The following judgment of the Board was delivered.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[1] The appellant, Wilston Campbell, is an attorney-at-law practising in San Fernando, Trinidad and Tobago. As long ago as February 1987 a complaint of professional misconduct was made against him to the Attorneys-at-Law Disciplinary Committee (the committee) by Simon Alexander. (Simon Alexander died in 2003 and although he was replaced as respondent to this appeal by the executor of his estate, for convenience the Board will continue to refer to him as the respondent.) The essence of his complaint was that he had paid the appellant $29,400 to purchase from him two parcels of land but the appellant had neither conveyed the land nor returned the purchase price. The appellant had, in short, bilked him.

[2] In November 1987 the appellant raised a preliminary objection before the committee, contending that the complaint failed to disclose any professional misconduct within the meaning of s 35 of the Legal Profession Act 1986, the statute governing what was then the state's newly fused legal profession. On 10 December 1987, however, the committee ruled against that objection and, in February 1988, it embarked on the substantive hearing of the complaint. The hearing lasted in all for eleven days stretching over a ten-month period ending on 6 December 1988 when there was a final adjournment for attorneys' addresses. Quite when these were made is not known but, astonishingly, it was not until 29 October 1996 that the committee produced its Findings and Orders. The committee found the allegation of professional misconduct substantiated and

ordered the appellant to pay the respondent compensation of $29,400 together with interest from the date of their order until payment, together with costs.

[3] On 9 December 1996 the appellant appealed to the Court of Appeal on two grounds: (i) that the committee's decision was unreasonable and could not be supported, having regard to the evidence, and (ii) that the complaint did not disclose any professional misconduct on the part of the appellant in his capacity as an attorney-at-law.

[4] The appeal was heard in early 2000 and dismissed with costs by the court (Hamel-Smith, Jones and Nelson JJA) on 22 May 2000—the joint judgment of Hamel-Smith and Nelson JJA being concurred in by Jones JA.

[5] Conditional leave to appeal to the Board was granted by the Court of Appeal on 7 July 2000 and, upon the appellant giving security of £500, final leave was given on 4 December 2000. Two principal arguments are advanced before the Board, neither having been advanced before the Court of Appeal: first, that the Committee should have applied, but failed to apply, the criminal standard of proof in their determination of the respondent's complaint; second, that the eight-year delay in the delivery of the committee's judgment was both intrinsically unfair and such as to affect adversely the quality of the judgment.

[6] With that comparatively brief introduction it is necessary now to return to the facts although, given the limited grounds of appeal before the Board, not in any great detail.

[7] The events giving rise to the complaint took place in 1985–1986. The respondent was then living with his common law wife, Kathleen Sylvester, in a rented property in Sangre Grande, buying that property off the landlord company and paying the price by instalments to the company's agent, one Gabby Osbourne. The payments being completed by August 1985, Osbourne arranged for the appellant to prepare the necessary deed of conveyance. Shortly before 30 August 1985 Osbourne told the respondent and his wife that he was also acting as the appellant's agent in the sale of two lots of land (nos 106 and 107 George Karim Avenue, Sangre Grande). They said they were willing to buy but first wanted to meet the appellant. Osbourne there and then telephoned the appellant, spoke to him for a short time and then handed the telephone to Mrs Sylvester. The appellant told her that he had to be in Sangre Grande on 30 August and would come to their house that day and take them to see the two lots. On 30 August the appellant duly arrived in a red car and drove them to George Karim Avenue where he pointed out the two lots and confirmed that Osbourne was his agent. The respondent and his wife agreed to purchase the lots for $29,400 and were told by the appellant to deal thereafter with Osbourne both as to the payment of the purchase price (by instalments) and completion. Having paid the final instalment and confirmed with the appellant that he had duly received the payments from Osbourne the respondent was asked to attend the appellant's office to obtain the requisite deed. On 12 February 1986 the respondent attended the appellant's office with his wife and a friend, Indra Rajbansee, whereupon the appellant informed them that the lots were mortgaged for more than the purchase price and he could not, therefore, now convey them. He promised, however, to repay the purchase moneys within a month, explaining that he had a shipment of tyres on the docks and that as soon as these were cleared and sold he would repay the respondent out of the proceeds. Despite repeated subsequent attempts to contact the appellant, however, the money was never repaid.

[8] The appellant's case was strikingly different. He denied ever having been the owner of plots 106 and 107, ever having agreed to sell those plots or any other

land to the respondent, and ever having received any moneys from him for the purchase of any land. He denied that Osbourne was his agent and denied ever having referred to him as such. He denied having spoken to Mrs Sylvester on the telephone shortly before 30 August 1985, having visited the respondent's home on that day, or having shown the respondent and his wife any land at any time. He admitted meeting the respondent and his wife and Indra Rajbansee at his office on 12 February 1986 but said that they were there to seek his help in persuading Osbourne to return their money and that he had told them it was Osbourne who owned the tyres on the docks.

[9] The committee accepted the respondent's and Mrs Sylvester's account of the matter and rejected the appellant's evidence. Amongst the many considerations leading them to that conclusion were that the appellant undoubtedly had gone to Sangre Grande on 30 August 1985 (he was in court there that day from about 8.45 am till about 10.30 am, having driven there from San Fernando in a red car); the appellant did own two lots on George Karim Avenue (although he said that they were lots 108 and 109 rather than 106 and 107), and these were indeed mortgaged. The committee—

> 'were impressed by the honesty, the forthrightness of the purchasers, the consistency of their answers under cross-examination and their general demeanour'.

By contrast—

> 'the committee was rather disturbed by the conduct and behaviour of the attorney in this matter and the evidence given by him, most of which we reject as being ad hoc and tailored for the purpose of meeting the applicant's case. ... We had no difficulty in rejecting the attorney's version of the events as a complete fabrication.'

[10] Having held 'that at all material times the relationship of attorney and client existed between [the appellant] and [the respondent] in respect of this transaction', the committee finally concluded:

> 'In light of all the evidence tendered in this matter and upon careful consideration of the facts the committee is satisfied that the allegation made against the attorney is one which can properly be construed or interpreted as professional misconduct. ... an attorney-at-law must at all times be a person of the utmost integrity and probity ... Both client and the general public must have supreme confidence in their ability to deal with an attorney at law with complete frankness and openness and, most important of all, without the least fear or trepidation that they would be taken advantage of or misled in any way. As to whether the requisite burden and standard of proof has been established in this application is a matter to which the committee has given the most careful thought and utmost consideration and upon the evidence placed before the committee, the committee finds that that burden has been satisfied.'

[11] As stated, the first ground of appeal before the Court of Appeal was that the committee's decision was unreasonable and unsustainable having regard to the evidence. The appellant's principal complaint in that regard focused on the telephone conversation which Mrs Sylvester said she had with the appellant shortly before the disputed meeting on 30 August 1985, a conversation to fix a meeting that day specifically because the appellant was already required to be in

Sangre Grande that morning. Mrs Sylvester's evidence was that the phone conversation took place 'about a week' before 30 August and was a local call. The appellant denied that any such conversation took place and produced his passport to prove that he had been in Miami for a week up to 27 August, and had only cleared customs on 28 August. The committee said nothing in its determination about this particular point although it plainly concluded that the parties had met by prearrangement on 30 August.

[12] In disposing of this complaint the Court of Appeal noted that Mrs Sylvester 'was recalling something she had done some three years before,' and concluded:

> 'What ... makes it more probable that the call did take place (whether it was one week before or two days before) is the fact that the wife said that the attorney told her that he had to be in Sangre Grande on August 30 and would meet with them. As it turned out, and the respondent and his wife would not have known this otherwise, the attorney had an appointment in court in Sangre Grande that day and had to be there. It certainly would have been a great coincidence for her to have plucked that day out of thin air and have it coincide with the scheduled visit to Sangre Grande. It is more likely that an attorney who practises in San Fernando and is based there would travel to Sangre Grande on appointment only unless of course his main practice is in Sangre Grande which is not the case here. On a balance of probabilities therefore it was far more likely that the call was made when the attorney had returned to the country and the respondent's wife was mistaken when she said that it had been made one week before. That is an inference open to this court.'

Their Lordships agree: the inference had equally been open to the committee and plainly it had drawn it.

[13] As to the second ground of appeal before the Court of Appeal, the appellant's contention that the complaint failed to disclose any professional misconduct on his part, the Court of Appeal stated as follows:

> '[E]ven if it were held that the attorney-at-law was in a non-client relationship with the respondent, in our view the notion that professional misconduct relates to conduct in a professional capacity only must fail. The Act itself contemplates that any conduct of an attorney-at-law which may undermine public confidence in the legal profession may amount to professional misconduct.'

[14] In holding that the appellant's conduct towards the respondent had properly been held to constitute professional misconduct the Court of Appeal referred to the governing statutory provisions, most notably s 35(1) and (2) of the 1986 Act, r 1 of Pt A of the Third Schedule to the Act (the Code of Ethics), r 35 (2) of Pt B of the Third Schedule, and s 39 of the Act. Since this point is no longer pursued by the appellant it is unnecessary for their Lordships to elaborate it further. Rather it is time to turn to the entirely fresh grounds of appeal which are now for the first time advanced before the Board.

GROUND 1—STANDARD OF PROOF

[15] The appellant's argument under this head proceeds in two stages. First he contends that the committee should have applied the criminal standard of proof; second that the committee in fact applied a lesser standard, namely either

the civil standard of a mere balance of probabilities, alternatively a standard somewhere between that and the criminal standard.

[16] That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt. If and in so far as the Privy Council in *Bhandari v Advocates Committee* [1956] 3 All ER 742, [1956] 1 WLR 1442 may be thought to have approved some lesser standard, then that decision ought no longer, nearly fifty years on, to be followed. The relevant passage from Lord Tucker's opinion on behalf of the Board in *Bhandari*'s case reads:

> 'With regard to the onus of proof the Court of Appeal [for East Africa] said: "We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities." This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee and there is no reason to think that either the committee or the Supreme Court applied any lower standard of proof.' (See [1956] 3 All ER 742 at 744–745, [1956] 1 WLR 1442 at 1452.)

[17] It has, of course, long been established that there is a flexibility in the civil standard of proof which allows it to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters. Lord Bingham of Cornhill CJ pointed this out in the Divisional Court in *B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562 at 573, [2001] 1 WLR 340 at 353–354 (para 30) and continued (at para 31):

> 'In a serious case such as the present [concerning the making of a sex offender order] the difference between the two standards is, in truth, largely illusory. I have no doubt that, in deciding whether the condition ... is fulfilled, a magistrates' court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard.'

[18] The same approach has been taken in later cases. In the Court of Appeal in *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351 at [90], [2002] 2 All ER 985 at [90], [2002] QB 1213, Lord Phillips of Worth Matravers MR held with regard to the serious consequences of making a banning order under the Football Spectators Act 1989:

> 'This should lead the magistrates to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard.'

[19] Most recently, in the House of Lords in *R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC* [2002] UKHL 39 at [37], [2002] 4 All ER 593 at [37], [2003] 1 AC 787, Lord Steyn agreed with what Lord Bingham had said in *B*'s case about 'the heightened civil standard and the criminal standard [being] virtually indistinguishable' and concluded:

> 'In my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under s 1 [of

the Crime and Disorder Act 1998, providing for anti-social behaviour orders] apply the criminal standard.' a

Lord Hope of Craighead similarly recognised that in all these cases 'the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard' and held that 'the standard of proof that ought to be applied in these cases to allegations about the defendant's conduct is the criminal standard' (see [2002] 4 All ER 593 at [83], [2003] 1 AC 787 at [83]). b

[20] Perhaps more directly in point, however, is the decision of the Divisional Court in *Re A Solicitor* [1992] 2 All ER 335, [1993] QB 69, concerning the standard of proof to be applied by the Disciplinary Tribunal of the Law Society. Lord Lane CJ, giving the judgment of the court, referred to the Privy Council's opinion in *Bhandari*'s case and continued: c

'It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standards. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point d where they feel sure that the charges are proved or, to put it another way, proof beyond reasonable doubt. This would seem to accord with decisions in several of the provinces of Canada.' (See [1992] 2 All ER 335 at 344, [1993] QB 69 at 81.)

[21] A little later in the court's judgment Lord Lane referred to the provision e in the Bar's Code of Conduct requiring the tribunal to apply the criminal standard of proof and observed ([1992] 2 All ER 335 at 344, [1993] QB 69 at 82) 'it would be anomalous if the two branches of the profession were to apply different standards in their disciplinary proceedings'. This last observation, of course, clearly warranted the Law Society Disciplinary Committee thenceforth applying the f criminal standard in all cases rather than merely in those, earlier referred to, 'where what is alleged is tantamount to a criminal offence'.

[22] Their Lordships would add that, even had they concluded that the criminal standard should apply only in disciplinary cases where what is alleged is tantamount to a criminal offence, that, at least arguably, would include the g present case. This was certainly no mere contractual dispute. The appellant accordingly makes good this first stage of his argument.

[23] Their Lordships turn therefore to the second stage, the appellant's contention that the committee in fact applied a lesser standard of proof. This contention fixes principally, not upon what the committee itself said, but rather upon what the Court of Appeal said in the final passage from their judgment set h out at [12], above, in particular the words: 'On a balance of probabilities therefore it was far more likely that the call was made'. The appellant also invites attention to other passages in the Court of Appeal's judgment where similar expressions are used: 'highly unlikely' (twice), 'the more likely inference', 'more likely than not', 'more probable', 'more likely'. These expressions, it is suggested, j demonstrate that the Court of Appeal for their part supposed that the correct test to apply was that of the balance of probabilities or, if not that, certainly something less strict than the criminal standard. Nor, it is said, is that surprising: it is not to be assumed that the Court of Appeal was aware of *Re A Solicitor* and, in any event, the Privy Council's decision in *Bhandari*'s case would have been regarded as binding in Trinidad and Tobago.

[24] Their Lordships are unimpressed by these arguments. In the first place there is nothing in the committee's own determination to suggest that it applied a lower (still less a materially lower) standard of proof than that of beyond reasonable doubt. On the contrary, the final paragraph of the committee's determination quoted at [10], above suggests rather that they applied a high standard. Even moreover so far as the Court of Appeal's judgment is concerned, the reference to 'a balance of probabilities' is a slender basis upon which to found a contention that such was the standard of proof applied in deciding the central allegation of professional misconduct. It is noteworthy that immediately after reference to 'a balance of probabilities' the Court of Appeal's conclusion was that something (the making of the disputed phone call) 'was far more likely'. The fact is that all the quoted expressions used throughout the Court of Appeal's judgment related, not to the critical final issue as to whether the allegation of professional misconduct was made out, but rather as to how a number of factual sub-issues fell to be resolved. To find this complaint proved it was not necessary for the committee or the Court of Appeal to find each and every sub-issue proved beyond reasonable doubt. A sufficient number of strong probabilities (or even mere probabilities) can in aggregate amply support a finding of proof beyond reasonable doubt. That, indeed, is how many a criminal case is proved in reliance principally upon circumstantial evidence.

[25] Nor does the Board accept the argument that the committee or the Court of Appeal were in any event likely to have been applying *Bhandari*'s case rather than *Re A Solicitor*. *Re A Solicitor* was fully reported well before the judgments were given in the present case. As Lord Lane observed, moreover, the criminal standard applied in several Canadian provinces. Why should Trinidad and Tobago be thought more likely to apply the approach of the East African Court of Appeal (albeit approved by the Privy Council) than the Canadian approach? In any event, as the recent English cases show, the apparent difference between the two standards 'is, in truth, largely illusory' (per Lord Bingham in *B*'s case); 'the heightened civil standard and the criminal standard are virtually indistinguishable' (per Lord Steyn in *McCann*'s case).

[26] The first ground of appeal accordingly fails. For good measure their Lordships would observe that the evidence against the appellant was in any event overwhelming. It would have defied common sense to dismiss this complaint.

GROUND 2—DELAY

[27] For the committee to have delayed eight years in giving its judgment was, it need hardly be said, highly reprehensible, indeed unforgivable. But it does not follow that the appellant was in any way prejudiced by this delay nor that it affords him any sustainable ground of appeal. It is moreover, noteworthy, as already remarked, that no point whatever was taken in the Court of Appeal about the delay and still less was it suggested that it had occasioned him any injustice. Now it is said, first, that the delay was of itself manifestly unfair to the appellant and, secondly, that deficiencies in the committee's judgment are properly referable to it.

[28] In support of the argument of manifest unfairness the appellant seeks to pray in aid a sentence from Auld LJ's judgment in the Administrative Court in *Aaron v The Law Society* [2003] EWHC 2271 (Admin) at [84], [2003] All ER (D) 205 (Oct) at [84]:

> 'Disciplinary proceedings before the Solicitors Disciplinary Tribunal are analogous to criminal proceedings. The uncertainty that springs from and

festers with unnecessary and unreasonable delay can, in itself, cause great injustice to practising solicitors, whose livelihood and professional reputations are at stake.' a

[29] Their Lordships accept that statement without demur but conclude that it cannot avail the appellant on the facts of this case. Mr Beharrylal urges on the appellant's behalf that Trinidad and Tobago's legal profession is so small and close-knit that everyone within it would have been aware of this outstanding allegation of professional misconduct against him. So be it. What, however, is strikingly absent from the case is any suggestion that the appellant ever wrote a single letter or made any other attempt to encourage the committee to accelerate its deliberations and judgment. Nor perhaps is that surprising. The plain fact is that the delay here was to the appellant's own considerable benefit. The evidence against him was, as already noted, overwhelming and the complaint was likely therefore to be found proved. Meantime he was able to retain and make use of the disputed moneys. Even when judgment was eventually given, indeed, so far from the appellant being penalised for his professional misconduct, all that was ordered was that he should at last refund the respondent's moneys, with no back interest at all, merely interest from that day forward until payment. No sanction whatever was imposed upon the appellant despite Parliament's apparent assumption, implicit in s 39(1) of the 1986 Act, that an attorney found guilty of professional misconduct should be fined or reprimanded besides being ordered to pay costs and any relevant compensation. b c d

[30] The only injustice caused by the committee's deplorable delay in giving judgment was to the respondent who never lived to see his money repaid and whose estate has yet to receive it. e

[31] As for the argument that the committee's delay adversely affected their determination, there is nothing in this point either. There are, of course, cases where such an argument should properly succeed. *Goose v Wilson, Sandford & Co* [1998] TLR 85 was one such. As Lord Carswell explained in giving the Board's judgment in *Boodhoo v A-G of Trinidad and Tobago* [2004] UKPC 17 at [11], [2004] 5 LRC 483 at [11], [2004] 1 WLR 1689, *Goose*'s case provides an example of where— f

> 'Delay may have so adversely affected the quality of the decision that it cannot be allowed to stand. It may be established that the judge's ability to deal properly with the issues has been compromised by the passage of time, for example if his recollection of important matters is no longer sufficiently clear or notes have been mislaid.' g

[32] The present case, however, is very different from *Goose*'s case on the facts. The delay here was, of course, considerably longer. But whereas in *Goose*'s case the judge's ability to decide the case was clearly compromised, here it was not. Here the committee had the full transcripts of all the evidence and it was well able to provide a reasoned decision in reliance upon them. What is striking, indeed, is that only two criticisms are made of the committee's reasoning (or lack of it) and that each of these turns entirely upon reading the committee's judgment in the light of the transcript. In other words, even if the criticisms were soundly based, they would not be explicable by reference to the delay. In fact, however, both criticisms are unwarranted. The first and main one went to the committee's failure to deal expressly with the sub-issue as to the precise date of the phone conversations between Mrs Sylvester and the appellant prior to the meeting on h j

30 August 1985, a matter which their Lordships have already dealt with at [12], above. (Mr Beharrylal's suggestion that that was the appellant's best point before the committee provides some indication of the weakness of his defence.)

[33] The appellant's second criticism was directed at the committee's finding that—

> 'all moneys which the [respondent] paid to Osbourne were paid to him as agent of the attorney. There was no evidence adduced by the attorney to refute this evidence and we find as a fact that the sum of $29,400 was paid to the attorney through his agent, Osbourne'.

Mr Beharrylal points to the appellant's evidence, recorded in the transcript, that he never in fact appointed Osbourne as his agent and never received any money from him. Their Lordships cannot accept, however, that the committee must have overlooked those denials; rather it was saying that there was no such evidence adduced by the appellant independently of his oral denials.

[34] The second ground of appeal also, therefore, fails. The appeal will accordingly be dismissed. Ordinarily it would be dismissed with costs. Since, however, the respondent took no part in the appeal the Board will assume, unless the executor suggests otherwise, that no order for costs is necessary.

Appeal dismissed.

Celia Fox Barrister.

McGlinn v Waltham Contractors Ltd and others

[2005] EWHC 1419 (TCC)

QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)

JUDGE PETER COULSON QC

24 JUNE, 1 JULY 2005

Costs – Order for costs – Jurisdiction – Pre-action protocol – Defendant incurring costs at pre-action protocol stage in responding to claims not pursued by claimant in subsequent proceedings – Whether such costs recoverable as costs 'incidental to' proceedings – Supreme Court Act 1981, s 51.

One of the defendants in a building dispute applied for an interim payment in respect of costs which it said had been thrown away in responding to claims made by the claimant at the pre-action protocol stage, but which he did not pursue in his particulars of claim when he subsequently brought proceedings. The issue arose as to whether such costs were recoverable as costs 'incidental to' the proceedings within the meaning of s 51[a] of the Supreme Court Act 1981.

Held – Unless the circumstances were exceptional and thereby gave rise to some sort of unreasonable conduct, costs incurred by a defendant at the pre-action protocol stage in successfully persuading a claimant to abandon a claim (either in whole or in part) were not costs 'incidental to' any subsequent proceedings if, in those proceedings, such claims did not feature at all. It followed that such costs were not recoverable under s 51 of the 1981 Act. As a matter of general principle, claims which were made at the time of the pre-action protocol procedure, but which were then deliberately excluded from the court proceedings (because those proceedings were framed narrowly) bore no real relation to the subject of the litigation. From a wider perspective, it would be contrary to the whole purpose of the pre-action protocols, which were themselves such an integral part of the CPR, if claiming parties were routinely penalised if they decided not to pursue claims in court which they had originally included in their protocol claim letters. The whole purpose of a pre-action protocol procedure was to narrow issues and to allow a prospective defendant, wherever possible, to demonstrate to a prospective claimant that a particular claim was doomed to failure. By inference, that was what had happened in the instant case. It would be wrong in principle to penalise the claimant for abandoning claims which the defendant had demonstrated were not going to succeed, because to do so would penalise the claimant for doing the very thing which the protocol was designed to achieve. Nor was it suggested that there had been unreasonable conduct or that the instant case was in any way exceptional. Accordingly, the application would be dismissed (see [11], [13], [14], [16], [19], below).

Re Gibson's Settlement Trusts, Mellors v Gibson [1981] 1 All ER 233 applied.

a Section 51, so far as material, is set out at [5], below

Notes

For costs 'incidental to' proceedings and for the objectives and effect of pre-action protocols, see respectively 10 *Halsbury's Laws* (4th edn reissue) para 4 and 37 *Halsbury's Laws* (4th edn reissue) para 203.

For the Supreme Court Act 1981, s 51, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1094.

Cases referred to in judgment

Callery v Gray, Russell v Pal Pak Corrugated Ltd [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112.

Gibson's Settlement Trusts, Re, Mellors v Gibson [1981] 1 All ER 233, [1981] Ch 179, [1981] 2 WLR 1.

Application

Huw Thomas Associates (HTA), the second defendant to proceedings brought by the claimant, Ian McGlinn, against it and the first and third defendants, Waltham Contractors Ltd and DJ Hartigan & Associates Ltd, applied for an interim payment in the sum of £20,000 in respect of costs said to have been incurred by it in responding to claims made by the claimant at the pre-action protocol stage, but which were not pursued in the subsequent proceedings. The facts are set out in the judgment.

Roger Stewart QC and *Andrew Rigney* (instructed by *Freeth Cartwright LLP*, Nottingham) for HTA.

Lucy Garrett (instructed by *Speechly Bircham*) for Mr McGlinn.

Cur adv vult

1 July 2005. The following judgment was delivered.

JUDGE COULSON QC.

INTRODUCTION

[1] Mr Ian McGlinn, the claimant, has issued these proceedings as a result of alleged deficiencies in the building work carried out at his property, Maison d'Or, on Jersey (the property). The defendants are, respectively, the building contractors, Waltham Contractors Ltd (Waltham); the architects, Huw Thomas Associates (HTA); and the engineers, DJ Hartigan & Associates Ltd. The claims involve allegations of defective work which, on the claimant's case, was so extensive that the property had, eventually, to be demolished. Against Waltham there is an additional claim for overpayment arising out of a dispute over the true value of the final account. The claims in total amount to about £4·5m.

[2] Before commencing these proceedings, the claimant properly went through the steps prescribed by the pre-action protocol for construction and engineering disputes. This led to a mediation in November of 2004, which was unsuccessful. The claims now made by the claimant in the particulars of

claim are, in some cases, different to those which existed at the commencement of the pre-action protocol procedure.

[3] In particular, HTA point out that the claims now made against them in the particulars of claim do not include claims in respect of overpayment to Waltham, nor claims in respect of loss and expense paid to Waltham. This is despite the fact that, at the outset of the pre-action protocol procedure, both such claims were asserted by the claimant against HTA.

[4] At the first case management conference, on 24 June 2005, HTA sought an interim payment in the sum of £20,000 in respect of the costs which they say were thrown away at the pre-action protocol stage in considering and responding to those two claims (for overpayment and loss and expense). The application was resisted by the claimant. In deference to the careful submissions made by Mr Roger Stewart QC, for HTA, and Miss Lucy Garrett, for the claimant, and in the absence of any direct authority on the point, I reserved judgment in order to reflect upon the principles involved. I have now concluded that I should refuse this particular application. My reasons for so doing are set out below.

JURISDICTION: 'COSTS OF AND INCIDENTAL TO'

[5] Section 51 of the Supreme Court Act 1981 provides as follows:

> '(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to the proceedings in—(a) the civil division of the Court of Appeal; (b) the High Court, and (c) any county court, shall be in the discretion of the court.'

[6] Mr Stewart submitted that the costs incurred by a party in complying with any pre-action protocol are capable of being costs 'incidental to' any proceedings which are subsequently commenced if the protocol procedure fails to lead to an early settlement. I did not understand Miss Garrett to dispute that, as a matter of principle, costs incurred during a pre-action protocol procedure may be costs 'incidental to' any subsequent proceedings. In my judgment, it seems clear that, as a matter of construction of s 51, the costs so incurred are capable of being costs 'incidental to' the proceedings.

[7] I am fortified in this view by the decision of Megarry V-C, in the case of *Re Gibson's Settlement Trusts, Mellors v Gibson* [1981] 1 All ER 233, [1981] Ch 179. In that case Megarry V-C decided that, on an order for the payment of costs of proceedings, costs incurred before the proceedings commenced would not be disallowed solely on that account. He said that '[o]n an order for taxation of costs, costs that otherwise would be recoverable are not to be disallowed by reason only that they were incurred before action brought' (see [1981] 1 All ER 233 at 237, [1981] Ch 179 at 184). He also made plain that the words 'incidental to' extended, rather than reduced, the ambit of any order, although he said that it was important to identify what the proceedings were in any case and how and why the costs claimed were incidental to those proceedings. As to costs incurred before the proceedings commenced he said ([1981] 1 All ER 233 at 240, [1981] Ch 179 at 187):

'Of course, if there is no litigation there are no costs of litigation. But if the dispute ripens into litigation, the question then arises how far the ambit of the costs is affected by the shape that the litigation takes.'

[8] As I have already noted, there is no direct authority on the question of the general recoverability of costs incurred in compliance with pre-action protocols. However in *Callery v Gray, Russell v Pal Pak Corrugated Ltd* [2001] EWCA Civ 1117, [2001] 3 All ER 833, the Court of Appeal were concerned with what costs were recoverable in circumstances where claims had settled without the need for substantive proceedings. At [54], Lord Woolf CJ said:

'(ii) Where an action is commenced and a costs order is then obtained, the costs awarded will include costs reasonably incurred before the action started, such as costs incurred in complying with a pre-action protocol.'

[9] Accordingly, both as a matter of construction of s 51, and by reference to *Re Gibson's Settlement Trusts* and to *Callery v Gray*, I am of the view that, as a matter of principle, the costs incurred in complying with a pre-action protocol *may* be recoverable as costs 'incidental to' any subsequent proceedings. Whether or not a particular item of pre-action protocol costs can properly be described as having been incurred 'incidental to' the proceedings will, of course, be a matter of fact and assessment on each occasion.

COSTS THROWN AWAY

[10] The next question of principle concerns the costs incurred by a defendant in responding to a claim brought in a pre-action protocol, which response was so successful that, when the subsequent court proceedings were issued, that claim was no longer pursued. The defendants in such circumstances may then assert, as HTA do in these proceedings, that they have thrown away costs in refuting an allegation which is no longer maintained. Are they entitled to recover those costs thrown away pursuant to s 51?

[11] In my judgment, save in exceptional cases, costs incurred by a defendant at the stage of a pre-action protocol, in dealing with and responding to issues which are subsequently dropped from the action when the proceedings are commenced, cannot be costs 'incidental to' those proceedings. If, say, the original pre-action protocol claim letter included claims 1, 2, 3, 4, and 5, but the subsequent particulars of claim in the court proceedings were limited to claims 1, 2 and 5, it is very difficult to see how, in ordinary circumstances, the costs incurred in refuting original claims 3 and 4, which were not included within or formed any part of those subsequent proceedings, were costs incurred 'incidental to' such proceedings.

[12] I draw support for this view from the words of Megarry V-C in *Re Gibson's Settlement Trusts, Mellors v Gibson* [1981] 1 All ER 233 at 240, [1981] Ch 179 at 187, where he said:

> '(6) It is obvious that the matters disputed before a writ or originating summons is issued, and the matters raised by the writ or originating summons, and by any pleadings and affidavits, may differ considerably from each other. A wide-ranging series of disputed matters may be followed by a writ or originating summons which raises only a few of the issues; or a narrow dispute may be followed by proceedings which seek to resolve wider issues as well. How far does the ambit of the litigation extend or restrict the matters occurring before the issue of the writ or originating summons which may be included in the taxed costs on the common fund basis?
>
> If the proceedings are framed narrowly, then I cannot see how antecedent disputes which bear no real relation to the subject of the litigation could be regarded as being part of the costs of the proceedings. On the other hand, if these disputes are in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them, then I cannot see why the taxing master should not be able to include these costs among those which he considers to have been "reasonably incurred".'

[13] Accordingly, as a matter of general principle, it seems to me that claims which were made at the time of the pre-action protocol procedure, but which were then deliberately excluded from the court proceedings (because those proceedings were 'framed narrowly') bear, in Megarry V-C's words, 'no real relation' to the subject of the litigation. The costs incurred in dealing with them would not therefore be costs incidental to those proceedings. This particular case gives a good example of that general principle. The proceedings against HTA have now been sufficiently narrowed such that there is now only one real subject, namely the defective work alleged by the claimant. The valuation claims, based on allegations of overpayment to Waltham, comprised a different category or type of claim, and have now been excluded from the proceedings. They therefore bear no real relation to the subject matter of the proceedings against HTA.

[14] From a wider perspective, I should add that, in my judgment, it would be contrary to the whole purpose of the pre-action protocols, which are themselves such an integral part of the CPR, if claiming parties were routinely penalised if they decided not to pursue claims in court which they had originally included in their protocol claim letters. The whole purpose of a pre-action protocol procedure is to narrow issues and to allow a prospective defendant, wherever possible, to demonstrate to a prospective claimant that a particular claim is doomed to failure. By inference, that is what has happened here, in respect of the claims against HTA arising out of overpayment and the payment of loss and expense to Waltham. It would be wrong in principle to penalise the claimant for abandoning claims which the

defendants had demonstrated were not going to succeed, because to do so would be to penalise the claimant for doing the very thing which the protocol is designed to achieve.

[15] In this respect, Miss Garrett identified a number of passages in *Civil Procedure* (2005) vol 1 (the White Book) dealing with the importance of pre-action protocols. It is unnecessary for me to cite them all. However, at para C1A-009, the learned editors make this telling point:

> 'Letters of claim and response are not intended to have the same status as a statement of case (a pleading). It would defeat the purpose of the protocols if a party were penalised for subsequently clarifying his/her claim or defence when proceedings were issued. However, parties should be wary of making substantial changes without explaining why this is necessary—as without good reason this could amount to "unreasonable conduct".'

[16] Accordingly, I consider that, as a matter of principle, unless the circumstances are exceptional and thereby give rise to some sort of unreasonable conduct, costs incurred by a defendant at the pre-action protocol stage in successfully persuading a claimant to abandon a claim (either in whole or in part) are not costs incidental to any subsequent proceedings if, in those subsequent proceedings, such claims do not feature at all. Accordingly, such costs are not recoverable under s 51 of the 1981 Act. Mr Stewart, quite properly, does not suggest that there has been unreasonable conduct and does not suggest that this is in any way an exceptional case. Accordingly, I conclude as a matter of general principle that the costs thrown away, which are the subject matter of this application, are not recoverable under s 51.

DISCRETION

[17] In view of my decision in principle, it is perhaps unnecessary for me to say too much about the exercise of my discretion. Much of the argument on this point was about the timing of any decision. Miss Garrett contended that, if I was against her in principle, I should not exercise my discretion at this stage and that the appropriate time to consider whether or not these costs were recoverable was at the end of the case. Mr Stewart submitted that, given that these claims were no longer pursued in the litigation, it was quite unnecessary to wait until the end of the case to decide whether or not the costs thrown away in dealing with them should be awarded to the defendant. I consider that Mr Stewart is right on this point and that, if I had considered that the application was well-founded in principle, I would not have waited to exercise my discretion until the end of the trial.

[18] For the avoidance of doubt, I should also say that, even if I were wrong on the general principle, and that the costs thrown away in these unexceptional circumstances were capable of amounting to costs 'incidental to' the proceedings, I would exercise my discretion against awarding such costs to the defendants in this case. The reasons for this are really the same

as outlined in [10]–[16], above. I consider that it would be contrary to the purpose of the pre-action protocol if the claimant in this case was penalised for dropping these two claims at the commencement of this litigation. Accordingly I would in any event exercise my discretion against awarding HTA the costs thrown away on those two claims. a

[19] Accordingly, for the reasons set out above, HTA's application is dismissed. Since the parties have very sensibly agreed the costs position in any event, there are no consequential orders arising out of this judgment. b

Application dismissed.

Martyn Gurr Barrister.

End of Volume 3